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Third time's a charm: Continued development of no contest case law from *Key v. Tyler III*

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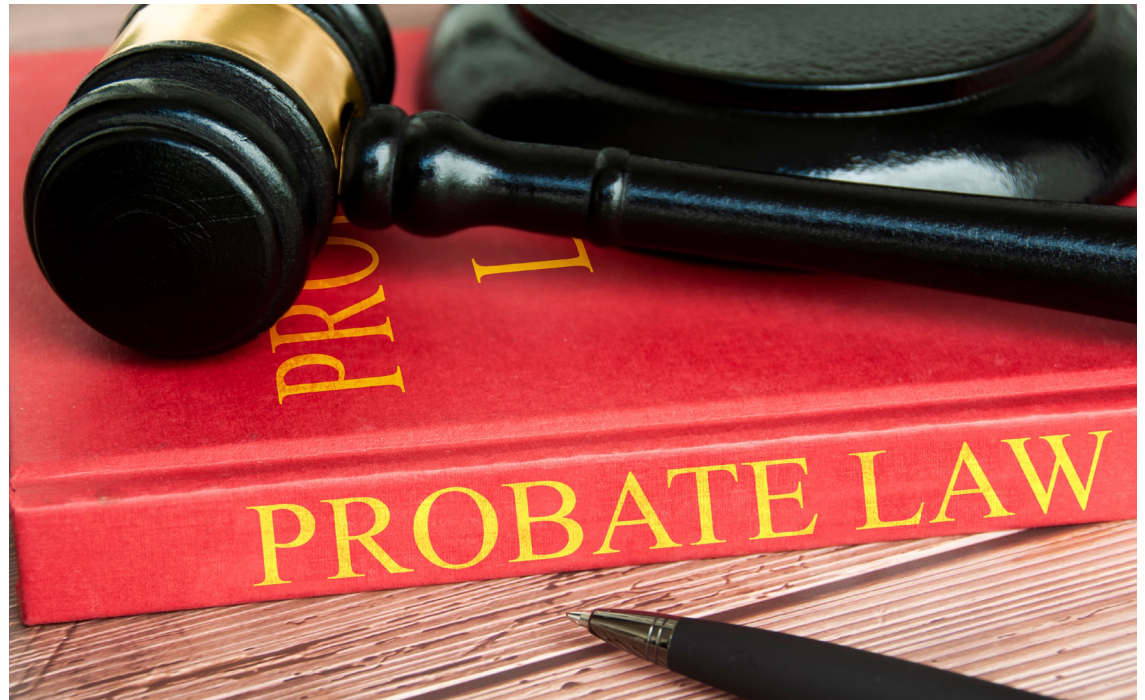
The exploration of California's no contest clause statute in the continuing saga of the *Key v. Tyler* litigation has another chapter, *Key v. Tyler III*, filed May 28, 2024.

In the third appellate opinion in this case, the court's interpretation of the no contest clause statute reaches the well-analyzed position that a forfeiture based on a direct contest of a protected instrument without probable cause is not limited on the scope of the forfeiture.

In *Key v. Tyler III*, the Appellate Court held that forfeiture due to a direct contest on an amendment (an "unprotected amendment" without a no contest clause) would result in a forfeiture under the original trust (a "protected instrument" with a no contest clause), as the assets attempted to be controlled by the amendment were initially controlled and ultimately disposed of by the terms of the original Trust.

For content, the saga of the *Key v. Tyler* litigation starts with a 2016 unpublished decision regarding a disputed trust amendment. In the unpublished *Key v. Tyler I*, the probate court invalidated a trust amendment drafted by Tyler. Beneficiary Tyler is a lawyer who effectively disinherited her sibling, Key, through an amendment Tyler procured. At the death of the surviving settlor, the trust assets were valued at over \$72 million.

Elizabeth R. Plott, the surviving settlor, purportedly executed an amendment in 2007 (the "2007 amendment") that changed how



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the Survivor's Trust assets would flow to the Residual Trust and thereby reduce Key's gift.

