

Second Supplement to Memorandum 2007-44

Revision of No Contest Clause Statute (Discussion of Issues)

The Commission has received three new letters commenting on the matters discussed in Memorandum 2007-44. The letters, which are from attorneys writing as individuals, are attached in the exhibit as follows:

Exhibit p.

- David C. Nelson, Los Angeles (10/22/07) 1
- Neil Horton (10/22/07) 3
- Adam Streisand, Los Angeles (10/22/07) 10

GENERAL REMARKS

David Nelson warns against introducing too many qualifications into the proposed law. Doing so might simply recreate, in different form, the overcomplexity of existing law. See Exhibit p. 2.

FORCED ELECTIONS

General Policy Concern

Adam Streisand argues for the elimination of marital forced elections on general policy grounds.

In the real world, however, the testator is waiting until after his death to dictate to the beneficiary essentially a post-death divorce settlement. The provisions should be read as follows: "I declare that all of this property is mine, and whether I am right or wrong, I have decided how much you should get. I am forcing you to choose between long, expensive and uncertain litigation to determine whether I am right or wrong about what I say is mine. If you choose that path, you may be bankrupted in the process, you may lose the argument that you own any of this property and be left with nothing, because if you choose that path, you don't even get what I think you should have, i.e., you are also disinherited."

If you think about this, it is truly egregious that our Legislature would condone a practice of allowing one spouse to do a will he may never share with his wife, and to use that will to do what he

would not do while he was alive, i.e., declare that property is his and not hers or theirs. We allow the spouse to say that property he knows is not his is his anyway. We allow a spouse literally to take property away from his wife, usually elderly by the time he has passed away, and to force her to take only what his will says she should have after death.

It is not just the Legislature that permits the use of forced elections, but also long-standing case law culminating in *Burch v. George* (7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994)), where the majority and minority argued exactly the issues raised by Mr. Streisand. The same concerns have been discussed in prior Commission materials. See, e.g., CLRC Memorandum 2006-42, p 12.

Doing away with forced elections entirely would be the “simplest” solution. It would secure the support of TEXCOM and produce a statute that is free from complications. However, it would also remove a planning tool that a significant body of estate planners use to avoid costly and protracted post-death property disputes.

REFINEMENT OF FORCED ELECTION LANGUAGE

As discussed in Memorandum 2007-44, the staff has attempted to refine the language that would authorize forced elections. Those attempts prompted a number of comments.

Required Declaration of Ownership

Under the proposed language, a no contest clause would only be enforceable against a claim of ownership of a specific asset if the transferor claims ownership of the same asset either expressly or impliedly (by making a specific gift of the asset). If the transferor doesn’t claim ownership of the property that is claimed by a beneficiary, then the beneficiary’s claim is not a contest.

That rule makes sense logically, and is also supported by case law. See *Estate of Richter*, 12 Cal. App. 4th 1361, 16 Cal. Rptr. 2d 108 (1993) (general gift of “my estate” not intended as transfer of surviving spouse’s community property; community property characterization petition did not violate no contest clause).

David Nelson objects that, under the proposed language, a transferor would need to constantly adjust an estate plan, as new assets are added to the estate, in order to declare the transferor’s ownership of each new asset. See Exhibit p. 1.

The staff believes that the burden would be manageable. A transferor could create a “schedule” of property that is declared to be the transferor’s separate

property. New separate property assets could simply be added to that schedule when transferred to the estate.

Neil Horton raises a related concern. Property descriptions made at the time that an instrument is executed could become inaccurate over time as the result of the subsequent sale or transfer of the described property. See Exhibit p. 7. In Memorandum 2007-44, the staff suggested that the solution to that problem might be tracing. However, Mr. Horton warns that an attempt to trace might itself trigger a no contest clause.

