Recent Cases of Interest to Fiduciaries: Part 2 – No-Contest Clauses, Powers of Attorney, and Pre-Death Will Contests

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In Re Estate of Dorsey W. Rohrbaugh, 80 Va. Cir. 253 (Fairfax Circuit Court, March 31, 2010)

Dorsey and Geanie Rohrbaugh were married in 1974. Before their marriage, they entered into a premarital agreement in which Mrs. Rohrbaugh waived various rights including the right to claim an elective share and any rights to Mr. Rohrbaugh's property in Orlando, Florida.

Mr. Rohrbaugh died in 2002, and his sons from a prior marriage qualified as executors under the will. Under his will, Mr. Rohrbaugh gave his wife his interest in the Orlando property and provided a trust for her benefit to be funded with property in Virginia or the proceeds from the sale of the Virginia property. Mr. Rohrbaugh left the residue of his estate to his four children from a prior marriage. Before his death, Mr. Rohrbaugh sold the Orlando property and purchased property in Inverness, Florida, with the proceeds. Mr. Rohrbaugh's will contained a no-contest clause that left any contestant to the will only $100.

In 2002, Mrs. Rohrbaugh filed a twelve-count complaint against the executors, which included claims to void the premarital agreement, breach of the agreement, elective share claims, and claims to the Florida and Virginia properties owned by Mr. Rohrbaugh at his death. Mrs. Rohrbaugh nonsuited various claims, and her other claims were found to be barred by laches or the premarital agreement. Cross appeals to the Virginia Supreme Court were denied.

In 2004, Mrs. Rohrbaugh filed another suit against the executors for $2 million claiming conversion of property by the executors and re-alleging her contract claims. At trial, Mrs. Rohrbaugh admitted on cross examination that she was contesting what she felt was the "will from hell" and that she was aware of the consequences of the no-contest clause. While the second suit was pending, the executors filed a motion claiming that Mrs. Rohrbaugh violated the no-contest clause. The trial court concluded that she had violated the clause, but the Virginia Supreme Court reversed and remanded the ruling due to lack of evidence of the second lawsuit formally in the record.

On remand, the Fairfax circuit observed that no-contest clauses are strictly applied in Virginia in order to protect the testator's right to dispose of his property as he sees fit, and the societal benefit of deterring bitter family disputes that will contests frequently engender. Reviewing the facts of this particular case, the court concluded that: (1) Mr. Rohrbaugh intended, by the use of the phrase "to the extent permitted by law," that the no-contest clause be given the broadest possible scope; (2) Mrs. Rohrbaugh's claims were designed to grant her property rights that were broader than those provided under the will; (3) Mrs. Rohrbaugh on cross examination revealed that her motive was to contest the will; and (4) Mrs. Rohrbaugh's cumulative actions constitute an indirect contest or claim against the will that violates the no-contest clause. For these reasons, the court held that Mrs. Rohrbaugh forfeited all rights under the will other than $100.

Derringer v. Emerson, 2010 U.S. Dist. LEXIS 79522 (August 6, 2010)

Richard Solem executed a living trust agreement in 2004, with himself as trustee, that provided at his death for the distribution of more than $2 million to his daughters and the balance to his charitable foundation. The trust contained a no-contest clause. In 2004, Solem sent a memorandum to his common law wife expressing his decision to change his trust to leave everything to the foundation. Thereafter, Solem executed a notarized summary of the changes to his trust, and informed his daughters that he had made changes to his estate plan.

Solem died in 2006. In 2009, the daughters filed a complaint seeking a declaration that the trust was not validly amended, and that they were entitled to a distribution of $2 million. Solem's common law wife, as successor trustee, moved for summary judgment on the grounds that the action was barred by the statute of limitations.

