Chapter 4

THE SYSTEMATIC FAILURE OF NO-CONTEST CLAUSES

Inheritance conflicts have plagued families since Adam: from Cain's murder of Abel to conflicts among the heirs of Abraham, Isaac, and Jacob. From the prodigal son to succession issues among Roman emperors, Mesoamerican rulers, European monarchs, and Asian prelates.[1] From King Lear and inheritance conflicts in works by Dickens, Austen, and the Brontes to contemporary works such as *Sycamore Row* by John Grisham. Inheritance conflicts still entertain us–and plague us.

Has anyone read Grisham's novel and not felt a surge of anger toward those grasping Hubbard children who are disinherited by their father Seth Hubbard and then proceed after his death to lie and cheat to undermine their father's will? Grisham describes their carefully-crafted lies and manipulations in ways that are deeply realistic and raise in a reader feelings of frustration I experienced in most every probate case I litigated.[2]

Anger and frustration. In reality (not fiction) many good people put up with years–or decades–of emotional and hostile abuse by a certain child. To think that this abuse will continue to disrupt the lives of their honest beneficiaries and could overturn their final wishes is too much for a good benefactor to contemplate. A benefactor's understandable anger dictates that such an heir be cut off the moment the heir raises his or her disruptive and entitled voice.

This anger is what motivates many benefactors to cling to no-contest clauses–those provisions in a will or trust that threaten to disinherit a beneficiary who contests the will or trust.

Other benefactors are motivated to include no-contest clauses in their documents for reasons other than anger: they are motivated by the desire that their beneficiaries will get along, will not fight. They are motivated not by anger but by loving concern.

Unfortunately for all you good benefactors, the frustrating fact is that no-contest clauses do not prevent contests and in almost 80% of cases do *not* result in contestants being disinherited, as I prove below.

In this chapter I first provide factual evidence proving that no-contest clauses systematically fail. I then provide specific examples of typical no-contest clauses, along with commentary on why no-contest clauses are so popular with attorneys and benefactors. Finally, I circle back to explain why judges systematically reject no-contest clauses.

The primary purpose of this chapter 2 is to help you recognize cheap, dangerous, and failed solutions to inheritance conflicts and to encourage you to start thinking about solutions that actually work.

NO-CONTEST CLAUSES DO NOT PREVENT CONTESTS

The purpose of a no-contest clause is to prevent contests. The idea is to scare a hostile heir or beneficiary with the threat of disinheritance if they even think about contesting the validity of a benefactor's will or trust or questioning the meaning of terms in the will or trust. In fact, no-contest clauses are referred to in legaleze Latin as *in-terrorem clauses*— clauses meant to terrify heirs from even contemplating litigation.

And yet the simple fact remains that no-contest clauses do not prevent contests.

Consider the Michigan case (*In re Estate of Gurniak*) in which an attorney described a no-contest clause to a client as a "drop dead" clause: that is, contestants are told to "go and drop dead." (*In re Estate of Gurniak*[3]) According to later court testimony, when hearing this description, the client laughed in his desire to include such a clause in his documents. After the client died, two of his children promptly filed a lawsuit contesting dad's will. These children were not dropping dead, and it is certain none of the client's other children were laughing.

In almost 80% of court contests involving no-contest clauses, the contestants are *not* disinherited.[4] Think of that. In 255 appellate court cases across the nation since 1980, courts enforced no-contest clauses only 55 times. That means that in 200 court contests involving no-contest clauses, the contestant did not drop dead and was not disinherited. An 80% failure rate for no-contest clauses!

Or look at it this way: 255 no-contest clauses, 255 court contests. That is a 100% failure rate for a provision known as a "no-contest clause." This little fact is a textbook definition of irony . . . and stupidity.

