I. INTRODUCTION

It has been seven years since the statutes governing no contest clauses were extensively revised to, among other things, prohibit their enforcement against direct contests filed with probable cause. Yet there is still no published decision elucidating the standard for probable cause. In the interim, many practitioners have grown complacent, some going so far as to report that “no contest clauses are dead in California.” With apologies to Mark Twain, the authors believe such reports are greatly exaggerated. This article is intended as a warning to practitioners, lest they find out the hard way that no contest clauses retain substantial potency. A recent case the authors litigated—in which beneficiaries of a $10 million gift were held to have triggered the no contest clause—provides an object lesson. Although this article focuses on contests based on the claim of undue influence, the analysis would be similar for other contests.

II. BACKGROUND

A. The New Law Was Designed to Solve Three Problems With Prior Law

At the change of the millennium, problems with existing law led some practitioners to propose that no contest clauses be abolished. The Legislature directed the Law Revision Commission (“Commission”) to study the issue. As a result of that lengthy study (which included an extensive survey of practitioners), the Commission recommended retaining no contest clauses; it did, however, propose certain “improvements” to the statutes governing the clauses. The Legislature adopted the recommendations, repealing Probate Code sections 21300 to 21308 and replacing them with Probate Code sections 21310 to 21315.

The new law addressed three problems associated with no contest clauses. The most serious of these problems, according to the practitioners surveyed, was uncertainty arising from, among other things, a great—and unpredictable—expansion of their enforcement far beyond traditional contests. The new law dealt with this problem by limiting enforcement of no contest clauses almost entirely to “direct” contests, i.e., pleadings that actually allege the invalidity of an instrument or one or more of its terms. No contest clauses can no longer be enforced against “indirect” contests, with the exception of two (supposedly) well-defined types of claims—creditor claims and property ownership disputes. These exceptions were retained to allow so-called “forced elections,” by which the decedent requires a beneficiary to choose between gifts under the instrument and alleged rights independent of the instrument, such as community property rights.

The second most serious problem identified by practitioners was the cost and delay caused by the overuse of declaratory relief procedures. Since the new law was intended to eliminate uncertainty and, hence, the need for declaratory relief, declaratory relief was eliminated under the new law. Problem (supposedly) solved.

The third most serious problem identified by practitioners relates to the subject of this article: the concern that no contest clauses could be used not only to advance the intent of the settlor, but “to shield fraud and undue influence from judicial scrutiny.” To the practitioners surveyed by the Commission, this was “a serious problem, but not a common one.” As discussed below, the Commission recommended that this problem be addressed by prohibiting enforcement of no contest clauses against direct contests brought with probable cause.

B. The New Law’s Probable Cause Exception

In recommending a probable cause exception, the Commission noted that (1) “The majority approach in the United States is to provide a probable cause exception to the enforcement of a no contest clause,” and (2) existing California law already provided a probable cause exception for many direct contests, including those based on allegations of forgery, revocation, and beneficiary disqualification under Probate Code Section 21350. Seeing no policy justification for limiting the probable cause exception to just those types of contests, the Commission proposed extending it to all types of direct contests.

Thus, the new law prohibits enforcement of a no contest clause against a direct contest brought with probable cause. “Probable cause” is defined as follows:
“[P]robable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.”

**C. In the Absence of Judicial Elucidation of the Standard for Probable Cause, Some Practitioners Have Grown Complacent**

The new law became effective January 1, 2010. Seven years later, there is still no published appellate decision elucidating the standard for probable cause.

Without any published guidance from the courts of appeal, some practitioners have grown complacent. A “Perspective” published in the Daily Journal argues that the definition of probable cause establishes a “low bar” that renders no contest clauses “unenforceable under all but the most extreme circumstances.” As long as the contest “rises above a minimum level of frivolous . . . a no contest provision will be disregarded.” The Perspective concludes that contestants “have little to fear from the infamous terror clause.”

Other practitioners have gone even further:

Why is anyone still using no contest clauses in California Trusts and Wills? . . . [¶¶][N]o-contest clause[s] are largely unenforceable now . . . The bottom line: no contest clauses are dead in California . . . [¶¶]Let’s quit fooling ourselves and just drop the no contest clauses. They may give the Trust Settlors comfort when they are signing the Trust documents, but they are utterly meaningless in practice . . .

Such claims are certainly untrue. The Legislature made perfectly clear it did not intend to exculpate a contest that merely “rises above a minimum level of frivolous.” As the Commission explained, “such a standard is too forgiving. A no contest clause should deter more than just a frivolous contest. General law already provides sanctions for frivolous actions.”