The federal district court for the District of Columbia, applying Virginia law, granted the motion for summary judgment and dismissed the daughters' claims as untimely on the following grounds: (1) a resort to the means provided by law to attack a will is a contest; (2) whether an action seeking interpretation of a will is a contest depends on the no-contest clause and the facts of the case; (3) an action that would thwart the purpose of the will is a contest; (4) Solem had the right to amend the trust by a writing delivered to the trustee, but since he was the trustee he only had to put in writing his amendments to render them effective; (5) the daughters' claims challenging the amendment sought to invalidate the amendments and amounted to a contest; and (6) a trust contest must be brought within two years after the settlor's death (or six months after receiving certain notice), and the daughters' claims were brought two years after the statute of limitations had expired on the claims.

Claude Arnall v. Dawn Arnall, 2011 Cal. App. Unpub. LEXIS 366 (January 19, 2011)

Roland Arnall died on March 17, 2008, leaving a trust with his wife, Dawn, as trustee. Under the trust terms, Dawn was directed to pay all taxes and expenses from the trust and then distribute the balance of the trust estate into sub-trusts in a fixed order of priority: (1) $100 million for Dawn; (2) then, $25 million for each of Roland's two children; and (3) then, $10 million for Roland's brother Claude. The trust provided that the trustee had six months to fund the various sub-trusts. As of January 19, 2011, none of the sub-trusts had been funded.

Claude sued to compel Dawn to distribute assets and for an accounting, and filed a safe harbor application seeking a determination of whether his proposed petition would violate the trust's no-contest clause. The probate court ruled that the proposed petition for accounting and distribution would not violate the no-contest clause. Dawn appealed on the basis that Claude sought to alter the trust's express funding priority by seeking funding of his share before payment of expenses or funding of the other sub-trusts.

The Court of Appeals affirmed the probate court on the grounds that Claude did not attack or seek to impair or invalidate any provision of the trust in violation of the no-contest clause, and rather sought "only to force Dawn to make the distribution exactly as specified in the trust."

The court further noted that according to the applicable version of section 21305 of the California Probate Code, a pleading based on the trustee's inaction as a fiduciary does not violate a no-contest clause as a matter of public policy. Section 21305 was repealed as of January 1, 2010.

Claude Arnall v. Dawn Arnall, 2010 Cal. App. Unpub. LEXIS 9218 (November 19, 2010)

Claude Arnall filed two identical safe harbor applications under section 21320 of the California Probate Code, one with respect to a trust and one with respect to the will of his brother the decedent, Roland Arnall, based on an alleged partially performed oral contract. Claude's claim sought $47.2 million representing the alleged unpaid portion of a contract for the sale of his interest in a company he had jointly owned with the decedent.

Strictly construing the no-contest clause, the probate court found that neither claim violated the instruments' respective no-contest clause provisions. Dawn appealed.

On appeal, the California Court of Appeals affirmed the probate court, finding that Claude's claim was a creditor's claim seeking only to collect money owed him under an oral sales agreement and therefore did not violate the no-contest clause. The court based its holding on the fact that nothing in Claude's safe harbor petition challenged the trust or will's characterization of the decedent's dispositions or the relative percentage allocations to each beneficiary, and rather merely reduced the amount of the money given to other beneficiaries.

Further, the court denied Dawn's request on appeal to include a finding that Claude would be deemed to have violated the no-contest clauses, if a court later found that Claude's claim was frivolous, noting that the decision about whether the beneficiary's proposed action would be a will contest may not involve a determination of the merits of the action itself.

Glory Kaufman v. JP Morgan Chase Bank, 2010 Cal. App. UnPub. LEXIS 8559 (October 28, 2010)

In March of 2009, Glory Kaufman, as beneficiary of the Donald B. Kaufman Revocable Trust, filed two applications under California Probate Code section 21320 for a determination that proposed petitions to remove and surcharge the trustee would not violate the trust's no-contest provision. The proposed petitions alleged breach of fiduciary duty, and an amended petition alleged gross negligence and reckless indifference by JP Morgan Chase Bank as trustee for failing to monitor and timely sell AIG stock as it declined in value.

The trustee argued that the petitions violated the no-contest provision by seeking to attack a provision of the trust which specifically authorized the trustee to retain all share of stock in Kaufman & Broad Inc. or its successor, and because AIG was the successor in interest to KBI. The trial court denied Glory's application on grounds that a decision would require a determination of whether AIG was in fact the successor to KBI, which would be outside the scope of the 21320 application.