Further, considering specifically the fees awarded attorneys in just a fraction of these 255 appellate court cases, and considering generally the costs of trial and appellate court work, no-contest contests since 1980 have likely resulted in wasting benefactor and beneficiary resources (and enriching probate litigators) in excess of a conservative $20 million. And that's just taking into account the 255 published cases, not the thousands of probate cases involving no-contest clauses litigated each year in this country that are never published. The point is that no contest clauses do not necessarily save money from being wasted in litigation.

THERE IS NO EVIDENCE NO-CONTEST CLAUSES DISCOURAGE CONTESTS

When I assert that no-contest clauses do not prevent contests, my evidence is the contests themselves. In presenting this evidence, I rely on the useful and common legal concept known as *res ipsa loquitur*: "the thing speaks for itself." The 255 contests involving no-contest clauses are *res ipsa* evidence that no-contest clauses do not discourage contests. Despite this fact, we must still endure the following statement made by far too many intelligent judges: "No-contest clauses are favored as a matter of public policy because they discourage litigation."[5]

It is revealing that not one judge in one of the 255 cases cites one study supporting this assertion. *Not one citation to any study.* Furthermore, none of the numerous articles or professional commentaries I could find discussing no-contest clauses (including the Restatements) cite such a study. *Hoping* no-contest clauses discourage litigation does not make it so. *Thinking* that it *must rationally* be so does not make it so.

Such a study does not exist for two likely reasons. First, such a study would be almost impossible to conduct because the hard data is almost impossible to obtain. How do you find sufficient representative samples of people who have faced an inheritance conflict, who have been subject to a no-contest clause, and who have decided *not* to engage in a court contest?

Second, the soft psychological data is even more difficult to get to. Numerous considerations—completely independent of the no-contest clause—may discourage a party *with a legitimate claim* from pursuing a *persuasive* case in litigation. I have experienced such a situation. I have had two clients with incredibly persuasive cases refuse to litigate for personal reasons. The unwillingness to suffer long-term emotional pain may deter a rightful party from engaging in litigation–even when a no-contest clause does not exist. The time and expense involved in litigation may further deter a party with a powerful case–again, even where there is no-contest clause. Religious or spiritual reasons may be a motivating factor why a justified party shuns litigation. Or a party's unwillingness to destroy family relationships beyond a first generation may act as a deterrent–even in the absence of a no-contest clause. How does one really prove it is a no-contest clause that deters contests?

THE JUDICIAL ASSERTION OTHERWISE IS UNGROUNDED AND INAPPROPRIATE

Consider again the judicial assertion: "no-contest clauses are favored as a matter of public policy because they discourage litigation." Let's unpack this assertion and logically determine whether it is accurate–or even appropriate for a judge to assert.

First, does the judge mean the* mere existence *of a no-contest clause discourages litigation?

If so, that is like saying that the mere existence of the third commandment ("thou shalt not take the name of the Lord thy God in vain") discourages casual and profane use of the word "God." Further, remember, *res ipsa loquitur*–the thing speaks for itself: 255 no-contest clauses–255 contests. It seems the mere existence of a no-contest clause *does not* necessarily discourage litigation. And again, there is no empirical study affirmatively proving that no contest clauses discourage litigation.

Second, does the judge mean* enforcement *of the clause discourages litigation?

If so, consider the facts, the hard evidence. The 55 cases in which a no-contest clause was in fact enforced did not discourage contestants in 200 other cases from litigating. Even within the same state where the clauses were enforced, such enforcement did not discourage contestants in that state from contesting! Enforcement of no-contest clauses does not necessarily discourage contests. Res ipsa loquitur.

Further, to assert that enforcing a no-contest clause discourages litigation is like saying that quickly executing murderers will discourage murder. Rationally, such quick execution may discourage some from committing murder; but one must also rationally conclude that an insane person who enjoys murder or an irrational person overcome in the heat of rage is not deterred. Every experienced probate litigator has a story to share about a hostile, irrational contestant who reveled in creating conflict–regardless of the consequences.

