

Probate Law

Controlling Interests

No-Contest Clauses and Advanced Rulings

An attack on the stock-redemption agreement would constitute an attack on the decedent's integrated estate plan.

By Marshal A. Oldman and Susan J. Cooley

In *Genger v. Delsol*, 97 Daily Journal D.A.R. 10435 (Aug. 13, 1997), the 1st District Court of Appeal decided what constitutes a contest to a testamentary instrument. The court also considered the circumstances under which a contestant can request an advanced ruling under Probate Code Section 21307.

The decedent was found to have created an integrated estate plan involving a trust, pour-over will and corporate stock-redemption agreement. The trust and the will both requested that the beneficiaries carry out the stock-purchase agreement, which was tied into the estate plan. Under the agreement, the decedent's house, which was in the corporation's name, and the decedent's indebtedness to the corporation were to be exchanged for his corporate shares. Under the trust, the house was to be distributed to his second wife. Additionally, the wife was to receive the decedent's individual retirement account and pension pursuant to the beneficiary designation.

Based on the decedent's statements, the family corporation, which he inherited along with his brother from their parents, was to remain solely in the hands of the family. Effectively, the redemption of the stock increased the share of the company owned by the decedent's daughter Elizabeth Delsol and son-in-law Robert Delsol.

The estate-planning documents were created at the same time and by the same counsel. The will and trust both included no-contest clauses, which were later explained to the decedent along with the remainder of the estate-planning documents. The will and trust were executed at the same time that the stock-redemption agreement was executed. Because the wife spoke little English, separate counsel was obtained for her. The documents were explained to the wife in her native language, Japanese, to be certain she understood them.

The wife wished to bring an action to set aside the stock-redemption agreement on the grounds that the stock was worth far more than the residence and the cancellation of indebtedness. Before bringing the action, however, the wife brought a petition under Probate Code Section 21320, asking the court to construe the no-contest clause. A separate petition was later brought to determine if the no-contest clause should apply to the wife under any circumstances pursuant to Probate Code Section 21307.

Relying on *Burch v. George*, 7 Cal.4th 246 (1994), the trial court and the Court of Appeal had little trouble determining that an attack on the stock-redemption agreement would constitute an attack on the decedent's integrated estate plan and would cause a forfeiture under the no-contest clauses in his will and trust. The trial court also determined that the no-contest clause should apply to the wife under Probate Code Section 21307. However, the Court of Appeal found that the trial court's ruling on the applicability of Section 21307 was premature and reversed on that issue. Under Section 21307, a contestant attempts to avoid the application of a no-contest clause on the ground that the document's proponent either drafted the clause or caused its inclusion in the document.

The reversal was caused by the language of Section 21307, which excludes a probable cause determination from being made in advance under Probate Code Section 21320. Pursuant to Section 21307, a litigant is protected from a forfeiture caused by a no-contest clause to the extent the contestant had probable cause to believe the no-contest clause was inserted into the testamentary document by its proponent.

Since this determination may require a factual hearing that is similar to an undue-influence contest, the Legislature was concerned that an advanced determination on this issue would involve the estate plan in a trial on the no-contest clause that would be only slightly less onerous than the contest itself. The Legislature did not wish to allow a contestant to put on her case simply to determine her probable cause prior to contesting the instrument.

While Section 21307 protections are available to shield a contestant from a forfeiture under a no-contest clause, the contestant must challenge the instrument before petitioning to determine if she remains able to inherit via the document after the court has overruled her contest. In this case, the Court of Appeal determined that the wife would need to challenge the stock-redemption agreement before she could determine if the no-contest clause applied to her. Even if she were successful against the agreement, however, she might still be found to have violated the no-contest clause, forfeiting her rights under trust.

For the second time in three months, the Court of Appeal has raised the concept of an integrated estate plan. A business contract was found to be part of an estate plan that also included a will, trust and beneficiary designations under an IRA and pension plan.

Although the notion of an integrated estate plan may be found in *Burch* and in *Estate of Wathen*, 97 Daily Journal D.A.R. 8346 (July 1, 1997), many decisions will be needed before its meaning can be fully ascertained and understood. In this matter, an action against the stock-redemption agreement was found to be a contest of the will and trust, which both requested that the parties carry out the agreement. This leaves unanswered the question of whether some sort of specific inclusion of an extraneous document is required in order for it to be integrated into the estate plan.

Additionally, can the beneficiary designations of pension plans, annuities, insurance policies and irrevocable trusts also be included in the ambit of a no-contest clause in a will or trust under an integrated estate plan? Conceptually, if the beneficiary designations are mentioned and executed at the same time as the testamentary documents, they might also be integrated into the estate plan and be covered by a no-contest clause. But if they are executed at different times, or are not mentioned in the will or trust, or if the testamentary instruments are later amended, possibly no integrated estate plan exists or later disintegrates, thereby restricting the no-contest clauses' reach.

With the interplay of Probate Code Section 21307, the question of the enforceability of a no-contest clause takes on the characteristics of three-dimensional chess. A litigant can obtain an advanced ruling regarding the applicability of a no-contest clause to a proposed action. Even if the action is covered by the clause, however, a litigant may still be able to avoid forfeiture under the clause by claiming after the contest that the proponent was instrumental in its inclusion. The range of participation in the instrument drafting and the inclusion of the no-contest clause may offer almost infinite possibilities and variables.

Parties cannot be certain of the clause's enforceability against a particular contestant until after the conclusion of litigation. The determination of probable cause to support a contestant's belief in the proponent's participation in drafting the instrument or clause may involve numerous facts and theories that may result in a lengthy hearing. From uncertainty grows a level of fear and terror. Time will tell if such doubt decreases the level of litigation involving estate plans or only makes such litigation more complicated.

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