#L-636

jd486
09/29/87

Second Supplement to Memorandum 87-44

Subject: Study L-636 - No Contest Clause

Attached is a letter from the Executive Committee of the Estate Planning, Trust and Probate Section of the State Bar. The letter reports that the Executive Committee has considered the position of the Beverly Hills Bar Association Probate and Estate Planning Legislative Committee that the majority rule concerning the effect of a no contest clause should be adopted in California in place of the minority rule now in effect in California.

The Executive Committee unanimously reaffirmed its position expressed in its earlier letter. A copy of the earlier letter also is attached to this supplement. The Commission should note that the earlier letter is addressed to a proposal of Professor Niles which was never considered by the Commission. Professor Niles has since abandoned that proposal and has indicated that he supports the staff proposal set out in Memorandum 87-44 to adopt the Restatement (majority) rule. For this reason, it is difficult to respond to the letter from the Executive Committee.

The Executive Committee also proposes legislation that would permit a beneficiary to obtain an advance declaration whether a prospective action will violate a particular no-contest clause. The Beverly Hills Bar Association Probate and Estate Planning Legislative Committee opposes this proposal. The Committee believes that the additional court workload that the proposal would create would outweigh whatever benefits the proposal may have.

Respectfully submitted,

John H. DeMoully
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September 16, 1987

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Re: First Supplement to LRC Memo 87-44
No Contest Clause

Dear Jim:

The Executive Committee of the Estate Planning, Trust and Probate Law Section considered the referenced supplement at its meeting last Saturday.

The Committee unanimously reaffirmed its position expressed in my earlier letters to you.

Respectfully submitted,

H. Neal Wells III

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Re: LRC Memorandum 86-66
No-Contest Clauses

Dear Jim:

A study team comprised of Kathryn A. Ballsun, Hermione K. Brown, Andrew S. Garb, Janet L. Wright and I have studied Memorandum 86-17 dated 02/04/86 (Professor Niles' February 2, 1986 recommendations) and Memorandum 86-66 dated 05/22/86 (Professor Niles' current recommendations).

Professor Niles proposes no-contest legislation to the following limited extent:

1. Recognize the validity of no-contest clauses insofar as they pertain to transfers pursuant to the instrument containing the no-contest clause except for:

a. A contest based upon forgery or revocation brought with probable cause; or

b. A contest of a particular provision of the instrument based upon violation of public policy brought with probable cause;

2. Allow relief to a contestant who has brought an unsuccessful contest "in good faith with a substantial likelihood of success" by means of a petition addressed to the discretion of the court which heard the contest; and

3. Exempt conditional transfers from the no-contest rules.

Professor Niles' proposal does not address indirect contests such as those encountered in the Estate of Kazian, 59 Cal. App. 3d 797 (1976).

Both the study team and the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California concluded that:

1. The most needed "no-contest" legislation is that providing judicial declaratory relief to any beneficiary who wishes court instructions as to whether specified contemplated proceedings will violate a no-contest clause;

2. Legislation exempting from the application of no-contest clauses a contest based upon forgery or revocation brought with probable cause would also be beneficial;

3. Legislation exempting from the application of no-contest clauses a contest based upon violation of public policy brought with probable cause would not be beneficial;

4. Legislation permitting the court to grant relief to a contestant who has brought an unsuccessful

contest in good faith and with substantial likelihood of success would not be beneficial;

5. Exemption of conditional transfers from no-contest exemptions would make other no-contest exemptions meaningless in attorney-drawn Wills; and

6. The study team and the Executive Committee would be most pleased to work with Professor Niles on the legislation recommended above.

"In view of the drastic consequences flowing from the violation of an interrorem clause, it would be highly desireable to know - prior to initiating contemplated action - whether it may be violative of such a clause". Garb - The Interrorem Clause Challenging California Wills. To this end, the study team and the Executive Committee recommend the drafting of legislation pursuant to which a beneficiary may obtain advance declaratory relief as to whether prospective action will violate a no-contest clause. Declaratory relief is particularly important to surviving spouses who wish a determination as to the ownership and character of the decedent's property (eg. separate, community or joint tenancy property and the extent thereof), or a set aside of exempt property, or a family allowance, or reimbursement via a creditor's claim, or an accounting, or a myriad of other things which, after the fact, may be determined to be an indirect contest. Declaratory relief could be granted less

expensively than a contest or a later petition for relief from a no-contest clause after a contest has been tried and lost. Also, after receiving the declaration from the court, it is reasonable to permit the beneficiary to go forward with the contemplated proceeding (if it is held not to violate the no-contest clause) or to put the beneficiary at peril in proceeding further (if it is held to violate the no-contest clause).