Third, the judicial assertion is judicially inappropriate

The assertion that "no-contest clauses discourage litigation" is based on terribly inappropriate judicial assumptions: (1) the assumption that all contestants are wrong, guilty, hostile, or irrational and (2) the assumption that a contestant is not entitled to judicial processes due him to prove his arguably legitimate case regarding fraud or misconduct.

The judicial assertion that no-contest clauses are favored because they discourage litigation is based on dangerous, non-judicious, and inappropriate assumptions; the assertion is further illogical: ungrounded in any empirical evidence. These clauses do not prevent animosity between parties and they do not prevent the public, expensive airing of disputes in litigation . The evidence is clear these clauses *do not work–even when they "succeed."*

DISINHERITING A BENEFICIARY DOES NOT DEFINE SUCCESS

A no-contest clause is successful when there are no contests, when assets are finally distributed without any contests at all. That means no complaints; petitions; requests for declaratory judgment; safe-harbor petitions; or any document filed in a court at any time contesting the validity of a document, interpretation of a document, or actions of a fiduciary.

When there is in fact a contest, then the no-contest clause was *not* successful. Indeed, even if a contestant is finally disinherited, the no-contest clause is still not successful. There was still significant financial harm, injury to the honest beneficiaries, a public spectacle, and ruined relationships. Can anyone rationally define this as success? In fact, the clause accomplished little, prevented nothing, and based on its titled, stated purpose ("no-contest clause") could only be deemed an abysmal failure. If a dishonest contestant causes mayhem among the entire family, but is finally disinherited–"dropped dead"–it is difficult to honestly argue that the no-contest clause was successful.

EXAMPLES OF TYPICAL NO-CONTEST CLAUSES

To explain why no-contest clauses are popular, and why most courts refuse to enforce these clauses, let's first examine a typical no-contest clause, phrase by phrase.

The First Phrase: Contesting the Validity Of Documents

Here is the first phrase in a typical no-contest clause. I have stripped the phrase of all legaleze and exposed it in its barest outline.[6]

> "If any heir or beneficiary contests in court the validity of this will, that heir or beneficiary shall be disinherited."

Benefactors like this clause for these reasons:

- The clause satisfies deep emotional needs to resolve and prevent the pain caused by disruptive beneficiaries: "If John continues to create problems, then that is it; he is done."
- The solution is so simple it is almost too good to be true!
- The clause saves benefactors the emotional pain of confronting disruptive beneficiaries: "I just want some peace; John'll find out soon enough what's in store."
- Benefactors hope the phrase will eliminate lawyers, judges, expenses: the whole litigation mess.

Attorneys like this clause for the following reasons:

- The clause shields attorneys from malpractice claims. If an honest beneficiary considers suing an attorney for failing to ensure a will was properly executed, the attorney joins forces with dishonest fiduciaries or other beneficiaries and simply accuses the contesting beneficiary of violating the no-contest clause and arguing that the beneficiary should therefore be disinherited.

- The clause validates the attorney's brilliance with his client: "Mr. Smith, we include in your will a provision that prevents beneficiaries from creating problems. We call it a 'drop dead' clause: no one will dare contest your document for fear they will be left out, dropped dead!"
- The clause is so easy for document-mill attorneys. No work is involved. Simply insert and ask the client for the check.

Three distinct defects cause this clause to fail, harming honest beneficiaries in the process.

First, the clause is used to protect the dishonest. It is already very difficult under current law to prove that a benefactor's will was fraudulently executed. This no-contest clause makes it even more difficult for honest beneficiaries to prove fraud. Yes, the honest beneficiary may *know* a disruptive beneficiary or a destructive fiduciary is a thief, and they may be convinced their evidence is compelling, but a disruptive beneficiary or fiduciary is perfectly confident that honest beneficiaries are unlikely to overturn a fraudulent will in court, with *independent, verifiable, unambiguous* evidence (not silly, self-serving statements that so and so said such and such).

