



## BUYNAK & FAUVER

### PROPERLY DISINHERITING AN HEIR UNDER CALIFORNIA LAW *(Estate Planning Advisory No. 13)*

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This Advisory is a summary of California law and standards so that persons accomplishing Wills or Trusts have their intentions realized. In particular, it sets forth the requirements to eliminate (disinherit) a person as a beneficiary from an estate.

This Advisory is neither exhaustive nor tailored to your specific situation. You should discuss your personal situation with us or with your own attorney. Our representation is only undertaken through a written engagement letter and not by the distribution of this Advisory.

**Disinheritance.** Sometimes an individual elects to restrict what a daughter, son, spouse or other person receives under their Will or Trust, or desires to completely forgo any transfer (bequest) of his/her estate to a certain individual, meaning that they elect to disinherit that person. This must be done properly, especially if one wants to avoid estate or trust litigation (sometimes, called a "will contest"). California law has recently changed as it makes a disinheritance more difficult, requiring specific language in your Will or Trust.

**Disinheritance Restrictions.** California law presumes that direct heirs (children and spouses) will be provided for in one's estate planning. One cannot simply omit them from their Will and/or Trust. If such direct heirs are omitted, it may be determined that they were "forgotten" by the person making the Will or Trust and are thus given a share of the estate automatically by law.

To validly restrict or disinherit someone from your estate planning, it is best to specifically state in a Will or Trust document:

"I have elected not to make any provisions for John Smith in the disposition of my estate."

For direct heirs, it is mandatory that this be done so that they are not determined to be a "forgotten heir", who can gain a part of your estate automatically.

A Trustor (person making a trust) or Testator (person signing a will) may also want to restrict, delay or set conditions to a bequest or transfer to a beneficiary under their estate



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planning documents rather than giving the asset to them outright upon death.

Disinheritances, restrictions, conditions and generally one's whole estate plan should be protected from disruption by "no contest" clauses.

**No Contest Clause.** *No contest clauses* in estate planning disinherit an individual if they contest or object to a Trust or Will or any of its provisions, restrictions or conditions. Such a clause should be included in a Will and/or Trust to protect the estate plan.

California law regarding no contest clauses was changed in 2010, imposing strict standards on such clauses to be effective. Particularly, a "No Contest Clause" that denies an inheritance to a beneficiary of a Trust or Will is enforceable only in the following circumstances:

- (1) If it is a direct contest brought without any probable cause; "direct" contests are those legal proceedings brought on grounds of forgery, lack of proper execution, lack of capacity, menace, duress, fraud or undue influence, revocation of the instruction and/or disinheritance of a beneficiary that was in a fiduciary relationship with the person creating the Will or Trust.
- (2) If specifically mentioned in the *No-Contest Clause*, a document filed with the court without any probable cause challenging the transfer of property on the grounds that it did not belong to the person making the transfer.
- (3) If specifically mentioned in the *No-Contest Clause*, the filing without any probable cause a creditor's claim or prosecuting an action based on a claim on an estate.

This means that if there is a valid *no contest clause*, a "direct contest" filed without any "probable cause" will result in the beneficiary's outright disinheritance. Contest and proceedings other than "direct contests" will not have this disinheritance penalty.

**Proof Standard.** The biggest difference between the previous law and the new law is the change of the standard required to bring a direct contest from "reasonable cause" to "probable cause." By raising the standard it means that the facts must show that a reasonable person would believe it is likely that the court will grant the petition. This higher standard makes it more difficult to enforce a *No Contest Clause*.

**Strategy.** Besides a *No Contest Clause*, the usual strategy for disinheriting a person from



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your estate plan, or for whom significant restrictions are in place, is to provide a smaller portion of the estate, so that a person, in considering a direct contest, will have concern about losing their inheritance altogether. Long ago, it was thought that leaving a person \$1.00 was a good way to demonstrate the choice not to leave a beneficiary any portion of an estate, but it has been found to be a better incentive to leave them enough of an inheritance, such as a \$10,000 or greater cash gift, that would motivate them not to challenge a Will or Trust at the risk of losing such a substantial gift/bequest.

**Review Your Estate Planning Documents.** If your estate planning documents have language prior 2010 regarding disinheritance, it is wise to update them to current law if you have a beneficiary you wish to disinherit. If you would like an evaluation of your estate planning documents, please contact our Firm for a complimentary consultation!

As always, you should be sure that additional legislation has not been enacted or court decisions rendered, that would change the above advisements. This Advisory is neither exhaustive nor is it tailored to your specific situation. You should discuss your individual situation with us or your own attorney.

Lana J. Clark  
Tax and Estate Planning Attorney

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*This Advisory is one of a series of business and tax advisories prepared by the attorneys at Buynak & Fauver, LLP. Should you have further questions regarding the information provided in this Advisory, please contact the author listed above.*

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