



Addressing Estate Litigation Through Will Drafting

Part 1: No-Contest Clauses

February 2022

When creating or updating testamentary instruments, a client may express concern about future estate litigation after he or she has passed away. This Solicitor's Tip is the first in a series focusing on how will drafting can be utilized to assist clients with posthumous estate litigation goals.

Preventing Will Challenges with No-Contest Clauses

Including a no-contest clause in a will may be appropriate in some situations where clients wish to discourage potential will challenges and estate litigation. A no-contest clause (also known as an *in terrorem* clause) threatens beneficiaries with disinheritance if they challenge the testator's will. Situations where a no-contest clause may make sense include:

- the testator limiting his or her children's entitlement under the will;
- the estate is distributed unequally amongst the testator's children; or
- the testator makes significant changes to the distribution of the estate amongst beneficiaries as compared to how the estate was distributed in a previous will or wills.

An example of a no-contest clause that was not declared void or unenforceable can be found in [Mawhinney v Scobie, 2019 ABCA 76](#). The clause in that case read:

If any beneficiary of this my Will challenges the validity of this my Will or any Codicil hereto or commences litigation in connection with any provision of my Will or any Codicil hereto, other than for:

- (a) Any necessary judicial interpretation or for the assistance of the court in the course of administration of my estate;
or
- (b) Seeking to enforce or obtain any rights or benefits conferred by the laws of the Province of Alberta;

then, such beneficiary shall absolutely forfeit and lose all entitlement to benefits or any gift to him or her hereunder, and every such benefit or gift so forfeited shall fall into the residue of my estate and the residue of my estate shall be distributed as if such beneficiary had predeceased me and left no issue surviving me.

This clause could be a useful starting point for drafting a no-contest clause, as it complies with the following requirements:

No-contest clauses must include a gift-over

The will must clearly articulate what will happen to a beneficiary's interest if that beneficiary contests the will. If there is no gift-over, the no-contest clause will be idle and therefore unenforceable.

The general rule that a failed gift will fall into the residue of an estate will not save a no-contest clause that does not include a gift-over. In [Bellinger v Nuytten Estate, 2003 BCSC 563](#), the court held that “nothing short of a positive direction of a gift over, of vesting in another, even in the case where the forfeited legacy falls in the residue, will suffice” (at para 9, emphasis added).

On this note, a carefully drafted no-contest clause should specifically include a gift-over, rather than a separate clause in the will to address how failed gifts are to be distributed.

No-contest clauses cannot discourage applications for statutory relief

A no-contest clause will be invalid if it is triggered by a beneficiary applying to enforce statutory rights related to the estate or applying for a benefit created by statute, such as claiming dependant's relief. Such a no-contest clause would typically be void due to public policy. Furthermore, the no-contest clause should not seek to prevent beneficiaries from seeking court assistance in interpreting the terms of the will.

Accordingly, a no-contest clause should not expressly discourage a beneficiary from bringing an application to enforce statutory rights or obtain benefits from the estate. However, a no-contest clause with broader wording could also be declared void on this basis. For example, in [Kent v McKay, 1982 CanLII 788](#) (BCSC), a no-contest clause that restricted “all litigation” was declared void because the court recognized that such language could be activated by an application for statutory relief from the estate. While the no-contest clause in [Mawhinney](#) discouraged “litigation in connection with any provision of [the] Will or any Codicil,” it avoided this issue by creating an exception for litigation seeking to enforce or obtain statutory rights.

Conclusion

When advising clients regarding no-contest clauses, it is important to remind them of their limitations and issues relating to their enforceability. While such clauses may be appropriate in some circumstances, a client's request in this regard may also be a sign of other issues at play, such as capacity issues influencing a client's decision to make radical changes to an estate plan. In any event, exploring alternatives and carefully documenting the client's instructions may be prudent.