More generally, as the Commission noted, “The longstanding general rule in California is . . . : ‘No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.’” In proposing the probable cause exception, the Commission explained that this “general policy of existing law would remain unchanged.”

**D. Our Recent Case**

A recent, unreported case the authors litigated both explores and illustrates these issues. While a litigant cannot rely on an unreported case to establish (or defend against) a no contest claim, the facts of the author’s recent case illustrate the danger of ignoring a no contest clause.

_In re Irene M. Lieberman Revocable Trust_ involved contests filed by beneficiaries who were supposed to receive $10 million from two trusts. After the contests were dismissed, however, the San Francisco County Probate Court granted a cross-petition seeking to declare the gifts forfeited, finding that the contests were filed without probable cause.

Irene Lieberman’s husband met an untimely death in a plane crash. Shortly thereafter, Mrs. Lieberman asked one of her three children to run the business she and her husband had founded. This exacerbated acrimony between Mrs. Lieberman and her two other children, who complained that the support their mother provided them (for doing nothing) was less than their brother earned running the company.

Despite decades of this acrimonious relationship, Mrs. Lieberman supported the other two children throughout their adult lives—although she was greatly disappointed that she had to do so. She also provided for trust distributions totaling $10 million to these two children on her death. As she explained in her Trust Declaration, she left this bequest out of a mother’s love, despite what she called their “poor treatment” of her (treatment the court would later describe as “stomach-churning”). As the trust further explained, all she asked in return is that they not “attack her right” to leave the residue of the estate, including the business, to her third child, who had run that business for 30 years. If they contested her wishes, she did “not want [them] … to receive so much as a dollar from her.” Ignoring these sentiments from the mother who had supported them throughout their adult lives and left them substantial wealth on her death, the two children filed the contests.
III. POTENTIAL TRAP: ESTATE OF GONZALEZ IS NO LONGER GOOD LAW

Before analyzing the probable cause standard under the new law, the authors wish to alert practitioners to a potential trap.

Former Probate Code section 21306, which was repealed under the new law, contained a “reasonable cause” exception that sounded similar to Probate Code section 21311’s “probable cause” exception. Under former section 21306, the claims had to be “likely to be proven after a reasonable opportunity for further investigation or discovery;” whereas under current section 21311, there must be a “reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.”

One case, Estate of Gonzales, interpreted the “reasonable cause” standard under former section 21306 as creating a very low bar, requiring only that a contest be legally “tenable.” It would be logical to conclude that this holding also applies to section 21311’s probable cause exception given (1) the textual similarity of the statutes, and (2) the appellate court’s view that “reasonableness” connotes something less than “more likely than not.”

There is nothing in the statutory language to dissuade a practitioner from this logical conclusion. Indeed, if anything, the former standard of “likely” success seems to create a higher bar than the current standard of “reasonable likelihood” of success—the plain meaning of “likely” is “having a high probability of occurring or being true,” whereas “reasonable likelihood” connotes something less than “more likely than not.” It would be easy, therefore, for a practitioner to assume that Estate of Gonzales still applies. That assumption would be false: a review of the Commission’s comments to section 21311—comments that are not reprinted in two desk references commonly used by probate practitioners—discloses that “reasonable cause” has been changed to “probable cause,” and “likely” has been changed to “reasonable likelihood,” precisely to overrule Estate of Gonzales, which the Commission thought imposed too low a standard. Thus, the Commission’s comments following section 21311 specifically say that the section “imposes a higher standard [than Estate of Gonzales’ ‘legally tenable’ standard]. There must be a ‘reasonable likelihood’ that the requested relief will be granted.”

IV. PROBABLE CAUSE UNDER THE NEW LAW

There are five major components of the statutory definition of probable cause in section 21311(b): (1) probable cause is determined based exclusively upon “the facts known to the contestant” “at the time of filing a contest;” (2) an objective “reasonable person” standard is used; (3) a “reasonable likelihood” standard is used; (4) it must be reasonably likely “the requested relief will be granted;” and (5) the determination is made considering there will be an opportunity for “further investigation or discovery.” Each component is addressed below. Special attention is given to the fourth component, which is almost always overlooked in discussions about the standard, but which the authors believe is often the most important.