This no-contest clause simply hinders honest beneficiaries in presenting any evidence of fraud or misconduct, let alone independent, verifiable proof of such misconduct. What is most disturbing is that disruptive beneficiaries actually win these cases, and honest beneficiaries are actually disinherited. That is a brutal fact.[7]

Second, the clause is used to threaten the honest. Suppose a dishonest heir persuades a vulnerable benefactor to sign a will giving everything to the dishonest heir. The will dictates: "If anyone contests the validity of this will, that person shall receive nothing." After the benefactor dies, the honest beneficiaries prove the benefactor had dementia and was on morphine drips at the time the will was signed. They contest the will's validity. But they are threatened with disinheritance. This kind of dishonest use of no-contest clauses to punish the honest actually happens.[8]

Third, the clause does not stop irrational conduct. Consider the following true story.[9] A benefactor suspects the validity of her trust will be challenged. She secures a psychiatrist affidavit that she is competent to sign the trust. She retains an independent attorney (in addition to her estate planning attorney) to formally attest she is not subject to fraud or undue influence. She formally observes the strictest formalities in signing her documents. She authorizes her trustees to defend the validity of the trust. Finally, she includes a no-contest clause in her trust.

Nevertheless, at her death, a hostile beneficiary contests the validity of her trust. The honest beneficiaries are compelled to see their inheritance diminished as trust funds are used to fight the disruptive, hostile beneficiary. It's a lose, lose situation for both sides and the disruptive beneficiary often does not care. (See great notes in the endnote on this case when talking about preventative steps.)

A no-contest clause does not stop irrational hostility. The clause especially does not stop heirs who have been completely disinherited, because they have nothing to lose and possibly everything to gain by contesting. Further, a no-contest clause does not prevent the emotional and financial pain honest beneficiaries are often compelled to endure.

The Second Phrase: Contesting Interpretation Of Documents

Here is the second phrase in a typical no-contest clause. Again, I have stripped the phrase of all legaleze.

> "If any heir or beneficiary seeks to negate any provision of the Will, or objects to the executor's interpretation of any provision in the Will, or seeks any judicial interpretation of the Will, then in that event the heir or beneficiary shall be disinherited."

Benefactors like this clause for all the reasons they like the first clause:

- The phrase resolves their anger toward hostile heirs.
- It is so simple it is almost too good to be true.
- Benefactors can hope they are eliminating everything related to litigation.

Attorneys like this second clause for the following reasons.

- Again, the clause protects the attorney from malpractice claims that the attorney failed to ensure the benefactor's will and trust were carefully drafted. Anyone contesting sloppy, ambiguous drafting can drop dead.
- Again, the clause makes the attorney look good in front of the client: "Mr. Smith, we insert in your will a legally-enforceable provision that prevents beneficiaries from even questioning the language in your documents."
- The clause is easy, requiring no thinking on the part of the attorney. The clause is simple to insert into a document.

This second clause is the golden key for a lazy or dishonest fiduciary. The fiduciary can interpret the will or trust any way he wants. Suppose a will requires the fiduciary to distribute assets "as soon as possible after the benefactor's death." Three years go by without any distribution of assets. The honest beneficiaries sue the fiduciary, asking the court to rule that the fiduciary has violated his duty to distribute assets "as soon as possible." The fiduciary promptly claims that the beneficiaries should be disinherited for questioning his interpretation of this provision.

Should these honest beneficiaries be disinherited? Courts consistently answer this question correctly. Courts routinely knock down no-contest clauses when contestants ask in good faith what a provision in a will or trust means. This issue of interpretation, and the following related issue relating to fiduciary actions, account for almost all cases in which no-contest clauses fail.

The Third Phrase: Actions Of Fiduciaries

Here is the third phrase in a typical no-contest clause. Again, I have stripped the phrase of legaleze:

> "If any heir or beneficiary under this Will shall contest the executor's exercise of his or her authority, in that event the heir or beneficiary shall be disinherited."

