LOS ANGELES
Daily Journal
www.dailyjournal.com
WEDNESDAY, NOVEMBER 19, 2014

PERSPECTIVE

Lawyers need not live in terrorem of no-contest clauses

By Alex M. Weingarten and Logan M. Elliott

A "no-contest," or in terrorem (Latin for "in fear"), clause is a provision in a will or trust that threatens to disinherit a beneficiary if they challenge a will or trust in court. Such clauses discourage beneficiaries from litigating after the death of a testator. Some states, such as Florida, deem no-contest clauses unenforceable under any circumstances. Others, such as Massachusetts, enforce them without exception. The Uniform Probate Code (UPC) provides that no-contest clauses are enforceable unless the contest is based on probable cause.

In 2010, the California Legislature enacted significant changes to the Probate Code with the goal of clarifying the law and limiting the enforcement of no-contest clauses by instituting a probable cause requirement. The idea behind these changes was to bring clarity to the Probate Code. Although there are no published opinions interpreting "probable cause" in this context, these changes appear to have resulted in a test that will result in no-contest clauses being unenforceable under all but the most extreme circumstances.

The pre-2010 statute provided that a "direct contest" (a suit seeking to invalidate a trust on specified grounds, such as forgery, incompetence, fraud and undue influence) could be brought without triggering a no-contest clause if the challenging party had reasonable cause, which required the challenging party to possess facts that would cause a reasonable person to believe that the challenger's allegations may eventually be proven. However, as noted by the state Supreme Court in a 2013 case, *Donkin v. Donkin*, the prior law was needlessly complex and "promoted ... uncertainty as to the scope of application of a no-contest clause."

To remedy such uncertainty and reduce the frequency of unjust disinheritances, the state Legislature adopted the recommendation of the California Law Review Commission and replaced the prior reasonable cause standard with the UPC's probable cause standard. Intuitively, "probable cause" implies a stricter standard than reasonable cause. However, the opposite appears to be true. Section 21311(b) states that "probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." The new probable cause standard shifts the inquiry from whether the challenger has facts sufficient to believe that his *factual contentions* will be proven true, to whether the challenger has facts sufficient to believe that the *requested relief* may eventually be granted. Even if the average reasonable person would doubt the veracity of the challenger's allegations, probable cause is nonetheless satisfied if it is reasonable to believe that the requested relief may ultimately be granted, regardless of whether the challenger's factual contentions are proven to be true.

But how have California courts defined and applied the new probable cause standard? Unfortunately, the issue has received limited attention. Two recent unpublished Court of Appeal opinions — *Estate of Terry* (2012) and *Estate of Marsh* (2014) — suggest that California courts do not enforce no-contest clauses in all but the most extreme cases.

In *Terry*, the widow of a deceased man sought to replace her late husband's trust with a handwritten will purportedly executed a year after the trust. In assessing whether the widow had probable cause, the court set a remarkably low bar. The court rejected the son of the decedent's argument that the widow could not show probable cause because her claims were barred by various defenses, noting that probable cause analysis was not an "outcome-directed focus, with its emphasis on whether respondent could have been successful." Rather, probable cause exists if the challenger held "a belief, from a reasonable person's perspective, of a reasonable likelihood of success." Probable cause was satisfied because the challenger's tenuous claims were not "illogical" or "obviously invalid" in the face of likely defenses. The challenger's reasonably held belief in the validity of her claims controlled, even if the claims were almost certain to fail as a matter of law.

While *Terry* demonstrates the broad leeway granted to challengers under the new probable cause standard, *Marsh* suggests there are limits. In *Marsh*, the Court of Appeal found that a widow did not have probable cause to challenge her deceased husband's will because her claims relied upon unsupported "conclusory allegations" and patently "frivolous" legal arguments. The widow was therefore disinherited under the will's no-contest clause.

Terry and *Marsh* establish there is likely a low bar for what would constitute probable cause under the new statute. So long as a challenge is not obviously invalid or frivolous from the perspective of a reasonable person, a no-contest clause will not be enforced.

Other jurisdictions, including some that adopted the UPC's probable cause standard, apply a similar test. In Colorado, the Court of Appeal found in *Estate of Peppler* (1998) that probable cause is likely satisfied if the challenger "relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts," without specific consideration of merit or likelihood of success. In Michigan, the court in *Estate of Stan* (2013) found probable cause for a petition contesting the appointment of the challenger's sister as personal representative of their deceased father's estate although the challenger contested the wrong testamentary document and presented no evidence to support her claims. Though the petition was legally invalid, it was nevertheless reasonable from the challenger's perspective based on questionable conduct by the challenger's sister in connection with estate assets.

In South Carolina, however, the court in *Russell v. Wachovia Bank*, N.A. (2006) limited a contestant's right to petition by applying the same probable cause standard enforced in *Marsh*. In that case a contestant was disinherited under a no-contest provision where the decedent had specifically anticipated a meritless challenge by the contestant that was based only on "family discord and strife, coupled with a less-than-favorable inheritance." "If a no-contest clause cannot be upheld under these facts," the court reasoned, "such a clause would not ever be enforceable."

Viewed through the probable cause standard applied by *Terry, Marsh* and the courts of myriad other jurisdictions, no-contest clauses appear to be unenforceable in all but the rarest of cases. When assessing whether a litigant has probable cause to challenge a will or trust, California courts will likely consider whether the challenge rises above a minimum level of frivolous from the perspective of a reasonable challenger. If so, a no-contest provision will be disregarded. This lax standard follows the Legislature's goal of allowing good faith probate contests to move forward without prejudicing the challengers. It will also likely invite more such contests given that contesting beneficiaries will have little to fear from the infamous terror clause.

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