The court held there was no credible evidence that the 2007 amendment manifested the intent of the beneficiaries' elderly mother. As the trial court found, the evidence "overwhelmingly establishes that the 2007 Trust Amendment is the product of undue influence." The court wrote, "The court finds that Ms. Tyler is *NOT CREDIBLE* and that the evidence overwhelmingly establishes that Ms. Tyler was involved in all aspects of the drafting and execution of the 2007 Trust Amendment."

There is no shortage of evidence that Tyler actually participated in the preparation of the Trust amend-

ment in 2007, personally and by giving directions to others. The evidence supported the trial court's finding that the 2007 amendment is nothing but Tyler's desire to benefit herself. It is not a manifestation of Mrs. Plott's intentions, as expressed in the Trust allocations.

The trial court rejected as "not credible" Tyler's claim that she was uninvolved in drafting the 2007 amendment, which, on its face, benefits Tyler and disinherits Key with respect to the Plott family's most substantial asset, its nursing homes. The record shows that Tyler and her law firm were instrumental in creating and revising the 2007 amendment.

As the court states, "The 2007

amendment was the product of undue influence, not the outcome of Mrs. Plott's free will, and was properly invalidated in its entirety." Tyler, as trustee, defended the 2007 amendment through litigation, which became a significant procedural point thereafter.

Following on the court's finding that the 2007 amendment was the product of undue influence, Key filed a petition to enforce the trust's no contest clause and thereby obtain a forfeiture of Tyler's inheritance. Tyler responded with her anti-SLAPP motion to defend her own rights to defend the trust in litigation. The probate court granted Tyler's anti-SLAPP motion.

In the second chapter of this saga, the issue on appeal was whe-

ther Key had proven the likelihood of success of her no contest clause enforcement petition in defense of the anti-SLAPP motion filed by Tyler. (*Key v. Tyler* (2019) 34 Cal.App.5th 505 (*Key v. Tyler II*).

In *Key v. Tyler II*, the appellate court reversed the probate court's order striking Key's petition under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The appellate court held that: (1) the anti-SLAPP statute applied to a petition to enforce a no contest clause and (2) Key adequately demonstrated a likelihood of success on her petition. With respect to this second point, the court concluded that Tyler's judicial defense of the 2007 amendment that she had procured through undue influence constituted a direct contest of the Trust. The appellate court also concluded that Key had provided sufficient evidence that Tyler lacked probable cause to defend that amendment in court.

Key invoked the trust's no contest clause, arguing that Tyler's judicial defense of the 2007 amendment was a contest to the validity of provisions of the underlying trust. In the context of ruling in an appeal from an anti-SLAPP ruling, the appellate court agreed with Key, reasoning that "Tyler's defense of the 2007 amendment, had it been successful, would have had the effect of revoking paragraph C of article four of the Trust, which the 2007 amendment purported to replace." This action fell within the definition of a direct contest under Probate Code section 21310 as "a contest that alleges the invalidity of a protected instrument or one or more of its terms" based upon the "revocation of a trust pursuant to Section 15401."

In *Key v. Tyler II*, the case was remanded to probate court for trial on Key's petition to enforce the no contest clause against Tyler. The definitive decision on this issue remains to be seen due to additional procedural matters.

In the current case, *Key v. Tyler, III*, Tyler raised a new issue: whether the lack of a no contest clause in the 2003 amendment that the parents executed to change the distribution of the Trust's residue meant that Tyler's share of the assets distributed under the terms of that 2003 amendment are exempt from forfeiture. The trial court concluded that they were. On appeal, the appellate court disagreed and reversed.