Again, a dream clause for a dishonest or lazy fiduciary. Suppose the honest beneficiaries believe the fiduciary is paying himself fees far in excess of the work he is doing. They demand an accounting, and the fiduciary promptly claims that they should be disinherited for questioning his authority and actions.

This third clause is against public policy.[10] Any provision that protects a fiduciary from accounting for his actions or from suffering the consequences of violating his duties is a provision contrary to public policy. Courts are routinely impatient with no-contest clauses that hinder a beneficiary's reasonable disputes regarding a fiduciary's actions. In my opinion, use of this third phrase indicates that the drafting attorney is either dishonest or fundamentally incompetent.

HOW PEOPLE MANIPULATE NO-CONTEST CLAUSES TO THEIR OWN ADVANTAGE

What do careful judges see when faced with a no-contest clause? Why do judges refuse almost 80% of the time to enforce no-contest clauses? A logical answer is that they perceive how no-contest clauses are manipulated by attorneys, beneficiaries, and fiduciaries in ways that would completely devastate honest benefactors.

Client Ignorance: The Dirty Secret Of Estate Planning

As the Iowa Supreme Court stated more than 70 years ago: "it does sometimes happen in very truth that a will regular in form, bearing the genuine signature of the testator in the presence of witnesses, is nevertheless not his will."[11] Think about that.

It is a dirty secret in estate planning that clients often do not fully understand the documents placed before them for signing. At a recent "Continuing Legal Education" seminar I attended, attorney John A. Adams told a group of attorneys the following story. Mr. Adams represented a trustee in an inheritance conflict. The trust contained a no-contest clause. He asked his client, "do you want to argue that the beneficiaries should be disinherited under the no-contest clause?" The trustee replied, "My father would never have wanted that clause to be enforced; he would never have wanted my siblings disinherited."[12]

Clients themselves may not be aware of the existence of a no-contest clause in their documents. Every experienced attorney has heard a client laugh about the complexity of these documents and joke that they have not read each word of the documents, but they are nonetheless ready to sign. Ha, ha, ha!

This disturbing secret—a client's willing ignorance of documents—is a fact unfortunately unprovable in court. The client's attorney surely is not going to admit such a conversation. And the dead tell no tales either. But careful judges (like those in the Iowa Supreme Court 70 years ago) cannot help but consider the very disturbing contemporary question: did the benefactor really understand how a no-contest clause works, how it can be manipulated and turned against honest beneficiaries?

Attorney Abuse Of No-Contest Clauses

Attorneys may abuse no-contest clauses in two ways.

First, unethical attorneys may insert no-contest clauses into documents to advance their own personal agendas. Consider the Georgia case of *Callaway v. Willard*.[13] Attorney Callaway drafted the client's trust; provided that trustees were to receive a minimum $35,000 annual fee; persuaded the client to name him (Callaway) as the first trustee (!); and then inserted a no-contest clause in the trust (!). The client died and Mr. Callaway promptly breached his fiduciary duties. When the beneficiaries confronted him, Mr. Callaways's law firm quickly invoked the no-contest clause against the beneficiaries. Fortunately, the Court removed Callaway and refused to disinherit the three beneficiaries for bringing their honest contest.

Second, unethical attorneys may also insert no-contest clauses into documents to divert attention away from their incompetence and malpractice in drafting documents. Consider the New York case *In re Estate of Stralem*.[14] The fiduciary was given broad powers enforced by a no-contest clause. When beneficiaries sued the fiduciary for breach of conduct, the fiduciary invoked the no-contest clause. The

Court rejected the no-contest clause and issued the following warning to attorneys who draft estate documents:

> "The increasing practice of testamentary draftsmen . . . in vesting in testamentary fiduciaries almost unlimited powers, with a minimum of obligations, is a serious potential menace not only to the rights of a surviving spouse but of the children and other dependents of the testator and of all persons interested in estates. This tendency must be curbed. . . . any impairment of these or similar obligations of a fiduciary [through a no-contest clause] are contrary to public policy."