A. The Inquiry is Limited to the Facts Known to the Contestant at the Time the Contest is Filed

Under the statute, “probable cause exists if”—and only if—“the facts known to the contestant” “at the time of filing a contest” are sufficient to establish probable cause. The question is whether those facts—and those facts alone—would cause a reasonable person to believe there is a reasonable likelihood the requested relief will be granted after an opportunity for further investigation or discovery. This requirement has important implications.

“Fact” means “something that actually exists; reality; truth.” Opinions, conclusions, understandings, beliefs and suspicions, on the other hand, are not facts. It is thus imperative that contestants adduce the underlying facts supporting their beliefs, rather than relying on conclusory statements. The contestant’s beliefs and conclusions play no part in the probable cause analysis, which is concerned only with what a reasonable person would believe under the circumstances.

In Lieberman, the decedent explained in her trust that she was giving the contestants a large gift despite their “poor treatment” of her. Without denying the individual charges of poor treatment, the contestants offered their conclusory opinion that they never treated their mother poorly “as they understand the term.” The court rejected this as “irrelevant” to the central question of what a “reasonable person” would make of the “facts” known to the contestants.

Only those facts known to the contestant “at the time of filing a contest” are relevant to a probable cause analysis. This makes logical sense, since the question is whether the contest was filed with probable cause. Facts learned after the filing date ordinarily do not go to this central question.

As they say, however, it is hard to untangle spaghetti. By the time the probable cause issue comes up for adjudication, it may be difficult or impossible to separate what the contestants knew at the time of filing from what they learned later. Respondents would therefore be well-advised to initiate immediate discovery, when the only facts the contestants
know are the facts they knew when they filed the contest. And contestants would be well-advised to carefully consider their response to that discovery. Contestants might be barred from using undisclosed facts to support a claim of probable cause, or the court might simply conclude that, given their discovery responses, the undisclosed facts must not have been known to them at the time of filing.39

What the contestant knew is not necessarily the same as what the contestant claims to have known. Thus, in ascertaining “the facts known to the contestant,” the court need not simply take the contestant’s word for it; it may need to resolve factual disputes. In Lieberman, the contestants claimed to have had a close and loving relationship with their mother, but given the weight of the evidence, the court found that they in fact knew that they had a “poor” relationship with, and were “estranged” from, their mother.40

Like all questions of fact, what a contestant knew can sometimes be proved by circumstantial evidence. The Lieberman contestants alleged that their mother’s “physical and mental weakness” rendered her susceptible to undue influence. However, virtually every disinterested witness testified that she suffered no physical or mental weakness at all; quite the contrary. Although the court’s job was to ascertain the facts known to the contestants, the court held that the perceptions of these other people were “relevant” for the simple reason that the contestants “knew the same [woman] as everyone else,” i.e., what was apparent to everyone else was likely apparent to the contestants as well.41

Finally, the court will consider all relevant facts, not just the facts the contestant wants to consider. The Lieberman contestants argued that they had advanced enough red flags to establish probable cause. Viewed with blinders, they may have had a point. But the contestants had left out all the facts about their “poor” and “estranged” relationship with their mother, including the very thing their mother said was important: their “poor treatment” of her. The court not only rejected the argument that these additional facts were irrelevant, it held that they “greatly undermine[d]” the contestants’ claim of probable cause.42

B. The Objective “Reasonable Person” Standard

The question of what a “reasonable person” would believe is an objective question under which the contestant’s subjective beliefs play no part. In Lieberman, the contestants insisted they filed the contests only after careful consideration, and in the good faith belief that their brother had unduly influenced their mother. But the court rightly focused “exclusively” on what a “reasonable person” would make of the facts known to the contestants.43

Obviously, what a contestant believes may be very different than what the court thinks a reasonable person would believe. The Lieberman contestants advanced the view that, for decades, a purported friend of the decedent’s had acted in cahoots with their brother. The court found that no reasonable person would have suspected such a thing—at least, “[n]o reasonable person—not under the spell of [the contestants’] warped world view.”44

“Objective” means “dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations.”45 But it does not mean the court will ignore its own experience, common sense, and sense of what is reasonable. Many judges are likely to see themselves as the prototypical reasonable person. What they believe could well determine what they find “a reasonable person” would believe.

C. The “Reasonable Likelihood” Standard

As noted, the former standard required only that success be “likely,” which Estate of Gonzales interpreted as requiring only that a contest be “legally tenable.”46 On the other hand, the Restatement requires a “substantial likelihood” of success,47 which Commission staff said “probably means that success is more likely than not.”48 In establishing a “reasonable likelihood” standard, the Legislature was aiming between the two, i.e., “more than merely possible, but less than ‘more probable than not.’”49

That is a rather indefinite standard. There is a large gap between “more than merely possible” (≥ 1%) and “less than ‘more probable than not’” (≤ 50%). At what point is there a “reasonable likelihood?”