"Property Ownership Claim" Too Broad

Neil Horton believes that allowing a forced election in response to *any* property ownership claim would "go too far." He suggests that a wide range of actions by beneficiaries could be described, at root, as a property ownership claim. See Exhibit p. 5. To prevent overbroad application of a no contest clause, he suggests that forced elections should be limited to community property claims. *Id.*

Creditor Claim Election Should Not Be Limited to Identified Debts

Under the language proposed by the staff in Memorandum 2007-44, a forced election could only apply to a creditor claim if both of the following conditions are satisfied:

- (1) The debt claimed by the creditor existed before the execution of the instrument containing the no contest clause.
- (2) A protected instrument specifically identifies the debt claimed by the creditor and expressly states that the gift given to the creditor under the instrument is in satisfaction of the debt.

The purpose of that language is to prevent the application of the forced election to debts that the transferor did not have in mind at the time of executing the no contest clause.

David Nelson objects to that approach:

Often, one of the transferor's biggest concerns can be bogus or unknown claims that the transferor has no way of anticipating or identifying in the instrument but that would seek to undermine his or her estate plan. Not even the smartest lawyer could possibly conceive of every type of claim that might be made following the transferor's death when he or she is no longer around to refute it.

The staff agrees that a transferor may wish to deter a bogus creditor claim that the transferor could not have anticipated when drafting a no contest clause.

However, any clause that is broad enough to apply to such claims would also open the door to all of the sorts of unintended application that are described in Memorandum 2007-44.

Expanded Grounds

David Nelson would like the statute to expressly provide for enforcement of a no contest clause in response to either (1) an attempt by a beneficiary to enforce a promise to make a will, or (2) a claim that the transferor has forgiven a debt owed by the beneficiary. See Exhibit p. 2.

The staff is reluctant to expand the scope of forced elections in the face of the countervailing arguments that forced elections should be limited or abolished.

Possible Alternative Approaches

Neil Horton suggests that it might be possible to prohibit the use of a no contest clause to create a forced election, but still allow a forced election to be created using other means. See Exhibit p. 8. For example, a gift could be conditioned on the beneficiary executing a written waiver of any community property interest in estate property. Unlike a no contest clause, the beneficiary of such a gift could participate in court proceedings without triggering a forfeiture. That would allow a beneficiary to take steps to better define the community property share of the estate, before making a final decision about whether to take the gift or the community property. The conditional gift would prevent double-dipping, but would give the beneficiary considerably more flexibility in exploring the options before choosing.

Adam Streisand seems to be skeptical of that approach. He sees the distinction between a no contest clause and a conditional gift as purely semantic and notes that every “no-contest clause can be reworded as a conditional gift.” See Exhibit pp. 10-11.

The staff has a similar concern. If the law were to prohibit forced elections created with a no contest clause, but allow forced elections created by other means, it would need to be made exceedingly clear which was which. The staff is not sure whether the distinction could be drawn with the necessary clarity. Also, to the extent that a conditional gift replicates the effect of a no contest clause, it would seem to invite the sorts of unintended results that have been identified as problematic. The conditional gift approach might also need considerable refining to avoid those problems.

If the Commission is interested in pursuing the use of a conditional gift as an alternative to a no contest clause, more time would be required to analyze that approach. That would mean deferring a final recommendation until some time in 2008. Although this study has no statutory deadline, the Legislature has been expecting completion in 2007.

Another possibility proposed by Neil Horton would be to allow a beneficiary to conduct pre-trial discovery without triggering forfeiture under a forced election, in order to determine the magnitude of the interests at stake in the choice. Forfeiture would only be triggered if the beneficiary went beyond discovery and commenced a trial based on a claim of ownership of purported estate assets. See Exhibit p. 8.

It makes sense that a beneficiary would want better information before deciding whether to forfeit a property interest. However, the point of the forced election is to avoid expensive and protracted property characterization. Allowing discovery to take place would undermine that goal.

GENERAL THOUGHTS ON FORCED ELECTIONS

The three letters attached in the Exhibit illustrate the problem that the Commission faces in attempting to reform the forced election provisions. We are caught between two fires. David Nelson wants the existing forced election to be preserved without limitation (or expanded). Adam Streisand sees the forced election as inherently unfair and wants it abolished. Neil Horton shares Mr. Streisand's concern, but is attempting to find a compromise, allowing forced elections so long as they can be made more fool-proof and less harsh. All have good policy arguments to support their views.