The study team and the Executive Committee are of the opinion that it is appropriately permissible for a testator to require beneficiaries to accord the testator's estate a peaceful administration with forfeiture penalties for breach of that peace. However, because forfeitures themselves are not favored, the beneficiary should be entitlted to know in advance whether specific conduct will cause the forfeiture.

The only exceptions to the foregoing are good faith contests based upon forgery or revocation. Such contests are in furtherance of the intent of the testator rather than in contravention of it and should not be discouraged. For instance, the beneficiary of a Will containing a no-contest clause may offer to probate a later instrument containing a revocation of the earlier Will, because the beneficiary wants the true last Will to be admitted to probate and considers it his moral duty to offer the later

instrument to the court. Also, a beneficiary may challenge all or part of a document as a forgery so that the decedent's true intent will prevail.

The same may not be said of most other contests. They are usually brought because the beneficiary of an earlier Will (or an intestate heir) believes that a beneficiary of a later Will achieved an advantage by undue influence of one sort or another. Such contests may be justified because elderly testators in a weakened condition often lose perspective as to the natural objects of their bounty and are prone to unduly favor the person or persons who last did something for them. However, testators must retain the right to change their Wills, even at the last, and to enforce the final Will by an interrorem clause. Moreover, it is not uncommon for a testator to leave a bequest to a relative, whom the testator would just as soon disinherit, in order to buy peace, and to enforce the peace by use of a no-contest clause.

Few contests are successful if viewed from the standpoint of victory at trial sustained upon appeal. Many contests are successful if viewed from the standpoint of a settlement pursuant to which the contestant improves his or her share of the estate. Neither the contests nor the use of no-contest clauses should be discouraged. Instead, the

present balance should be preserved.

It is the opinion of the study team, the Executive Committee and many other probate attorneys that the general probable cause exception formulated by the U.P.C. will unduly shift power to contestants by permitting them to hold an estate hostage by prolonged expensive litigation, in the hopes of winning a settlement, and of being relieved from their actions by a compassionate court should the contest fail. For this reason, the study team and the Executive Committee do not favor adopting the general Probable Cause Exemption in California. Moreover, the Probable Cause Exemption cannot go hand in hand with recognition of the validity of conditional gifts. Were both to be adopted in California, the following year CEB course on Will drafting would concentrate on "How to Prepare No-Contest Clauses By Use of Conditional Gifts".

Memorandum 86-66 also has a number of technical questions to be addressed.

1. The memorandum envisions only attacks upon the validity of the document containing the no-contest clause. It does not address the situation where a document, such as a Will, has a no-contest clause which would disinherit a beneficiary if the beneficiary challenges the validity of a companion inter vivos trust or visa versa. Cross-over no-contest clauses are an intregal part of

estate planning and should be considered in any legistative scheme.

2. The term "violates the public policy of the state" is so broad that any court which seeks to give relief to an unsuccessful contestant could use it as a basis for its decision and create a hodge-podge in the law. As noted above, the phrase "substantial likelihood of success" could be defined quite differently in the context of settlement, trial or appeal.

3. It is unclear under 86-66 whether an unsuccessful contestant who is brought within the ambit of paragraphs 1 and 2 of the initial section, merely raises the paragraphs as a defense against forfeiture or must petition for relief to keep a forfeiture from being imposed.

4. It is unclear why Professor Niles limited a public policy contest under paragraph (b) to only a particular provision of any instrument rather than allowing it to be brought against the instrument as a whole if the entire instrument was violative of public policy.

As you know, the Probate Litigation Subcommittee of the Estate Planning, Trust and Probate Law Section of the State Bar studied no-contest problems for a year. The U.P.C. commissioners and other probate attorneys have also reflected upon them for countless hours. After it all, the

study team and the Executive Committee are of the view that a beneficiary should be permitted an advance ruling as to whether specified conduct will violate a no-contest clause, but that after receiving that ruling, there should be no relief to an unsuccessful contestant unless the contest was based upon probable cause forgery or revocation.

Respectfully submitted,

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