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Recent Changes to the Law Governing No-Contest Clauses in Wills and Trusts

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In the last decade, the legislature has altered the Probate Code and changed how courts interpret and enforce no-contest clauses in wills and trusts. These changes restrict the application of no-contest clauses executed since January 1, 2001, and may require revisions to testamentary instruments executed since that date.

When drafting a will or a testamentary trust, devisors and trustors commonly insert a no-contest clause, which eliminates gifts to beneficiaries who contest provisions in the instrument or bring any pleading that would result in the nullification of part of the instrument. These clauses are inserted to discourage probate litigation and avoid wasting estate assets on legal fees.

The new law states that a no-contest clause “shall only be enforced” against three types of pleadings: (1) a “direct contest that is brought without probable cause”; (2) a pleading challenging a transfer of property because the transferor did not own it; and (3) a filing of a creditor’s claim or an action based on a creditor’s claim. These latter two categories only apply if the no-contest clause specifically refers to them. Most applications of no-contest clauses will fall into the first category.

A “direct contest” is defined as a contest that alleges invalidity of a instrument on the basis of forgery, lack of due execution, lack of capacity, fraud or undue influence, or revocation of the will or instrument. Only contests making these claims may trigger a no-contest clause.

Furthermore, those claims only trigger a no-contest clause if brought without probable cause. What constitutes probable cause will be the subject of future litigation, but generally it seems that a beneficiary can bring a direct contest as long as it appears reasonable that further fact-finding will support the claim.

What instruments does the new law apply to? The law applies to any instrument, “whenever executed,” that became irrevocable on or after January 1, 2001. For example, a trust executed in 1980 that became irrevocable in 2002 will be subject to this law. What about will codicils and trust amendments? The new law provides that, to be protected, the instrument be in existence when the no contest clause is executed. As a result, codicils and amendments must contain their own no-contest clause because they did not exist when the original will or trust containing the no contest was executed.

As a consequence of these and other probate law and tax law changes, you should review, and if necessary, restate your estate planning documents so they conform to the new laws. Contact one of KDG’s Estate Planning attorneys for help.