#L-636

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01/04/88

Third Supplement to Memorandum 87-44

Subject: Study L-636 - No Contest Clause

Attached is a letter from the State Bar Section containing additional comments concerning whether any change should be made in the California law concerning no-contest clauses.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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October 21, 1987

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Re: LRC Memorandum 87-44-No Contest Clause

Dear Jim:

The following additional comments are offered respecting the referenced memorandum:

1. Testators abhor the thought of their estates being consumed by attorneys' fees. Defense of a routine Will contest costs an estate $25,000 or more, and can easily cost up to $50,000.

2. Testators also abhor the thought of their beneficiaries and heirs being pitted against each other in litigation with resultant strife and discord which may never be healed.

3. To avoid family strife and the consumption of estates, knowledgeable estate and trust lawyers often recommend a prophylactic bequest coupled with a no contest clause. For example, a testator who has no spouse but has 3 children one of whom is estranged from the testator and two of whom are close, may be counseled to leave a substantial bequest to the estranged child coupled with a no contest clause. In such a case, it would be the hope of the testator that 1) the estranged child will not

feel the hurt of a complete specific disinheritance, 2) the estranged child will not feel that he has to vindicate the stain of disinheritance by litigation and 3) the estranged child will be disuaded from suing his brothers and sisters by the risk of the loss of his inheritance if he sues and loses.

The rationale of the bequest is often as follows: It is worth X dollars to the testator to avoid outright formal rejection of the estranged child, open hostilities in the testator's family, and the expense of unnecessary litigation in the testator's estate. However, if the estranged child insists upon bringing suit, then the disinheritance would be totally imposed.

The strategy usually works because the estranged child is able to save face, and having done so, does not want to risk his bequest by a Will contest.

4. If the probable cause rule is adopted, an estranged heir can bring a Will contest, cost an estate $25,000 or more in litigation expenses, involve his or her brothers and sisters as opponents in litigation, and upon losing still ask the court for restoration of the estranged person's bequest.

Faced with this prospect, testators will be often counseled to disinherit the estranged person with a view to offering him a settlement when and if a Will contest is filed. If the estranged person declines to accept the settlement and loses the contest, there will be no restoration of the settlement offer by the court.

5. A bequest coupled with a no contest clause is

preferable to outright disinheritance because 1) the bequest is far more humane than a formal rejection by disinheritance, 2) a Will contest is not required in order for the estranged person to receive something from the estate and 3) the misery of litigation between family members is often avoided. This estate planning device should not be undermined and lost.

6. It should be noted that the "majority rule" has generally been adopted by less populated states eg. Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, Nebraska, North Dakota and Utah. Maryland, Michigan and New Jersey are the only states with significant population which have adopted the Restatement.

In contrast, "In 1965, the New York Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, considered the policy issues involved and rejected the probable cause rule except for contests on the ground of forgery or revocation by subsequent Will" LRC Memorandum 86-17, Pages 3-4. The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California concurs with the New York Commission in this regard.

Respectfully submitted,

P.S. The situation referred to in Exhibit 2 of Memorandum 87-44 would not have been prevented by a probable cause rule. If the attorney in question was able to dominate the will of the testator, then faced with a probable cause rule, he could have influenced the testator to leave the niece less (or even nothing) so as to be able to offer her more in settlement on a take it or leave it basis.