#L-1010 ns3
05/22/86

Memorandum 86-66

Subject: Study L-1010 - Estate and Trust Code (Opening Estate Administration--no contest clauses)

At the Commission's February 1986 meeting, the Commission's consultant, Professor Russell Niles, discussed with the Commission some of the policy considerations in enforcement of no contest clauses found in wills, trusts, and other donative transfers. Among the matters discussed were the consequences of adoption of a "probable cause" standard to deny enforcement of a no contest clause, the need to ameliorate a no contest clause in a case where the purported transfer clearly should be tested, the procedural posture of the parties and incentives to settlement, and the problem of ascertaining what actions amount to a contest.

The Commission requested Professor Niles to provide it with an initial draft for consideration that would codify the strict forfeiture rule of existing California law, but would allow a contesting beneficiary to petition for relief from forfeiture under the court's equitable powers. The standard for relief would be fairly strict, so that the no contest clause remains in fact a disincentive to litigation. However, it would also allow for relief in meritorious situations, with the procedural burden on the contestant.

Attached to this memorandum is a memorandum from Professor Niles in accordance with the Commission's request. The memorandum includes a draft statute and a discussion of the draft. Our objective is to develop an effective statutory treatment of this aspect of the law for inclusion in the Estate and Trust Code.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

0102L
5/8/86

MEMORANDUM

To: California Law Revision Commission

From: Russell D. Niles

Re: Draft of Statute Relating to No-Contest Clauses

Date: May 8, 1986

In a memorandum to the Commission dated 2/2/86 (Study L-1010, Memorandum 86-17, 2/4/86) I referred to the definitive treatment of no-contest provisions and other restraints in the recent volume, Donative Transfers, a part of the Restatement of the Law, Second, Property, approved by the American Law Institute in 1983. Especially relevant are §§ 9.1, 9.2, 10.1 and 10.2. The Institute changed the position taken in the first Restatement of Property (1944), §§ 428, 429, that such clauses (with two exceptions) were enforceable, regardless of probable cause and instead adopted the rule of the Uniform Probate Code (§ 3-3.5) that such provisions were unenforceable where there was probable cause. I also pointed out that a New York commission had retained the strict view and some prominent members of the American Law Institute had expressed reservations about the change during the Annual meeting of the Institute. [Proceedings, 58th Annual Meeting, 1981, pp. 52-133]

In my memorandum I expressed the view that it might be possible to draft a statute that would retain the traditional view in California

and yet relieve a contestant from forfeiture in clearly meritorious cases. The Commission suggested that I submit such a draft. (Minutes, 2/15/86, Study L-1010).

The draft is keyed to the two Restatements. Paragraph (a) retains the traditional California view, which was adopted by the first Restatement. Paragraph (b) accepts the essence of the probable cause rule adopted by the current Restatement, but with an important procedural difference

Paragraph (c) is added to make it clear that paragraph (b) does not relieve a donee from the enforcement of conditions or elections of the types dealt with in Donative Transfers §§ 10.1 and 10.2.

DRAFT OF PROPOSED STATUTE

Probate Code § . Restraints on Contests.

(a) An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid unless:

(1) The contest of the validity of the document is on the ground of forgery or revocation by a subsequent document and there is probable cause for making the contest, or

(2) The attack on a particular provision in the document is on the ground that the provision violates the public policy of the State and there is probable cause for making the attack.

(b) A donee of a donative transfer who has unsuccessfully contested or attacked the validity of a document transferring an interest in property, or a provision in such document, may nevertheless file a petition in [a court of equitable jurisdiction] to be relieved of the consequences of the contest or attack. If the court determines that the beneficiary acted in good faith and with a substantial likelihood of success, the court may grant such relief as it deems proper.

(c) This section is not intended to change the law which:

(1) Enforces an otherwise effective provision in a will or other donative transfer which is designed to prevent the acquisition or retention of an interest in property if there is an attempt to enforce an independent obligation of the transferor or the transferor's estate, or

(2) Imposes a condition precedent to the interest of a beneficiary that the transfer, if accepted, is in lieu of an interest in other property owned or disposed of by the transferor.

Comment. The purpose of paragraph (a) of this section is to retain the traditional California law relating to no-contest clauses

as stated in §§ 428 and 429 of the first Restatement of the Law, Property (1944), but as modified by paragraph (b).

Paragraph (b) is substantially like § 9.1 of the Restatement of the Law, Second, Property, Donative Transfers (1983), but with an important procedural difference. If a will is contested on the grounds contemplated in Probate Code § 371 it may be necessary to consider many facts relating to capacity, independence of judgment, and the like, to determine whether the transferee acted with probable cause. Such an inquiry may be a duplication of the contest itself and may raise issues of burden of proof, expense to the estate, and right to trial by jury. All of these issues are resolved by the procedure required by paragraph (b).

Paragraph (c) is intended to refer to the general case law, which is restated in Donative Transfers, §§ 10.1 and 10.2. The restraints involved in these sections involve issues in which the public interest is neutral and therefore conditions and elections, if so intended, may be enforced whether or not the transferee acted reasonably or with probable cause.

Several recent Court of Appeal cases suggest how the draft statute would be applied.

1. Contest of a Will on Grounds Enumerated in Probate Code § 371.

In a recent case, Estate of Friedman [100 Cal. App. 3rd 810, 161 Cal. Rptr. 311 (1979)] the testatrix had inherited a large fortune

from her first husband. The testatrix devised to her daughter a legacy of $50,000 and the life income from a residuary trust. The testatrix, however, gave the bulk of her estate to her second husband under a marital trust. The will contained a no-contest clause. If the daughter contested her mother's will on the ground of undue influence and failed, would the daughter forfeit the benefits under the will--regardless of probable cause? The settled law of California would require a forfeiture. In the Friedman case the court so declared. The daughter and her counsel so conceded. Under the draft statute the decision would be the same--initially. But under paragraph (b) the daughter could, after the contest but before distribution, seek relief from forfeiture. If the facts alleged could be established, she would surely win.