The Commission staff did not believe “that the likelihood of success on a claim [could] be reduced to a numerical percentage.”50 Given the statute’s repeated emphasis on reasonableness—i.e., whether a “reasonable person” would believe there is a “reasonable likelihood” of success—clearly the question instead is one of reasonableness.

D. The Likelihood That “The Requested Relief Will Be Granted”

1. Introduction

“Reasonable likelihood” does not mean much in a vacuum. There is a reasonable likelihood that this article will cause a few practitioners to think twice before filing a contest.
is no chance it will win a Pulitzer Prize. To understand the standard for probable cause, therefore, the critical question is, reasonable likelihood of what?

By its terms, the standard requires a reasonable likelihood “that the requested relief will be granted.” As the Commission noted, “That question depends not only on the proof of facts, but on the proof of facts that are sufficient to establish a legally sufficient ground for the requested relief.” Accordingly, when a contest is brought on a claim of undue influence, probable cause must be determined in light of the requirements for invalidating an instrument on grounds of undue influence. As discussed below, at least where no presumption of undue influence applies, that can be a daunting proposition.

2. The High Burden of Proof

As the California Supreme Court has said, “[T]he right to testamentary disposition of one’s property is a fundamental one,” “most solemnly assured by law.” The California Supreme Court thus stressed “the stringency with which [the courts] protect the testamentary disposition against the attack of undue influence.” As that Court pointed out, “a legion of decisions strike down attempts . . . to invalidate wills upon the grounds of undue influence. . . .”

Given “the strength of the presumption in favor of the will,” the law imposes a “heavy burden of proof” on a contestant, the highest there is in civil cases: “clear and convincing evidence.” This standard generally is held to require that the evidence be “sufficiently strong to command the unhesitating assent of every reasonable mind.” It is one thing to say that the facts might arouse the suspicions of a reasonable person. It is quite another to say that contestants are reasonably likely to be able to prove their case by clear and convincing evidence (even considering they will have an opportunity for further investigation and discovery). In Lieberman, the court ultimately concluded, “What is relevant is the absence of facts supporting [the contestants’] speculation and suspicion at the time of filing that would lead a reasonable person to conclude that facts later found would support a conclusion of undue influence by clear and convincing evidence.”

3. The High Bar For Circumstantial Evidence

What contestants must prove can be as daunting as the standard by which they must prove it. “The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of a pressure which overpowered the mind and bore down on the volition of the testator at the very time the will was made.” Proof that the influencer was involved—or even an important influence—in the estate planning process may not be enough. There is a difference between persuasion and what the cases call “over persuasion” and the statute calls “excessive persuasion.” The former may well influence the decedent’s decisions, but if the decedent remains the true decision maker, undue influence has not occurred. It is only where the influencer “overpowered the mind” of the decedent, effectively supplanting his own will for hers, that the influence becomes undue. That can be hard to prove, especially by clear and convincing evidence.

In recognition of the fact that undue influence happens behind closed doors, a contestant may attempt to satisfy the burden of proof with circumstantial evidence. But “proof of circumstances consistent with undue influence is insufficient—the proof must be of circumstances inconsistent with voluntary action.” This means that even where “[c]ircumstances have been proven which accord with the theory of undue influence,” “[t]his does not amount to proof [of undue influence]” unless the proven circumstances are “inconsistent with the hypothesis that the will was the free act of an intelligent mind.”

By way of illustration, the Appellate Court in David v. Hermann upheld a finding of undue influence, explaining, “There is no rational explanation for this sudden shift in attitude by [the decedent] other than [the influencer] falsely poisoning [the decedent’s] mind.” If there had been another rational explanation, the ease would have turned out differently.