On appeal, the California Court of Appeals explained that a trial court ruling under section 21320 may not consider the merits of the proposed action itself because a beneficiary is not entitled to two determinations of the merits of the proposed actions. The court affirmed the denial of the application on the basis that the determination of whether AIG was the successor in interest to KBI would impermissibly be a determination on the merits.

Lange v. Nusser, 2011 Cal. App. Unpub. LEXIS 1576 (March 2, 2011)

Ardene Lange executed a revocable trust on January 21, 1997. Under the trust agreement, Ardene provided at her death for her daughter, Lynda, 58 percent of the trust, and the remaining 42 percent to her other two children and a grandchild. The sole trust asset was Ardene's home. Lynda lived in the home with Mrs. Lange from February of 2004 until Mrs. Lange's death on July 30, 2007, at which point, Lynda became successor trustee of the trust.

After Mrs. Lange's death, Lynda continued to live in the house and cared for Mrs. Lange's cats as provided for in the trust. Lynda did not pay rent, but paid for all house expenses, the costs of caring for the cats, and allowed her children to live in the house rent free in return for their help with the expenses.

On November 10, 2008, the other trust beneficiaries filed a petition for interpretation of the trust, an accounting, and claiming that Lynda breached her fiduciary duties as trustee and should be removed. The other beneficiaries asked the court to: (1) determine whether any of the cats belonging to Mrs. Lange at the time of her death (which the court referred to as the "cat beneficiaries") were still alive, and if not, to order distribution of the trust assets to the residual beneficiaries; and (2) interpret the trust provisions for the cats to allow Lynda to arrange for alternative placements for any living cats, and to sell the house and distribute the proceeds. The beneficiaries alleged that Lynda had abused her discretion by living in the home rent free to care for the cats and failing to make the trust property productive.

The probate court ruled in Lynda's favor, and held that the beneficiaries had violated the trust's no-contest clause, thereby forfeiting their interests. The beneficiaries appealed.

On appeal, the court noted that Section 21305 of the California Probate Code governed (it has since been repealed) and therefore a safe harbor application seeking interpretation of the no-contest clause alone did not violate the clause itself. The court reversed the probate court, and held that the beneficiaries sought only an interpretation of the trust and did not challenge the trust's validity, and rather asked the probate court to determine whether any cat beneficiaries existed and to establish them by some form of identification, none of which amounted to a contest. The court also noted that California's statute governing animal trusts (Cal. Prob. Code § 15212) mandates distribution to the residual beneficiaries upon the death of the last cat beneficiary under the trust, and therefore a request for a finding as to whether any cat beneficiary was still living did not thwart the cat provision and instead sought only to ensure proper implementation of the trust's provision.

Christopher Gene Fazzi v. Norma Jean Klein, 2010 Cal. App. LEXIS 2112 (December 14, 2010)

On January 29, 1987, Norma Jean Klein and her husband, Lloyd, created a joint revocable trust called the Klein Family Trust, and executed pour over wills. Norma and Lloyd served as co-trustees during their lives. Under the trust agreement, on the death of either spouse, the survivor as trustee was to divide the trust assets into three sub-trusts, two of which were to become irrevocable at the first spouse's death. Norma's son, Christopher, and Norma's other children and stepchildren were named as remainder beneficiaries of the irrevocable sub-trusts. The trust agreement contained a no-contest clause. The trust agreement also specified a procedure for appointing successor trustees upon the death of either spouse, and designated Norma's other son, Michael, as successor trustee.

Lloyd died and Norma became sole trustee. Nine months later, Norma executed an asset allocation agreement providing for the funding of the three sub-trusts.

In November of 2008, Christopher filed an application for safe harbor determination under California Probate Code former section 21320 whether his proposed petition constituted a contest to the trust. Christopher's petition sought: (1) removal of Norma as trustee for cause; (2) a determination that the provisions designating Michael as successor trustee only applied to the original trust and not to the irrevocable sub-trusts, but that if the designation did apply to those trusts, a determination that Michael was unfit to serve and disqualified from serving as successor trustee; and (3) appointment of a professional fiduciary as successor trustee of the irrevocable sub-trusts.

