

CALIFORNIA COURT SAYS MOTHER'S TRUST CAN FUND TRUSTEE TO FIGHT TRUST CONTEST AFTER HER DEATH

There's a new no-contest case in California — *Doolittle v. Exchange Bank* ([pdf](#)). The twist here is the beneficiary who contested the validity of trust amendments also sought to broaden the reach of California's no-contest statute. Apart from its holding (a defense-of-claims provision is not the same thing as a no contest clause and therefore trust assets are currently available to the trustee to defend against a beneficiary's contest), this case teaches some basic lessons about our succession laws in general.

Our society recognizes and protects the rights of individuals to control what happens to their property after they die (as long as they take proper measures such as setting up a revocable living trust). This is what Stanford law professor Lawrence M. Friedman calls "freedom of testation" (*Dead Hands: A Social History of Wills, Trusts and Inheritance Law*). Basically, you can leave your property to anyone you choose.

There are some limitations on the right of the deceased to control what happens to his or her property. Some of these limitations are found in the laws governing the creation and validity of trusts. A beneficiary could file a contest in an attempt to invalidate a trust amendment for lack of capacity, undue influence, fraud, or duress. There are also statutes that act to "modify" the trust provisions themselves — these are the sorts of things found at the back of the California Probate Code dealing with omitted spouses, attempts to create perpetual trusts, and the like. In *Doolittle*, a disappointed beneficiary filed a contest against her deceased mother's trust and, in a separate action, tried to thwart instructions from her mother to the trustee to use trust assets to defend against just such a contest. The beneficiary tried to place limitations on her mother's instructions by using California's no-contest statute as a sword to prevent the trustee from having immediate access to trust funds to fight the contest.

Constance (Connie) Doolittle, a Marin County resident, died last year, survived by two daughters, Susan and Carolyn. She established her trust in 1999 and amended it in 2000, 2004 and 2005. Susan Doolittle has challenged the validity of her mother's 2004 and 2005 trust amendments. She contends her mother's multi-million dollar trust estate should be distributed according to the terms of the 1999 trust, as amended in 2000. If the 2004 and 2005 amendments are invalid, Susan and Carolyn will receive most of their mother's \$8.4 million estate. If the 2004 and 2005 amendments stand, the daughters will receive much less:

In the 2005 trust, Connie made gifts upon her death to various beneficiaries, including \$500,000 to Susan, \$500,000 to Carolyn, and \$150,000 to each of her grandchildren. She named seven persons, not including Susan or Carolyn, as remainder beneficiaries, giving one-fourth of the remainder to Juan [her gardener] and one-eighth of the remainder to each of six beneficiaries who were Connie's friends and caregivers.

Constance Doolittle's 2005 amendment of her trust included a provision entitled "No Contest." This section of the trust instructs that a beneficiary will forfeit his or her share if the beneficiary contests the validity of the trust: "the right of that person to take any interest given to him or her by this Agreement or by Trustor's Will shall be determined as it would have been determined had such person predeceased Trustor, without issue." This section of the trust also instructs the trustee "to defend, at the expense of any trust estate governed by this Agreement, any contest or other attack of any nature on this Agreement, on any of its provisions and any amendments hereto."

The opinion in *Doolittle* is not about the ultimate validity of the 2004 and 2005 trust amendments. Instead, *Doolittle* deals with Susan Doolittle's attempt to use California's no contest statute (which itself can be viewed as a limitation on the power of the deceased to force a contesting beneficiary to forfeit his or her share of the trust) to prevent the trustee from carrying out Connie Doolittle's instructions to use trust funds to defend the trust.

There are at least four court actions stemming from Constance Doolittle's revocable living trust. It's helpful to put the claims in context:

- The first action — filed by Susan Doolittle — alleges financial elder abuse and seeks to invalidate the 2004 and 2005 amendments
- The second action — filed by Susan Doolittle — alleges Connie Doolittle lacked testamentary capacity to amend her trust in 2004 and 2005, and seeks to invalidate the 2004 and 2005 amendments
- **The third action — filed by the trustee Exchange Bank — is a petition for instructions to confirm that the trust authorizes the trustee to use trust assets to defend against Susan's elder abuse suit and trust contest**
- **The fourth action — filed by Susan Doolittle — is a petition for instructions that the trust's defense-of-claims language "is actually a no-contest clause and the trustee is prohibited from defending against either action until the courts resolve the two contests on their merits"**

So just how did Susan Doolittle attempt to use California's no contest statute to prevent her mother's instructions from being carried out? She argues that these instructions are a part of the trust's "no contest clause" and are therefore subject to the **statutory restrictions** on no contest clauses. In California, there is a statutory prohibition against enforcing a no contest clause unless it is determined that the contest was brought without probable cause. Susan Doolittle's argument goes something like this: even though her mother instructed the trustee to defend against an attack on the validity of the trust at the expense of the trust, the trustee cannot use trust assets (at least not now) to do this because the "defense-of-claims" provision is a no-contest provision and no-contest provisions cannot be enforced by law until it is known whether the beneficiary's claims regarding the validity of the trust lack probable cause, which won't be known until the trust contest and elder abuse claim are over.

Following its detailed analysis of the history and policy of no contest clauses, the Court held that the deceased's instructions to defend the trust at the expense of the trust was not the same thing as a no contest clause. As such, Susan Doolittle could not defer the trustee's access to the trust assets.

The Court acknowledged that Connie Doolittle "obviously anticipated the possibility of a challenge after her death." Dead hand control is far-reaching. In *Doolittle*, it extends beyond the deceased's right to choose who receives her property to the right to fund the trustee to defend those choices.

Related Attorneys

- Karen A. Meckstroth