Fiduciary Manipulation Of No-Contest Clauses

The 255 cases suggest that no-contest clauses are manipulated not so much by disgruntled beneficiaries as by dictator family fiduciaries who use the clauses to further their schemes in taking assets. This is a fact recognized by the courts. The *Callaway* Court stated: "our Supreme Court has held that, as a matter of public policy, in terrorem clauses may not be construed so as to immunize a fiduciary from the law that imposes certain duties upon and otherwise governs the actions of such fiduciaries."[15]

Beneficiary Manipulation Of No-Contest Clauses

Of course, beneficiaries also manipulate no-contest clauses. Consider the Missouri case of *Ivie v. Smith*.[16] Mrs. Ivie was mentally incapacitated when Mr. Smith (Mrs. Ivie's fourth husband) manipulated her to change her trust and ownership documents to largely benefit himself. When Mrs. Ivie died, her sisters called Mr. Smith to account. Mr. Smith quickly played the no-contest clause against the sisters. The court refused to enforce the no-contest clause.

WHO IS ULTIMATELY RESPONSIBLE?

Who is ultimately responsible for these failed no-contest clauses and all the pain they cause? One can reasonably lay the blame on ignorant benefactors, disruptive beneficiaries, destructive fiduciaries, gullible legislators, or even busy judges. But in my opinion, the responsibility lies first with boilerplate estate planning attorneys.

Let me be clear. My opinion here is not a typical "attorney joke": a cheap shot at attorneys, offered by someone who does not know the difference between a plaintiff and a defendant. Given my position as an insider, a probate litigator, and one who deeply respects the many competent, honest attorneys in my field, I am in the honest position to criticize a certain class of my colleagues. And I assert that document mill attorneys are a problem. These boilerplate attorneys simply fail to engage in the hard work of *truly educating and truly protecting* (1) their clients, the benefactor, and (2) their client's diligent fiduciaries and honest beneficiaries.

Blaming boilerplate attorneys is especially appropriate considering the fact that benefactors pay attorneys to protect them. A typical no-contest clause in an attorney's document indicates the attorney's absolute failure to earn his fees. These typical clauses indicate the attorney's incompetence and lack of interest in truly protecting the benefactor.

Boilerplate attorneys are also to blame even if a no-contest clause "succeeds" in disinheriting a *dishonest* contestant. If an attorney does his work carefully, no one but the most insane contestant will waste a dime filing a contest in a court of law. There will be dramatically fewer contests, and in regard to the insane contestant, the contests will be efficiently contained and resolved outside of court.

The California case *In re Estate of Ferber* illustrates the problem here.[17] In administering his father's estate, James M. Ferber experienced 17 years of estate conflicts, including a lawsuit against him. These years of conflict had such a terrible impact on Mr. Ferber's quality of life that when he had his own will prepared, "he directed his attorney to prepare the strongest possible no-contest clause." Mr.

Ferber wanted "a no-contest clause that went as far as it could go to avoid any litigation at all involving his estate." Mr. Ferber's attorney drafted a no-contest clause that was a work of art.

But when Mr. Ferber died, his attorney's careful no-contest clause did not prevent a contest. Sandra, a friend of Mr. Ferber, and one of his beneficiaries, filed a petition, asking whether certain actions she wanted to bring would violate the no-contest clause. She ultimately hoped to remove Mr. Ferber's executor and control more readily the $250,000 Mr. Ferber bequeathed her. After extensive and expensive trial and appellate court litigation, costing Mr. Ferber's estate an untold amount in fees and thus hurting the honest beneficiaries, Sandra's petition was denied (that is, the no-contest clause was held to be valid), but Sandra was *not* disinherited. She was still entitled to her $250,000!