The staff has been laboring in the same field as Mr. Horton. Considerable efforts were made to refine the statutory language authorizing forced elections to make it more predictable and less prone to producing unintended results. The effort has not been well received. The staff is coming to suspect that any compromise language would be opposed by both camps as doing either too much or too little.

PROBABLE CAUSE STANDARD

As explained in Memorandum 2007-44, the staff is proposing the following standard for determining whether a beneficiary has probable cause to bring a direct contest:

21333. ... (b) For the purposes of this section, a contestant has probable cause to bring a contest if the facts known to the contestant, at the time of filing the contest, would cause a reasonable attorney to believe that there is a reasonable likelihood that relief will be granted after an opportunity for further investigation or discovery.

Comment. ... Subdivision (b) provides the standard for determining whether there is probable cause to bring a direct contest. The term "reasonable likelihood" has been interpreted to mean "something less than 'more probable than not,'" and "something more than merely 'possible.'" See Alvarez v. Superior Ct., 2007 DJDAR 13088, n. 4 (construing Penal Code § 938.1); People v. Proctor, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033).

David Nelson raises two objections to the proposed standard for probable cause to bring a direct contest.

First, he wonders whether the reference to "relief" being granted is specific enough. Would *any* relief be sufficient, or must it be the *requested* relief? See Exhibit p. 1.

The point of the standard is to evaluate whether there is good cause to bring a contest. For that purpose, it is probably enough to believe that *some* relief will be granted, even if a reasonable attorney would not expect that *all* of the requested relief will be granted. An initial pleading might include a range of causes and requests for relief. Some will probably be more likely to succeed than others. It should be sufficient that there is a reasonable likelihood of some success. **The staff is inclined to leave the standard as drafted on that issue.**

David Nelson also objects to the proposed standard of likelihood of success. Under the proposed language, there must be a "reasonable likelihood" that the relief will be granted. As explained in Memorandum 2007-44, that standard has been interpreted by the courts as requiring less than a preponderance, but more than a mere possibility.

David Nelson finds that range of probabilities to be too wide, making the standard too unpredictable:

The standard does not establish a meaningful baseline or threshold for “reasonable likelihood.” We know it does not have to be more probable than not, and so does not have to be greater than a 50% probability (and probably does not have to be 50%). But how much less than 50% is sufficient? The explanation says “more than merely ‘possible.’” But even a 1% chance is possible. So at what point between 1% and 50% does a claim stop being a “mere possibility” and become a “reasonable likelihood”? Assume you have a claim with roughly a 25% chance of success. One judge could call that a reasonable likelihood while another judge might not. If there is going to be a probable cause exception, the standard needs to provide a clear threshold. “More likely than not” is reasonably clear because it can be equated to greater than a 50% chance. But reasonable likelihood is ambiguous because it does not identify a meaningful threshold.

See Exhibit pp. 1-2.

The staff does not believe that the likelihood of success on a claim can be reduced to a numerical percentage. The prevailing standards of proof are rough approximations. They define a conceptual range of probability for the finder of fact.

For example, what is meant by “clear and convincing evidence?” More than a preponderance, but less than beyond a reasonable doubt. It defines a wide range of probabilities, from 51% to near certainty. That standard poses exactly the same problems identified by David Nelson. Is 52% clear and convincing? Is 60%?

Reasonable likelihood and clear and convincing evidence both define a range of probabilities that are of roughly equivalent magnitude (though covering different ground). If clear and convincing evidence provides a workable standard, then reasonable likelihood should be just as workable. To the staff’s knowledge, the clear and convincing evidence standard is used widely throughout the law, without causing any significant problems. A standard of reasonable likelihood should prove equally workable.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

**EMAIL FROM DAVID C. NELSON
(10/22/07)**

Brian:

Time is short, so I'll provide brief comments by this email.

1) I'm concerned about limiting the applicability of no contest clauses to creditor's claims and property ownership claims only to those specifically identified in the instrument. Often, one of the transferor's biggest concerns can be bogus or unknown claims that the transferor has no way of anticipating or identifying in the instrument but that would seek to undermine his or her estate plan. Not even the smartest lawyer could possibly conceive of every type of claim that might be made following the transferor's death when he or she is no longer around to refute it.

