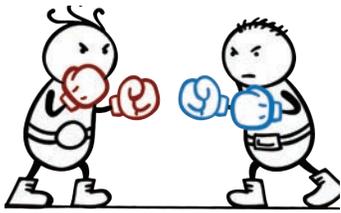


# NO CONTEST

## WILL A CLAUSE SOLVE A PROBLEM?

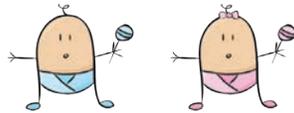
A good estate plan should address the impact of favoring one child over another if the children are not treated equitably. Sometimes, I have encountered an estate plan that has descended into perdition when



siblings went to war after their parents died. Thus I ponder the plusses and minuses of a clause designed to curb litigation, a “no-contest” clause, in the safety of abstractions until, suddenly, the veil is pierced. Did my mother prefer my twin sister over me?

Mom, at least once a year...and every year...would say *“Your sister was scheduled to arrive first and you pushed her out of the way”*.

How could my Mother not show preference for my



twin sister when I behaved so poorly on the day I arrived? Fortunately, she treated her children equally. The lawyer saw no need to introduce the no-contest clause unless my Mother favored Jill over Jack. A no-contest clause simply says that if I challenge my mother’s estate plan, I will get nothing from her estate.

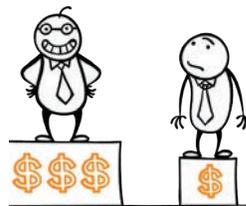
In estate planning, your lawyer may broach the subject of sibling rivalry and they may encourage consideration of a no-contest clause if, for example, you don’t favor the children equally. If they don’t suggest a no-contest clause, it may not be an item on their checklist, perhaps because they did not experience the impact: the negativity, the unnecessary costs and

the “net”. The net may include innocent bystanders, such as trustees and lawyers, as defendants.

Or your lawyer may default to a core principal that they learned in law school: *“Equity abhors a forfeiture.”* A court of equity will refuse to permit an unreasonable forfeiture if it is unfair. They may feel that disgruntled heirs should have their day in court, reflecting a view incorporated in some statutes: some states ban no-contest clauses in wills as against public policy.



Or your lawyer may sense you might be competent but may be subject to undue influence. It is harder for lawyers to “try the case” with their client if they deny heirs their future day in court. Also, they may not introduce the concept when a second spouse becomes a beneficiary for the same reasons.



If a no-contest clause is introduced in your plan, lawyers may suggest that you leave a small bequest to the party that may challenge your plan, so they have more to lose, other than lawyer fees, were they to challenge your plan: *“I leave \$15,000 to Jack and the balance of my estate to Jill” would be an example.*

Is there a corollary between the size of the estate and estate conflict? Probably. That said, sibling rivalry can include self-destructive behavior. Cost of conflict may not be a factor.

Smaller estates don't make the news. Larger estates may go public. The stories are often similar.



Judge Donald Stuart Russell, a former governor of South Carolina, died at age 92 leaving a \$33 million estate, three sons, a daughter, and grandchildren. A son and a daughter challenged

his plan. Fifteen months before he died, Judge Russell had inserted a no-contest clause. One of the lawyers representing the daughter publicly stated that the South Carolina high court had never upheld a no-contest clause.

Unfortunately for the two children, they received nothing. For the son, he only lost an interest in a \$750,000 trust. The daughter, on the other hand, lost an interest in a \$10.7 million trust created for her and her children and the court sanctioned an earlier decision instructing her to pay the legal fees of those drawn into the net: trustees and heirs, to the tune of half a million. Their father was a sitting federal judge and his brethren on the court listened. In their decision, the South Carolina Supreme Court stated why a no-contest clause has merit: *“to protect estates from costly and time-consuming litigation and minimize the bickering over the competence and capacity of testators.”*

At the time Judge Russell inserted the no-contest clause, he was still hearing cases and driving his car. He also anticipated litigation regarding his competency and was examined by a psychiatrist to create a record of his testamentary capacity.

A no-contest clause deals with conflict. It may only be a simple paragraph but it may have a profound impact on your legacy. Fortunately, my family did not face family conflict. The children shared equally. But then again, I was the family lawyer.

For me, my parent's legacy includes an issue that is



unresolved. What were they thinking when they named us Jack and Jill? I experienced adoration thanks in part because of my cute sister. Then one day, I was pre-teen

gangly and the adoration stopped. Where did it go? Now I deal with deflation and cannot resolve it in court. At least once a year, when I disclose to someone that I have a twin sister, I get this: *“Are you fraternal or identical?”* Most male/female twins encounter this...but the Jack and Jills of this world may also encounter *“Did you break your crown?”* or *“Were you able to make it up the hill this year?”*

- Jack Davidson



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