I think Mr. Ferber's attorney failed him. The attorney placed so much faith in his brilliant drafting of a no-contest clause that he failed to consider a variety of other practical solutions that would have likely satisfied Mr. Ferber's desire to shut down someone like Sandra. Yes, Mr. Ferber insisted his attorney draft the no-contest clause. But a good attorney would have known that no-contest clauses are riddled with weaknesses; would have known about safe harbor petitions, and would have known the type of people Mr. Ferber's beneficiaries were, including Sandra. The attorney would have taken the painful steps of explaining to Mr. Ferber deeper, more uncomfortable, but definitely more effective options in shutting down contestants like Sandra.

Again, I assert that boilerplate attorneys fail to engage in the hard work of truly communicting with, educating, and protecting their clients, their clients' estates, and their clients' diligent fiduciaries and honest beneficiaries.

A PUZZLE: THE FINAL FATAL FLAW

Finally, before the solutions, I wish to present a puzzle–a drafting challenge–to anyone who still considers using a no-contest clause. This puzzle is for anyone who considers themselves an experienced thinker. This puzzle should drive home the point that a typical no-contest clause is an idea too good to be true. Here is the puzzle. Can you solve it?

> Draft a no-contest clause (preferably one paragraph, but no longer than a page of 450 words) for inclusion in a will. The clause *must* satisfy *all four* of the following requirements:
>
> 1. The clause must *guarantee* that any contestant is dishonest. The clause must *guarantee* that a beneficiary questioning the validity of the will or a fiduciary's actions would never have an honest reason for doing so.
> 2. The clause must *guarantee* on the other hand that every fiduciary will be perfectly honest and will never make a mistake.
> 3. The clause must *guarantee* that if a beneficiary contests the validity or meaning of the will, that beneficiary will be disinherited–100% of the time; *it does not matter* if the beneficiary has an honest reason for the contest.
> 4. The clause must *guarantee* to stop contests–must guarantee that a beneficiary can *never* file any pleading in a court of law that questions the validity of the will or a fiduciary's interpretation of the will.

Try your hand at drafting such a clause. It should take only a few moments to realize the impossibility of the task. It is impossible to

1. prevent a person from filing a contest in a court of law;

2. guarantee a contestant is always dishonest.
3. guarantee a fiduciary will be perfect in every way; and
4. guarantee that a contestant will be disinherited;

The sooner you reach these conclusions, the sooner you have reached the following important level of enlightenment: that a typical no-contest clause is not only inadequate in resolving inheritance conflicts, but that such a clause is dangerous in that it fails to protect benefactors and honest beneficiaries from fraud and misconduct.

Fortunately, the good news is that you benefactors can still prevent and contain inheritance conflicts. You can even disinherit disruptive beneficiaries if you are so inclined. However, you need more than a feel-good paragraph to ensure your desires are honored. The solutions require mental and emotional effort on your part as well as professional help.

PRACTICAL SOLUTIONS
–THE TO-DO LIST–

As we delve deeper into inheritance conflicts in following chapters, I offer increasingly detailed and practical strategies for preventing or minimizing the harm caused by such conflicts. For instance, I offer in a later chapter solutions to the situation involving Mr. Ferber and his friend Sandra.

For now, please remember my first solution: "Educate Yourself." In addition, based on the knowledge you have acquired in this chapter, I offer a second solution, to complement the first solution: Retain the Right Attorney.

Inheritance conflicts are complex and their resolution requires both an educated benefactor and the right attorney. One without the other is inadequate. This is not a cliche. Truly, the best attorney cannot prevent inheritance conflicts unless the benefactor is fully educated and engaged. And the most educated benefactor needs the help of the right attorney. So here is our list of solutions:

1. Educate Yourself
2. Retain the Right Attorney.

A Simple Question to Find the Right Attorney

The following simple question regarding a no-contest clause will help a great deal in retaining the right attorney. Simply ask the attorney: "Do you put in your documents a no-contest clause?" The attorney's answer to this simple question will reveal much more about your attorney than just his thoughts on no-contest clauses.