Lieberman involved just that situation. Even before addressing the alleged facts that the contestants claimed supported probable cause, the court expressed its doubt that such facts could undermine the facts offered by the proponents to support Mrs. Lieberman’s testamentary instruments. As the court explained:

Here, the facts [the contestants] knew when they filed the Contests include all the stomach-churning facts relating to their estrangement from and mistreatment of [the decedent]. . . . Thus, even if other facts [the contestants] knew were in “accord with the theory of undue influence,” the Court does not believe it reasonably likely that [the contestants] knew facts that would lead a reasonable person to conclude they could establish that the overall circumstances are “inconsistent with the hypothesis that the will was the free act of an intelligent mind.” That is because these other facts would not negate the hypothesis that [the decedent] designed her estate plan in the way
she did for precisely the reason she said she did: [the contestants’] poor treatment of her.66

4. The Necessity of a “Combination” of Indicia of Undue Influence

There are a number of indicia of undue influence established in case law65 and by statute.68 In combination, they may demonstrate undue influence, although none, standing alone, is sufficient to do so.69

It is hard to say what combination of indicia will suffice, other than the three that, collectively, will create a presumption of undue influence—confidential relation, active participation, and undue benefit.70 It appears, however, that certain indicia are critical, or even indispensable, to establish undue influence. If there is no probable cause as to any one of these indicia, the contestant is at great risk of failing to establish probable cause.

The cases cited below all predate the Probate Code’s 2014 adoption of a statutory definition of undue influence.71 No case has yet discussed the relationship between this new statute and the preexisting common law. However, the statute provides, “It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.”72 Accordingly, unless and until a case holds otherwise, practitioners would be well-advised to assume the cases remain good law, especially when dealing with an issue as fraught with peril as no contest clauses.

a. Susceptibility

One indicium of undue influence is whether “the decedent’s mental and physical condition was such as to permit a subversion of his freedom of will.”73 Where the decedent was in a very weakened condition mentally or physically, it may take “but little” to unduly influence him.74 But the California Supreme Court has said, “It is no easy thing to overpower the mind of a normal person in full possession of his senses . . . .”75 This can happen but rarely in cases of persons of normal strength of mind in the full possession of their faculties unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be very strong indeed.76 Accordingly, if there is not a strong reason to suspect that the decedent was susceptible to undue influence, it may be very difficult for the contestant to establish probable cause.

The court in Lieberman said that the physical and mental status of the decedent was a “key indicator” of the likelihood of the contests succeeding. It found that the contestants “knew

b. Active Participation

Another indicium of undue influence is whether “the chief beneficiaries under the will were active in procuring the instrument to be executed.”77 But it is apparently more than simply an indicium; the California Supreme Court has said that active participation is an absolute prerequisite to a finding of undue influence.78 Moreover, meaningful participation is required; merely accompanying the decedent to the attorney’s office, for example, would not suffice.79 Accordingly, without facts suggesting that the alleged influencer actively participated in the estate plan, it is difficult to see how probable cause can be established.

In Lieberman, the contestants provided a calendar entry showing that Mrs. Lieberman met with her estate planner in the offices of her business, where the alleged influencer, who managed the business for her, worked. However, considering evidence that Mrs. Lieberman considered the office to be hers—and therefore might naturally meet with her attorney there—and that the office had a conference room where the Mrs. Lieberman and her attorney could meet in private, the court found that, absent facts suggesting the alleged influencer participated in the meeting, there was nothing inherently suspicious about the calendar entry.80

c. Undue Benefit

Another indicium of undue influence is whether “[t]he provisions of the will were unnatural,”81 often referred to as an undue benefit. This indicium is reflected in the statutory definition of undue influence, i.e., “excessive persuasion that [among other things] results in inequity.”82 Undue benefit may, therefore, be another indicium that is really a requirement. Even if not a requirement, the authors suggest that it is unlikely a court would overturn an instrument on grounds of undue influence if the instrument does not create an undue benefit.

To establish an undue benefit, it is not enough to say that one beneficiary received more than another, or even the whole of the estate.83 Rather, the analysis of undue benefit “clearly entails a qualitative assessment” in which the factfinder must evaluate “the respective relative standings of the beneficiary and the contestant . . . [to] determine which party would be the more obvious object of the decedent’s testamentary disposition.”84 Unless the facts suggest an undue benefit in this qualitative sense, probable cause is unlikely to be found.
For example, the Lieberman court found the contestants had no probable cause to believe they could establish an undue benefit, given their knowledge that “[their brother’s] relationship with his mother was far more intimate than the abusive relations she had with [them].”85 The court in Lieberman also found, “A reasonable person would likely conclude that [$10 million] was substantially more than a reasonable mother would have left [the contestants] at that point in their relationship. Such a reasonable person would not believe it reasonably likely that [the contestants] could establish that their gift was inequitable.”86

5. Conclusion

Because of the “stringency with which [the courts] protect the testamentary disposition against the attack of undue influence,”87 when no presumption of undue influence applies, contestants will face potentially daunting challenges, including a high burden of proof, an exacting standard of what must be proved, a high burden for circumstantial evidence, and a need to show a combination of several indicia of undue influence. It may be difficult for such a contestant to persuade the court that a reasonable person would believe it reasonably likely that the contestant would meet each of these challenges.

