

First Supplement to Memorandum 2007-44

Revision of No Contest Clause Statute (Discussion of Issues)

On page 8 of Memorandum 2007-44, the staff describes a situation where it is not clear whether a transferor intends to create a forced election:

If an instrument provides for a general gift of “all of my property” or “the remainder of my property,” it is unclear what property would fall within the gift. The courts have held that a reference to “my property” is not intended to include the property of another. Therefore, it would not include community property of the transferor’s spouse.

In order to determine the content of such a gift, it is necessary to determine which property belongs to the transferor and which property belongs to the surviving spouse. The surviving spouse can participate in that determination without violating a no contest clause. Such participation helps to *effectuate* the transferor’s intentions, rather than impair them. See e.g., *Estate of Kazian*, 59 Cal. App. 3d 797, 130 Cal. Rptr. 908 (1976).

It would have been better to end that passage with the following citation:

See, e.g., *Estate of Richter*, 12 Cal. App. 4th 1361, 16 Cal. Rptr. 2d 108 (1993). Compare *Estate of Kazian*, 59 Cal. App. 3d 797, 130 Cal. Rptr. 908 (1976).

In *Richter*, the court held that a general reference to “my estate” did not create a forced election and the surviving spouse’s request for a determination of community property did not trigger a no contest clause. *Kazian* presented the same substantive issue, but with the opposite result. In *Kazian*, the transferor’s declaration that “all property in her name was her sole and separate property” did create a forced election.

Respectfully submitted,

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