The understanding of this question on appeal in *Key III* benefits from a further understanding of the background in the settlors' estate planning. Settlers Thomas E. Plott and Elizabeth R. Plott executed a trust in 1999 (the "Original Trust") that called for creation of a typical Survivor's Trust, Marital Trust, and Exemption Trust upon the death of the first spouse. The Original Trust also created a Residual Trust to receive the assets of those three subtrusts upon the death of the surviving spouse. Both settlors executed a one-page amendment in 2003 (the "2003 amendment") that called for the Residual Trust to be distributed equally among their three daughters. After the death of Thomas E. Plott, Tyler unduly influenced surviving settlor Elizabeth R. Plott into executing an amendment in 2007. Key successfully invalidated the 2007 amendment based on Tyler's undue influence under *Key v. Tyler I*. In *Key v. Tyler II*, the court found that Tyler's defense of the 2007 amendment constituted a "direct contest" of the Original Trust. (*Key v. Tyler* (2019) 34 Cal.App.5th 505 (*Key v. Tyler II*).

In *Key v. Tyler III*, Tyler argued that, notwithstanding that invalidity of the 2007 amendment, she was entitled to inherit one-third of the Residual Trust as set forth in the 2003 amendment because the 2003 amendment was a separate, unprotected instrument that did not contain any no contest clause. The Probate Court agreed with Tyler, and Key appealed.

On appeal, the appellate court reversed the trial court's decision and held that Tyler's direct contest of the Original Trust was sufficient to support a forfeiture even if the 2003 amendment was a separate, unprotected instrument. The assets in the Residual Trust that Tyler sought to inherit were "given under" the Original Trust. The no contest clause in the Original Trust required the challenger to forfeit all interests under "this Trust" and "any other trust," including the Residual Trust. Therefore, the absence of an express reference to amendments in the no contest clause did not limit the forfeiture and the absence of a no contest clause in the 2003 amendment was immaterial. The Original Trust did not limit the forfeiture that would result based on a contest of future amendments.

In reaching its conclusion, the *Key III* court took into consideration the scope of the forfeiture under the no contest clause in the Original Trust. Acknowledging the statutory direction that "language of a no contest clause must be strictly construed," the *Key III* court also recognized that "it is the testator's intentions that control, and a court 'must not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.'"

Fundamentally, Tyler's interest in assets distributed through the Residual Trust come within the more specific scope of assets that are subject to forfeiture if they are "given under" the Original Trust. Under the terms of the Original Trust, the subtrusts would contribute assets to the Residual Trust. The 2003 amendment (an unprotected instrument) changed the percentage of assets that each beneficiary would inherit from the Residual Trust. The invalid 2007 amendment would have replaced a term in the Original Trust.

The appellate court held that this significant change if the 2007 amendment had been implemented would amount to the type of contest that the settlors clearly intended to trigger the full scope of the forfeitures identified in the no contest clause.

A no contest clause essentially acts as a disinheritance device; if a beneficiary contests or seeks to impair the trust or will or any of its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided

under the instrument. No contest clauses, whether in wills or trusts, have long been held valid in California. Such clauses promote the public policies of honoring the intent of the testator or settlor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument.

Since 1989, however, the California Legislature has increasingly limited the enforceability of no contest clauses. There is a difficult balance between the public interests of avoiding forfeiture while also promoting full access to the courts. (Prob. Code § 21311.) Thus, even if a dispute falls within the scope of a trust's no contest clause, the no contest clause can be enforced only in those situations specified by statute.

Despite the three iterations of opinions in the *Key v. Tyler* dispute, there is still more guidance on no contest clauses the court can provide. Importantly, there has yet to be any judicial interpretation or construction of the phrase "probable cause" as used in the context of a Section 21311 direct contest. *Key v. Tyler III* was remanded to the probate court to make such findings, specifically whether Tyler lacked probable cause for her direct contest of the Trust. This issue was not decided in the remand under *Key v. Tyler II* due to the threshold issue of whether the no contest clause applied to the 2003 amendment. Now, after the decision of *Key v. Tyler III*, it will be incumbent upon the probate court to consider whether the facts show that Tyler lacked probable cause. Stay tuned for *Key v. Tyler IV* on this important "probable cause" inquiry.

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