The trial court granted Christopher's safe harbor petition on the grounds that the sub-trusts did not contain a no-contest clause or incorporate the no-contest clause contained in the original trust by reference.

On appeal, the California Court of Appeals reversed the trial court and found that the intent that the no-contest clause apply to the sub-trusts was implicit in the trust document, noting that because the original trust was revocable, a contest was never a possibility during the joint lives of the settlors.

The court similarly rejected the argument that the successor trustee provisions did not apply to the sub-trusts, and refused to find that Michael was unfit to serve because of his lack of necessary education or his hostile attitude toward Christopher, noting the importance of the settlors' choice of a trustee.

The court agreed that, assuming the claim was not frivolous, Christopher's request to remove Norma for cause did not violate the no-contest clause because the trust contained no prohibition or provision at all on an action to remove an individual trustee for cause. The court noted that even if the no-contest clause at issue had specifically prohibited any action to remove a trustee, the provision would have been unenforceable because a trustee cannot hide behind a no-contest clause and commit breaches of fiduciary duty with impunity.

James Munn v. Michael D. Briggs et al., 2010 Cal. App. LEXIS 860 (June 10, 2010)

In 1983, Janell Munn executed a will exercising a testamentary power of appointment over a trust created by her late husband. Janell had two children, James and Carlyn. On December 22, 2007, Janell executed a codicil to her will which exercised the power of appointment to make specific gifts of $1 million to Carlyn's two children, and gave the remaining funds to Carlyn. The codicil specifically indicated that no provisions were being made for James or his children, and contained a no-contest clause.

After Janell's death, her will and codicil were admitted to probate. James did not object to the will or codicil or challenge the validity of the $1 million gifts. Rather, James filed a petition alleging tortious interference with inheritance against Carlyn and her husband, Michael. In his petition, James alleged specific incidents of Carlyn and Michael's engagement in behavior that was manipulative and mentally and emotionally abusive toward Janell. James alleged that Janell executed the codicil as a result of the wrongful conduct.

Carlyn and Michael moved to dismiss the claims, and the trial court dismissed the claims on the grounds that intentional interference with inheritance expectancy was not a recognized tort in California.

On appeal, the California Court of Appeals affirmed, and declined to recognize the tort of interference with an expected inheritance where the beneficiary has an adequate remedy in probate. The court rejected the argument that the no-contest clause deterred his challenge to the codicil in probate, noting that such an argument would undermine the important public policies served by no-contest clauses.

Siegel et al. v. JP Morgan Chase Bank, 2011 Fla. App. LEXIS 1925 (February 16, 2011)

Dorothy H. Rautbord created a trust for her lifetime benefit, with the remainder distributable to her children including her sons, Daniel and Simon Siegel. The trust terms allowed the trustee in its sole discretion to pay so much of the income and principal as the trustee deemed necessary for Dorothy's support, maintenance, health, comfort, or general welfare. Dorothy reserved the power to amend, modify, or revoke the trust and specifically excluded any attorney-in-fact from exercising her power. Dorothy appointed JP Morgan Chase Bank as trustee.

Dorothy also executed a power of attorney and named her daughter, Ms. Novak, as agent. Ms. Novak's powers as agent included the power to make gifts to individuals or charitable organizations, provided the gifts were reasonably consistent with Dorothy's pattern of giving or her estate plan, or were not in excess of the annual exclusion from federal gift tax. The power of attorney specifically excluded any power to revoke, amend or withdraw principal from any trust where Dorothy reserved the power to amend or revoke the trust.

During Dorothy's life, Ms. Novak made large withdrawals of principal from the trust by signing revocation letters, which the trustee approved. In addition, the trustee issued checks for numerous gifts and made large distributions for Dorothy's general welfare.