E. The “Opportunity for Further Investigation or Discovery”

Before making its recommendation to the Legislature, the Commission circulated for comment a tentative standard for probable cause that would have required a contestant, at the outset, to have sufficient “evidence” to prevail. Practitioners criticized the proposed standard on the grounds that a would-be contestant had no way to gather evidence, such as medical records, the estate planner’s file, or any other documents, before filing a contest. Commission staff advised the Commission, “These evidentiary concerns are valid.”88 Accordingly, the Commission’s ultimate recommendation—and the standard implemented by the Legislature—turns not on whether the contestant had enough evidence at the time of filing to prevail, but on whether, “at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.”89

This does not mean probable cause is determined based on facts learned through post-filing investigation or discovery. Again, probable cause is determined based exclusively on the facts known to the contestant “at the time of filing a contest.”90 Instead, the question is whether a reasonable person would believe the contestant was reasonably likely to prevail considering that there will be “an opportunity for further investigation or discovery.” Presumably, if enough red flags exist, and if they are sufficiently suggestive of undue influence, a reasonable person would believe that, given the opportunity for further investigation or discovery, there is a reasonable likelihood the contestant will be able to prove undue influence occurred.

Because contestants need not have “evidence” at the time of filing, but need only know facts that would cause a reasonable person to believe they are reasonably likely to obtain sufficient evidence by the time of trial, the relevant facts need not themselves be admissible. In Lieberman, for example, the contestants claimed that someone told them the alleged influencer had a draft of Mrs. Lieberman’s estate plan documents on his computer years before Mrs. Lieberman met with her estate planner. The Lieberman court did not doubt that this claim, although hearsay, was relevant to probable cause. However, by the same token, the court did not simply assume the hearsay was credible. Under the circumstances, the court in Lieberman found that “[a] reasonable person would not credit [the witness’s] story or think it reasonably likely that a trier of fact would credit it,” given the witness’s extreme bias and lack of credibility, and the lack of any corroboration for the ever-shifting and inherently-implausible story.91

Finally, as the court in Lieberman explained, “[B]ecause the standard for probable cause presupposes—and is designed to accommodate—the reality that a contestant cannot begin discovery until after the contest is filed . . . [a contestant’s] claim that they were unable to obtain documents does not entitle them to special dispensation from having to comply with [the probable cause] standard.” The Lieberman contestants had claimed that the trustee’s failure to provide them medical records, the estate planner’s file and other documents was a fact suggesting he had something to hide. The court rejected the contestants’ claim. Not only had the contestants failed to show that documents were improperly withheld, but for the reasons discussed above, the court also called the claim “irrelevant to the probable cause analysis.”92

V. CONCLUSION

In the absence of a published decision from the courts of appeal elucidating the standard for probable cause, many practitioners have grown complacent about the continued viability of no contest clauses. But the Legislature did not intend to make no contest clauses toothless. Given how difficult the law makes it to prove undue influence in many cases, practitioners should not be surprised if courts require...
facts that strongly suggest the possibility of undue influence before concluding a reasonable person would believe there is a reasonable likelihood their contesting client will prevail. As Lieberman suggests, reports of the death of no contest clauses are greatly exaggerated.

*Evans, Latham & Campisi, San Francisco


2 Twain, Autobiography of Mark Twain, Volume 2 (2013) p. 11 (“[A reporter] told me that his paper, the Evening Sun, had cabled him that it was reported in New York that I was dead. What should he cable in reply? I said—‘Say the report is greatly exaggerated’”).

3 See Hartog et al., Why Repealing the No Contest Clause is a Good Idea (Fall 2004) 10 Cal. Tr. & Est. Q. 9; Baer, (Fall 2004) A Practitioner’s View, Cal. Tr. & Est. Q.; Horton, A Legislative Proposal to Abolish Enforcing No Contest Clauses in California, (Fall 2004) 10 Cal. Tr. & Est. Q. 6. But see MacDonald & Godshall, California’s No Contest Statute Should be Reformed Rather Than Repealed (Fall 2004) 10 Cal. Tr. & Est. Q. 18; Streisand & Handelman, (Fall 2004) No contest Clauses Need to be Reformed, Not Abolished 10 Cal. Tr. & Est. Q. 27.