2) I'm also concerned for an additional reason about limiting the applicability to property ownership claims to property identified in the instrument. That would require a settlor to list every asset he owns -- including bank accounts, works of art, etc., etc. -- in the instrument. It also would require amendment to the instrument every time a new asset is acquired or a new bank account is opened.

3) In my prior letter, I had proposed that no contest clauses also remain applicable to (a) claims asserting an agreement to make a donative transfer (e.g., an agreement to make a will or a testamentary gift) and (b) claims that a transferor forgave or agreed to forgive a debt. I still feel that these should be permissible subjects of no contest clauses. However, they do not fall within either creditor's claims or property ownership claims. To my knowledge, there has not been any discussion about whether to include or not include these things as permissible subjects of no contest clauses.

4) I see two problems with the "reasonable likelihood that relief will be granted" standard for probable cause:

(a) What "relief" must be reasonably likely? Any relief at all? Only the specific relief requested?

(b) The standard does not establish a meaningful baseline or threshold for "reasonable likelihood." We know it does not have to be more probable than not, and so does not have to be greater than a 50% probability (and probably does not have to be 50%). But how much less than 50% is sufficient? The explanation says "more than merely 'possible.'" But even a 1% chance is possible. So at what point between 1% and 50% does a claim stop being a "mere possibility" and become a "reasonable likelihood"? Assume you have a claim with roughly a 25% chance of success. One judge could call that a reasonable likelihood while another judge might not. If there is going to be a

probable cause exception, the standard needs to provide a clear threshold. "More likely than not" is reasonably clear because it can be equated to greater than a 50% chance. But reasonable likelihood is ambiguous because it does not identify a meaningful threshold.

5) A general observation: With so many exceptions, limitations, ambiguous terms, etc., I fear that we potentially are headed toward a new version of no contest clause law that will be at least as cumbersome and uncertain (and perhaps even more so) than the existing law. We wouldn't think of legislatively limiting the freedom to contract in this way just because it sometimes can be time-consuming or difficult for courts to interpret contract provisions. Why impose such limits on the freedom to place conditions on donative transfers?

I hope to be able to attend this part of the meeting on Friday. What time would you suggest that I be there?

Thank, Brian.

David

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RESPONSE TO MEMORANDUM 2007-44

To: Brian Hebert and CLRC

From: Neil F. Horton

cc: CLRC Committee, Shirley Kovar, and Warren Sinsheimer

I write this memorandum as an individual. It will focus on three subjects:

1. Allowing no contest clauses to apply to a property ownership claim as defined in Memorandum 2007-44, at pp. 12-13, including the proposal to retain declaratory relief for beneficiaries seeking to determine whether their proposed action to pursue a property ownership claim would violate the no contest clause, at pp. 14-15;
2. Alternatively, allowing no contest clauses to apply to a community property dispute as defined at p. 10; and
3. Allowing no contest clauses to apply to a creditor's claim, described at p. 3.

Background

Many practitioners responded to CLRC's survey about no contest clauses and to its April 2007 Tentative Recommendation. Those responses overwhelmingly support elimination of declaratory relief. The availability of declaratory relief, most practitioners agree, results in unwarranted additional expense and delay in administering estates and trusts. On the other hand, declaratory relief is desirable where the scope of a no contest clause is unclear. Where a beneficiary can not reasonably know whether or not a court pleading will result in a forfeiture under a no contest clause, it is appropriate to allow a beneficiary to get a court determination of that issue without risking a forfeiture.

The April Tentative Recommendation clarified the permissible scope of no contest clauses by limiting them to a group of well-defined direct contests that are brought without

probable cause and by prohibiting the enforcement of no contest clauses to all indirect contests.

Indirect contests are understood to mean contests that are based on a claim that exists independently of the donative instrument. Because the April Tentative Recommendation clarified the permissible scope of no contest clauses, it recommended that declaratory relief be abolished. Texcom supports this general approach.