The only difference between the draft statute and the new Restatement (and the Uniform Probate Code) would be that the issue of whether or not there was probable cause would be tried after an unsuccessful contest, not in advance of the contest, nor while the contest was being tried.

Donative Transfers, § 9.1, adopts the view that probable cause should be determined on the basis of facts known at the initiation of a contest. [Comment j] If so, it might be necessary to make findings of many detailed facts about mental capacity, duress, fraud or undue influence, and then later to establish the same facts in the contest proceeding. In one state that had adopted the Uniform Probate Code

the judge ordered a preliminary trial of probable cause before the contest. [American Law Institute proceedings, 1981, p. 82] Members of the Institute at the debate on § 9.1 were not in agreement as to whether the issue of probable cause should be tried to a jury, or by the court [Ibid. pp. 93,112-119] There was doubt about the cost to the estate and about who had the burden of proof. There also was concern that if the standard of probable cause should be construed too liberally, some disappointed legatees would be tempted to initiate a contest to secure a settlement. [Ibid. pp. 65-67, 70-71, 97].

The draft statute requires the risk of an initial forfeiture. When relief is sought later the court has before it all of the evidence adduced in the trial of the contest. The court, presumably, would try the issue without a jury, the burden of proof would be on the petitioner, and the costs would be in the discretion of the court.

2. Restraints not involving Access to the Courts.

The current volume of the Restatement, Donative Transfers, makes an important distinction between the restraints dealt with in Chapter Nine, including restraints on contests and the other restraints dealt with in Chapter Ten. The Introductory Note to the latter chapter states: "Chapter Ten, in contrast with Chapter Nine, is concerned with restraints imposed in a donative transfer which force the beneficiary to make a choice as to a course of conduct with no public interest at stake in placing the beneficiary in that position. Consequently, the transferor should be free to deprive the beneficiary of the gift if the beneficiary engages in the prohibited conduct."

There are many conditional gifts that do not restrain a beneficiary from challenging the validity of a donative transfer. In these cases the public interest is neutral. If the donee's conduct violates the condition the donee cannot be relieved of the consequences of his or her action by claiming that he or she acted reasonably or with probable cause. [Donative Transfers, § 10.1, Reporters Note 6, p. 397; 6 Am. Law of Property, § 27.5]

Generally, a claim by a survivor to a property interest which was not acquired through the testator's will will not violate a no-contest clause [Estate of Black, 160 Cal. App. 3d 582, 206 206 Cal. Rptr. 663 (1984); Estate of Schreck, 47 Cal. App. 3d 693, 121 Cal. Rptr. 218 (1975)]. But as shown in cases cited in the Reporter's Notes to § 10.1 these provisions can involve a forfeiture if the testator so intends even if the validity of the will is not challenged. [In re Madansky's Estate, 29 Cal. App. 2d 685, 85 Pac. 2d 576 (1938); In re Kitchen's Estate, 192 Cal. 384, 220 p. 301 (1923)]

A case that illustrates the distinction between Chapter Nine and Chapter Ten cases is the well-known decision in Estate of Kazian [159 Cal. App. 3rd 797, 30 Cal. Rptr. 908 (1976)]

The testatrix had inherited an estate of $300,000 from her first husband. At the time of her death the estate had increased to $1,300,000. She was survived by children of her first husband and by a second husband, Kazian. She devised $60,000 to Kazian, and the balance to her children.

The testatrix made elaborate declarations in her will that all of her property was separate property. She also provided that if any "beneficiary under this will...shall contest it or any of its parts or provisions then such person shall receive the sum of one dollar ($1.00) only, in lieu of all interest in this estate or under my will." Kazian did not challenge the validity of the will. He filed a complaint to establish a community interest in her property. When he failed to establish such an interest, should he forfeit the legacy of $60,000?

The testatrix could have given a legacy to her husband on the condition precedent that he make no claim to a community interest, or on a condition subsequent that any such a claim would cause a forfeiture of the legacy to her estate or would cause the legacy to pass to others. But it is not a contest of a will for a beneficiary to claim that the testator had purported to devise property already owned by the beneficiary. [See Estate of Black and Estate of Schreck, cited above.]

Justice Kaus conceded that the word "contest" in an "attorney drawn will should ordinarily be construed to refer to proceedings raising issues affecting the validity of the will--fraud, undue influence and the like." But the court held that in this will drawn by a layperson, considering all the language and all the circumstances, this testatrix intended her forfeiture clause to be applicable to her husband's claim.

If this case means that a no-contest clauses, used inexpertly, may be construed to be a forfeiture clause restraining a legatee from making various types of claims, then the only question is this: Is this a case for relief against forfeiture under the probable cause rule or under paragraph (b) in the proposed statute? Assume for example, that Kazian could make a plausible case that because of his investment skill he had contributed to the large increase in the value of the property his wife had inherited. Even if Kazian lost in his proceeding to determine a community interest, could he be relieved of forfeiture under the probable cause rule or under paragraph (b)? If the Kazian case fits under §§ 10.1 or 10.2, then probable cause is immaterial. The Kazian case is cited in the Reporter's Notes under § 10.2.

It is necessary to analyse cases to determine if they involve a contest in the precise sense, raising the policy considerations in restraints on contests, or are express or construed provisions involving only private interests. This distinction will have to be made in all states that adopt any form of the probable cause rule.