8 Prob. Code, section 21310, subd. (b).

9 Prob. Code, section 21311, subd. (a)(2) and (3).


13 Id. at p. 388.


15 Id. at p. 396.

16 Id. at p. 397.

17 Prob. Code, section 21311, subd. (a)(1).

18 Prob. Code, section 21311, subd. (b).


27 Id. at p. 391.


31 Id. at p. 1305.


33 People v. Harris (2013) 57 Cal.4th 804, 822.


37 <http://www.dictionary.com/browse/fact> [as of April 5, 2017].


43 Order Granting Cross-Petition, 6:13-14.


47 Rest.3d Property, section 8.5, com. c, p. 195.


52 Estate of Fritschi (1963) 60 Cal.2d 367, 373.


58 Order Granting Cross Petition, 19:4-7.
59 *Hagen v. Hickenbottom*, supra, 41 Cal.App.4th at 182, internal quotations omitted, emphasis added; *Rice v. Clark* (2002) 28 Cal.4th 89, 96; see also Welf. & Inst. Code, section 15610.70 (“‘Undue influence’ means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.”), Prob. Code, section 86 (adopting section 15610.70).
61 Welf. & Inst. Code, section 15610.70.
63 Ibid.
66 Order Granting Cross-Petition, 8:17-28, citation omitted.
67 *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585.
68 Welf. & Inst. Code, section 15610.70.
70 *Estate of Fritschi*, supra, 60 Cal.2d at p. 376.
71 Prob. Code, section 86.
72 Ibid.
73 *Estate of Lingenfelter*, supra, 38 Cal.2d at p. 585.
75 *Estate of Anderson* (1921) 185 Cal. 700, 707.
76 Order Granting Cross-Petition, 4:14-5:21.
77 *Estate of Lingenfelter*, supra, 38 Cal.2d at p. 585.
78 *Id.* at p. 586 (“To overturn a will on the ground of undue influence, [there] must [ ] be evidence of activity on the part of the beneficiary”); see also *Id.*, at pp. 585-586 (“Conceding that [every other indicia of undue influence is present], there is still no proof of undue influence. Evidence of activity by Madge in procuring execution of the will is entirely lacking”).
80 Order Granting Cross-Petition, 12:8-16.
81 *Estate of Lingenfelter*, supra, 38 Cal.2d at p. 585.
82 Welf. & Inst. Code, section 15610.70; see Prob. Code, section 86 (adopting section 15610.70).
83 *Estate of Sarabia* (1990) 221 Cal.App.3d 399, 607-608 (“unless it shall be said that the claims of blood dominate and control the testamentary right (in which case the laws of wills should be swept from our statute books and all property pass under the laws of succession), the will in question was natural in its recognition of the claims of gratitude, affection, and love”).
84 *Id.* at p. 607.
86 Order Granting Cross-Petition, 7:8-15.
87 *Estate of Fritschi*, supra, 60 Cal.2d at p. 373.
89 Prob. Code, section 21311, subd. (b). (Italics added.)
REPORTS OF THEIR DEATH ARE GREATLY EXAGGERATED

THE VIABILITY OF NO CONTEST CLAUSES AGAINST DIRECT CONTESTS BROUGHT WITHOUT PROBABLE CAUSE

Andrew Zabronsky, Esq., Evans, Latham & Campisi, San Francisco
New Law:
Probate code sections 21310-21315

• Repealed Probate Code sections 21300-21308
• Effective January 1, 2010
• Since 2010, no published appellate decision elucidating the standard for probable cause
  • Practitioners have Become Complacent:
    • probable cause establishes a “low bar” that renders no contest clauses “unenforceable under all but the most extreme circumstances. “As long as the contest “rises above a minimum level of frivolousness . . . a no contest clause will be disregarded.”
    • “The bottom line: no contest clauses are dead in California. . .”
Probable Cause Exception

• “[P]robable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery"
Prob. Code, section 21311, subd. (b).
Former Probate Code section 21306, contained a “reasonable cause” exception

• The claims had to be “likely to be proven after a reasonable opportunity for further investigation or discovery;”
  • Estate of Gonzales (2002) 102 Cal.App.4th 1296, 1304-1305, “reasonable cause” standard under section 21306: a very low bar, requiring only that a contest be legally “tenable.”