An articulate minority – both within Texcom and in the comments that CLRC received – wants to retain declaratory relief and wants to continue to allow no contest clauses to be enforced to indirect contests based on property ownership claims. The main concern is community property claims. Practitioners often see situations in which a client has been married for many years to a spouse who is the step-parent of the client's children. Spouses engaged in estate-planning often do not want to address the issue of what is their community and what is their respective separate property. A commonly-used device to deal with this problem is for a spouse to couple a gift to the other spouse with a no-contest clause that would forfeit the gift if the other spouse asserts a community property claim.

At its last meeting, Texcom considered a draft proposal from CLRC staff that would allow no contest clauses to cover indirect contests that are limited to community property disputes. Texcom unanimously objected to the proposal. The unanimous vote reflected two opposing camps: those who support limiting the enforcement of no contest clauses to direct contests and support prohibiting the enforcement of no contest clauses to indirect contests and those who want to keep the current no contest law, which covers all indirect contests, including community property disputes.

Property ownership claim and declaratory relief

Memorandum 2007-44, at p. 12, states that Texcom's opposition "could be eliminated if the provision were expanded to apply to *any* property ownership claim." I disagree. Texcom's opposition is likely to increase commensurately with the scope of the exception for indirect contests. An exception for all property ownership disputes will attract more vociferous opposition than an exception limited solely to community property disputes. And although Texcom opposes the concept of permitting no contest clauses as a forced election in community property disputes, the proposals suggested below may soften Texcom's opposition.

Allowing an exception for all property ownership claims goes too far. Under the proposal, no contest clauses may apply to any pleading that asserts ownership of property that a protected instrument specifically identifies as the transferor's property. A probable cause exception will not be available under the proposal, but the beneficiary could still apply for declaratory relief.

In order for the no contest clause to apply to a property ownership claim, the no contest clause must satisfy two tests. First, the instrument must specifically identify the property as the transferor's property. Second, the no contest clause must expressly state that it applies to a property ownership claim.

If this proposal becomes law, almost every revocable trust containing a no contest clause will easily satisfy the two requirements. The first paragraph in most revocable trusts recites that the settlor holds the property listed on Schedule A in trust. The Schedule A contains a list of the settlor's assets and frequently contains additional catch-all descriptions, such as any other real property in the settlor's name and any other investments. Future form no contest clauses simply will incorporate the list of property on Schedule A and contain language extending the forfeiture

to include any property ownership claim.

The goal of no contest reform is to reduce the need for declaratory relief in order to reduce the expense of litigation and the delay in distributing property after death. Unlike the April Tentative Recommendation, the current proposal allowing no contest clauses to apply to indirect contests based on property disputes will not result in a significant reduction of declaratory relief petitions. This proposal will not result in reducing litigation expense and avoiding delay in distributing property to beneficiaries.

Community property disputes

As Memorandum 2007-44 states, p. 1, at its August meeting, on a closely-divided vote, CLRC allowed a no contest clause to operate as a forced election, “requiring a beneficiary to choose between taking the gift offered under the estate plan or asserting a ... property ownership claim.” The discussion at the August meeting focused on marital property disputes. CLRC afforded me full opportunity to present the policy arguments against allowing no contest clauses to impose forced elections with respect to disputes over community property. I will not re-argue those issues here. Instead, I want to focus on how to implement the proposal in a way that addresses some of Texcom’s concerns.

The first concern deals with the fact that a considerable amount of time may pass between the time that the transferor signs the revocable trust containing a no contest clause and the time that the transferor dies. Consider the situation in *Estate of Pittman* (1998) 63 Cal. App. 4th 290. There a husband and wife, both previously married, listed all their assets on Schedule A and agreed that the assets on Schedule B were community property, the assets on Schedule C were husband’s separate property, and the assets on Schedule D were wife’s separate property. The

husband and wife decided that, on the survivor's death, his separate property and community property share would go to his family and her separate property and community property share would go to her family. A no contest clause applied to any beneficiary who challenged their characterization of property.

Now suppose that more than ten years passed between the date on which the husband and wife signed the revocable trust that implemented their plan and the surviving spouse's death. Many assets on the survivor's death are different from the list of assets on the Schedules. In the interim, some assets listed as one spouse's separate property were sold and the proceeds invested in assets that were listed as community.

