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THE NO CONTEST CLAUSE—MORE CONTROVERSIAL THAN IT APPEARS **By Randy Spiro**

On the surface, a no contest clause says that if a person who would otherwise receive benefits under a Will or Trust will forfeit those benefits if he or she takes certain actions. But it is more complicated than that.

The clause only takes effect if the contestant loses. For example, if I contend that my father's Will which disinherits me is a forgery, I am not disinherited under the no contest clause if I prove that my father's purported signature was really a forgery.

Because no contest clauses cause a forfeiture when enforced, most states limit their enforceability. For example, a state statute might say that a no contest clause will not be enforceable to the extent it defines a contest as a challenge to discretionary actions of a Trustee or Executor.

But what of other beneficiary actions such as filing a Creditor's claim, or couching a contest as a request to interpret an instrument? In these instances, the relevant state's statutes must be examined to determine whether or not the clause is enforceable.

What if a Will or Trust has a no contest clause and an amendment to the Trust or a codicil to the Will (which amendment or codicil itself does not contain a no contest clause) is challenged? Even though the amendment or codicil may incorporate by reference the no contest clause in the Trust or Will, state law must be reviewed to see if the no contest clause will not be enforced on the ground that the contested instrument doesn't contain the clause.

What of a Husband who has his own trust who wants to discourage his Wife from claiming a community property interest in his Trust. He may wish to craft a no contest clause which includes in the definition of contest any attempt by his Wife to claim a community property interest in the assets of his Trust. His intent is to avoid double dipping. He doesn't want his Wife to get the benefits under the Will or Trust and in addition to take a community property interest.

If an heir (a person who would inherit in the absence of a Will or Trust) is disinherited in the Will or Trust itself, he or she will not be deterred by the no contest clause. Why? Because the heir has nothing to lose.

One strategy is to make a gift to the heir (for example—one of the children) that is large enough to cause the heir to worry that the risk of losing what he or she has been given is simply not worth it. It angers some people that they have to make a gift to someone they wish to disinherit in order to discourage that person from contesting, but sometimes the ability to prevent a contest and the attorneys fees it would generate on both sides will cause the Testator to make such gift, distasteful as it may be.