• Law Revision Commission Contests to Section 21311 - The former standard required only that success be “likely.” One court interpreted that standard as requiring only that a contest be “legally tenable.” In re Estate of Gonzales, 102 Cal/App.4th 1296, 1304, 126 Cal.Rptr. 332 (2002). Subdivision (a) imposes a higher standard. There must be a “reasonable likelihood” that the requested will be granted. The term “reasonable likelihood” has been interpreted to mean more than merely possible, but less than “more probable than not.”
Probable Cause under New Law

• **Five major components under section 21311(b):**
  - (1) probable cause is determined based exclusively upon “the facts known to the contestant” “at the time of filing a contest;”
  - (2) an objective “reasonable person” standard is used;
  - (3) a “reasonable likelihood” standard is used;
  - (4) **it must be reasonably likely “the requested relief will be granted;”** and
  - (5) the determination is made considering there will be an opportunity for “further investigation or discovery.”
1. The facts known to the contestant at the time of filing a contest

• “probable cause exists if”—and only if—“the facts known to the contestant” “at the time of filing a contest” are sufficient to establish probable cause

• “Fact” means “something that actually exists; reality; truth.”

  NOT

  Opinions, conclusions, understandings, beliefs and suspicions
2. Objective “Reasonable Person” Standard

- What a “reasonable person” would believe is an objective question under which the contestant’s subjective beliefs play no part.
- “Objective” means “dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations.”
3. “Reasonable Likelihood” Standard

• **New standard**
  between
  “more than merely possible” (≥ 1%) and
  “less than ‘more probable than not’” (≤ 50%).

• **At what point is there a “reasonable likelihood?”**
  Given the statute’s repeated emphasis on reasonableness—i.e.,
  whether a “reasonable person” would believe there is a “reasonable
  likelihood” of success—clearly the question instead is one of
  reasonableness.
4. Likelihood That “The Requested Relief Will Be Granted”

Probable cause must be determined in light of the requirements for invalidating an instrument on grounds of undue influence.

• High Burden of Proof

• High Bar for Circumstantial Evidence

• The Necessity of a “Combination” of Indicia of Undue Influence
The Necessity of a “Combination” of Indicia of Undue Influence: Susceptibility

• Whether “the decedent’s mental and physical condition was such as to permit a subversion of his freedom of will.” Estate of Lingenfelter (1952) 38 Cal.2d 571, 585.

• A very weakened condition mentally or physically, it may take “but little” to unduly influence him. Estate of Bucher (1941) 48 Cal.App.2d 465, 474.

• “It is no easy thing to overpower the mind of a normal person in full possession of his senses . . . . [¶]This can happen but rarely in cases of persons of normal strength of mind in the full possession of their faculties unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be very strong indeed.” Estate of Anderson (1921) 185 Cal. 700, 707.
The Necessity of a “Combination” of Indicia of Undue Influence: Active Participation

• Absolute prerequisite to a finding of undue influence.
  • "chief beneficiaries under the will were active in procuring the instrument to be executed.” Estate of Lingenfelter, supra, 38 Cal.2d at p. 585.
  • Meaningful participation is required; merely accompanying the decedent to the attorney’s office, for example, would not suffice. Cal. Trust & Probate Litigation (Cont.Ed.Bar, 2017 Update) Vol. I, section 6.25, p. 6-16, citing Estate of Lingenfelter (1952) 38 Cal.2d at p. 586.
The Necessity of a “Combination” of Indicia of Undue Influence: Undue Benefit

• Undue benefit maybe an indicium that is really a requirement.
  • Statutory definition of undue influence, i.e., “excessive persuasion that... results in inequity.” 82 Welf. & Inst. Code, section 15610.70; see Prob. Code, section 86 (adopting section 15610.70).

• To establish an undue benefit, it is not enough to say that one beneficiary received more than another, or even the whole of the estate. Estate of Sarabia (1990) 221 Cal.App.3d 599, 607-608
  • Analysis “clearly entails a qualitative assessment” in which the factfinder must evaluate “the respective relative standings of the beneficiary and the contestant . . . [to] determine which party would be the more obvious object of the decedent’s testamentary disposition.” 83 Estate of Sarabia (1990) 221 Cal.App.3d at 607.
Conclusion

PROBABLE CAUSE:

Courts may require facts that strongly suggest the possibility of undue influence before concluding a reasonable person would believe there is a reasonable likelihood their contesting client will prevail.
Questions

Andrew Zabronsky, Esq.
Evans, Latham & Campisi, San Francisco