Memorandum 2007-44, at p. 13, assumes "that the court could trace the proceeds...." That statement raises the second concern, namely that beneficiaries who are subject to a no contest clause can not bring a matter before the court without incurring a forfeiture. Courts can act only if a party files a pleading raising the issue. In the above example, if any child petitions the court to determine that certain assets are community or are the separate property of a parent, the child will violate the no contest clause, as happened in *Pittman*.

An argument in favor of allowing no contest clauses to apply to community property disputes is that the surviving spouse has an option to pursue her community property claim or to take the gift under the instrument. See *Burch v. George* (1994) 7 Cal. 4th 246, 265. If the purpose of using no contest clauses to deter community property disputes is to force the surviving spouse to decide between her gift under the instrument and her community property rights, the surviving spouse should be allowed to make an informed choice. Under the forced election cases, courts were reluctant to put the spouse to the election until she had adequate

knowledge of her options. See *Estate of Dunphy* (1905) 147 Cal. 95, 104-105.

An alternative that may satisfy Texcom would be to clarify that the new statute does not prohibit conditional gifts, including forced elections, that do not act as forfeitures. That would allow a spouse who is forced to elect between a gift and her community property rights to conduct discovery to obtain the information that she needs to make an informed decision.

Another alternative would be to trigger the forfeiture on the spouse's filing an election to pursue her community property claim at trial. The spouse would not be penalized for filing a petition that raises the issue of her property claim and conducting discovery on it. If she pursued her claim at trial, she would lose her gift under the instrument. If she did not take her claim to trial, she would not forfeit her gift under the instrument. That solution would avoid the "double-dipping" that would occur if the no contest clause were not enforceable. It also would allow the spouse to make a deliberate and informed choice.

Creditor claims

Memorandum 2007-44 is helpful in explaining the rationale for the creditor claim proposal. Its purpose appears to be to allow a transferor to use a no contest clause to create a forced election in contexts other than community property claims. Under the proposal, the no contest clause would not be enforceable if the debt arose after the no contest clause; the debt must exist before the instrument was signed. And the instrument must specifically identify the debt claimed by the creditor and expressly state that the gift is in satisfaction of the debt.

Because Texcom was running out of time when it discussed this proposal, these limiting features were not fully explained. After a more informed discussion, Texcom may still oppose this proposal, but it needs to consider its merits more closely.

If the legislature adopts the creditor claims proposal, I doubt that it will be used widely.

Memorandum 2007-44 points out, at p. 11, that under existing law no contest clauses often apply to creditor's claims. But except for a situation like *Colburn v. Northern Trust Company* (2007) 151 Cal. App. 4th 439, where a former spouse had obtained a family court child support judgment against the settlor, it is not often that a client will want to make a donative transfer to a creditor, even if its purpose is to use the transfer to satisfy the debt.

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MEMORANDUM

Date: October 22, 2007

File: 666666-66666

To: Brian Hebert

From: Adam F. Streisand

Re: CLRC No Contest Clause Study

I wanted to provide you with thoughts on two issues prior to CLRC's next meeting. I am a member of TEXCOM including its CLRC Committee, but am speaking on my own behalf.

Conditional Gifts versus Forfeiture or No-Contest Clauses.

A no-contest clause, by definition, creates a conditional gift. There is nothing more than a semantic difference between a "conditional gift", on the one hand, and a "forfeiture provision" or "no-contest clause," on the other. Consider the following example:

- Testator A's will provides: "I give my wife \$1,000,000 provided that she accepts the manner in which I have characterized the assets set forth on Schedule A hereto as being my separate property."
- Testator B's will provides: "I give my wife \$1,000,000 provided that she delivers to my executor a deed quitclaiming any interest she may claim in the assets set forth on Schedule A hereto, which I declare to be my separate property."
- Testator C will provides: "I give my wife \$1,000,000, but if she contests the manner in which I have characterized the assets set forth on Schedule A hereto (as being my separate property), then I disinherit her."

There is no difference among these three provisions. Indeed, every "no-contest clause" can be reworded as a "conditional gift." Thus, by limiting the enforceability of "no-contest clauses," on Los Angeles New York Chicago Nashville www.loeb.com



the one hand, and re-affirming the viability of “conditional gifts,” on the other, without greater explication, the Legislature’s efforts would be in vain.