Dorothy died in 2002, and thereafter the trustee filed a complaint for judicial settlement of its accountings and sought a discharge of its liability for its actions as trustee. Dorothy's sons filed an answer and affirmative defenses, alleging that expenditures were not made for proper trust purposes. The trial court concluded that the issue whether expenditures were appropriate was a question of law to be determined by the court, and then proceeded to grant summary judgment in favor of the trustee based on its findings that: (1) gifts were permitted under the trust instrument, (2) the sons lacked standing to challenge any distributions made prior to Dorothy's death because the trust was revocable; and (3) the sons had no present interest in the trust assets during Dorothy's life.

On appeal, the Florida Court of Appeals remanded certain questions of fact which required more than a mere interpretation of the trust instrument, and found that the trial court had incorrectly treated the question of whether the withdrawals were appropriate and authorized as a question of standing. The court disagreed with the trial court's interpretation of the trust instrument and the power of attorney, and found that: (1) the trust agreement gave no power to the trustee to make gifts or invade principal unless requested by Dorothy; (2) while the power of attorney gave Ms. Novak the power to make gifts, it did not provide for the invasion of trust principal for that purpose; and (3) the trust restricted the power of the trustees and imposed a duty to invade principal only for Dorothy's support, maintenance, health, comfort, or general welfare.

The court noted that the trust had significant provisions to dispose of the trust property at Dorothy's death to specific persons, demonstrating a purpose not only to benefit herself during her lifetime, but to benefit specific other persons, and that permitting the trustee to deplete the trust principal by lavishing gifts on others would thwart this intent.

The court found the trustee's reliance on the attorney-in-fact's authority to make gifts as misplaced and remanded the issue for further factual determinations, based on the court's view that: (1) the gifts were not within Dorothy's pattern of giving and her estate plan (certain gifts were made to Ms. Novak's employees and to persons Dorothy did not know); (2) Ms. Novak's withdrawals of trust principal exceeded her authority and

should never have been authorized by the trustee; and (3) the numerous gifts suggest that the power to gift was not exercised with Dorothy's best interests in mind.

Turning to the objection to expenditures for Dorothy such as lavish birthday parties, airline tickets for friends, health expenses, pets, and similar items, the court rejected the trial court's determination that the sole discretion granted the trustee under the trust instrument summarily enabled these expenditures, noting that under New York law even where the trustee had the sole discretion to determine the appropriateness of expenditures, the court should still determine the proper use of that discretion.

The court reversed the award of summary judgment in favor of the trustee, and remanded the case for further factual determinations by the trial court.

Deirdre Foster v. Winifred Foster, 2010 Ark. App. LEXIS 629 (September 15, 2010)

Winifred Foster filed a "pre-death will contest" action during her lifetime to declare the validity of her will and her living trust dated June 26, 2007. The execution ceremony was videotaped. The circuit court upheld the validity of the documents.

Winifred's granddaughter, Deirdre, appealed the circuit court's determination alleging that: (1) the will was not properly executed; (2) the will was procured by her sister, Nayla, by undue influence; (3) collateral estoppel prevented Nayla from claiming Winifred was competent; and (4) the trial court ignored evidence of incompetence and lack of testamentary capacity.

On appeal, the court affirmed the trial court on the grounds that: (1) Deirdre's failure to raise each argument at trial prevented ruling on each issue in Deirdre's favor on appeal; (2) the will was validly executed and signed by two witnesses in Winifred's presence; (3) publication was made by inference from Winifred's explanation of her bequests to Nayla prior to execution; (3) Winifred's attorney had contacted her about preparing the June 2007 documents, and Winifred had paid him directly for drafting the will and trust; (4) Winifred stated in the video that she intended Nayla to be the sole beneficiary under her will; (5) collateral estoppel did not apply to Nayla's prior filing of a guardianship action for Winifred, because the issue had not actually been litigated and Winifred had not been finally adjudicated incompetent; (6) complete sanity in a medical sense at all times is not essential to testamentary capacity, provided capacity exists at the time the will is executed; and (7) the trial court had sufficient evidence to conclude that Winifred had the requisite capacity, based on video and witness testimony, at the time of the signing.

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