Concededly, even though “no-contest clauses” are “conditional gifts”, not every “conditional gift” is a “no-contest clause”. This is because a “no-contest clause” prohibits a direct or indirect contest, defined as the filing of a pleading in a proceeding in court that challenges the validity or invalidity of an instrument or its provisions. P.C. § 21300. The following “conditional gift” is not a “no-contest clause”: “I give you \$1,000,000 if you graduate from the University of California.” The gift is not predicated on requiring the beneficiary to refrain from directly or indirectly contesting the instrument or its terms.

Even Testator B’s will, in the above example, is predicated on requiring the beneficiary to refrain from indirectly contesting the instrument or its terms. In that example, if the spouse refuses to execute the quitclaim deed, she has not contested the will, she has simply failed to fulfill the condition. But, at some point, someone needs to assert legal ownership over the property. If the property is in the name of the decedent, but the spouse refuses to quitclaim her possible community-property interest, the executor or beneficiary who receives the property will have to sue the spouse. If the spouse intends to assert her ownership, she will have to respond by filing a pleading in a proceeding in court asserting her rights, i.e., challenging the validity of a provision of the will declaring the property as the separate property of the decedent.

In sum, if the Legislature were to affirm the viability of “conditional gifts”, without explication, it would be allowing lawyers to re-word “no-contest clause” aimed at indirect contests as “conditional gifts” and achieving the same results.



What explication would be necessary to avoid this problem?

The answer is that Legislature should make it clear that a condition to a gift that seeks to deter a beneficiary from filing a pleading in a proceeding in court that challenges the validity of an instrument or its terms, other than a “direct contest”, is voidable as an unenforceable “no-contest clause”, and that a pleading seeking to determine that a provision is an unenforceable “no-contest clause” is not a “direct contest”.

Forced Elections

I urge CLRC to take into account that the issue of a “forced election” is not nearly as simple as its proponents would have us believe. Those who advocate in favor of “forced elections”, including some of my beloved law partners, will always say that what a testator proposes to give is a gift to which the beneficiary has no legal entitlement. They say that the beneficiary has a choice, as in Burch v. George, to pursue her legal rights or accept a gift to which she is not otherwise entitled.

In the real world, however, the testator is waiting until after his death to dictate to the beneficiary essentially a post-death divorce settlement. The provisions should be read as follows: “I declare that all of this property is mine, and whether I am right or wrong, I have decided how much you should get. I am forcing you to choose between long, expensive and uncertain litigation to determine whether I am right or wrong about what I say is mine. If you choose that path, you may be bankrupted in the process, you may lose the argument that you own any of this property and be left with nothing, because if you choose that path, you don’t even get what I think you should have, i.e., you are also disinherited.”



If you think about this, it is truly egregious that our Legislature would condone a practice of allowing one spouse to do a will he may never share with his wife, and to use that will to do what he would not do while he was alive, i.e., declare that property is his and not hers or theirs. We allow the spouse to say that property he knows is not his is his anyway. We allow a spouse literally to take property away from his wife, usually elderly by the time he has passed away, and to force her to take only what his will says she should have after death.

The Legislature should encourage people to decide openly what they believe their property to be while they are alive, rather than force a widow to accept the decedent's post-death dictates. This does not mean that the Legislature is encouraging divorce. It means people should either agree or should find a lawyer and maybe an accountant to help them determine who owns what. If they do not want to do this, then they leave open the possibility of disputes after death. That is the right choice to impose on people.

True, some spouses will litigate their property rights and want to eat their cake too by receiving the gift under the will. Testators should understand that such a possibility exists and plan accordingly before death. Ultimately, wouldn't we all prefer, as the lesser of two evils, that some greedy widows obtain more than their share, rather than the children (who truly are the ones obtaining the windfall) receiving the benefit of some greedy decedents who chose not to take any action while alive to clarify what they really owned and what belonged to their spouses (either as community property or separate property)?

I hope CLRC will really think long and hard about this issue because our elderly, and often most vulnerable citizens truly deserve their long and thoughtful consideration.