The Answer Reveals the Attorney's Competence. Not every estate planning attorney understands sophisticated estate tax issues or special needs strategies and planning. However, every estate planning attorney must–at least–be familiar with basic laws that govern the validity of estate documents and the transfer of assets. Any attorney with this basic legal knowledge will know what you now understand: typical no-contest clauses do not prevent conflicts and rarely result in the punishment of a contestant.

Do not tip your hat. Just ask the attorney: "Do you put in your documents a no-contest clause?" An attorney who answers with an unqualified "yes" or who endorses no-contest clauses without

qualification exhibits a disturbing lack of professional knowledge. This is an attorney who does not understand his craft. This is an attorney who is not careful or current. Be prepared to politely leave.

A no-contest clauses is like dynamite–or any dangerous tool. If an attorney knows how to *carefully* and *narrowly* use the tool, the clause may cause minimal harm and do some good. But ignorant, blanket use of a boilerplate no-contest clause only decimates estates and blows up families.

The Answer Reveals the Attorney's Interest in You. The fact that you would ask such a question will cause a careful and competent attorney (who is truly interested in you) to pause. An attorney's response to your question will be to explore in honest depth your background and concerns: "Tell me, Mr. Smith, really tell me, about your beneficiaries." "Share with me what your fiduciaries are like." "Why, really why, do you want to distribute your assets that way?" "What kind of conflicts are you anticipating?"

The sensitive attorney will listen. The attorney will explore your concerns and suggest effective options. For this attorney, *surprise planning* is a calling: protecting you, the integrity of your documents, and the welfare of your beneficiaries. You will know.

ENDNOTES:

[1]. For an interesting history of estate planning, see *Blood & Money: Why Families Fight Over Inheritance and What to Do About It* (Farmington Hills, Michigan: Collinwood Press, 2011), 203.

[2]. For a detailed review of the reality of Grisham's novel from the perspective of a probate litigator–a review which does not reveal the stunning ending, and which I hope is entertaining as well as informative, see www.dark-side-of-estate-planning.com.

[3]. *In re Estate of Gurniak,* No. 277537 (Mich.Ct.App. 2008). In this case, (not formally published), the attorney's statement and benefactor's reaction were presented to explain the benefactor's state of mind when deciding to disinherit his children. Generally speaking, this kind of practiced statement by an attorney is not intelligent, helpful, or amusing.

[4]. In 255 cases (from 1980 through July 15, 2016), appellate courts in states across the nation adjudicated the enforceability of no-contest clauses against contestants. In 78.4% of the cases, the appellate courts declined to enforce the no-contest clause. I have included on my website a table of citations to these 255 cases and my brief notes regarding disposition of each case. See www.dark-side-of-estate-planning.com. You will also find on the site detailed articles I have written about no-contest clauses. While these articles are written to an audience of attorneys and judges, an educated layperson will be able to understand them. The articles discuss the following issues related to no-contest clauses:

1. Problems with statutory exceptions to no-contest clauses
    - probable cause and good faith exceptions
    - safe harbor exceptions and declaratory judgments
2. False presumptions about no-contest clauses
3. Contests that should not be subject to no-contest clauses
4. Increased litigation costs with no-contest clauses

5. Benefactor ignorance of no-contest clauses in documents
6. Attorney abuse of no-contest clauses
    - advancing personal agendas
    - covering up incompetent planning
7. Fiduciary abuse of no-contest clauses in embezzling assets
8. Irrational hostile beneficiaries who ignore no-contest clauses
9. Beneficiary use of the clauses to disinherit fellow beneficiaries
10. The inclination of most judges to ignore no-contest clauses.

[5]

. *Colburn v. Northern Trust Co,* 151 Cal.App.4th 439, 447 (App. 2d Dist. 2007) (ellipsis omitted). The cases in which judges make this assertion are too innumerable to cite here.

[6]

. For a full legaleze version of this clause, see our website: www.dark-side-of-estate-planning.com.

[7]

. In most of the 55 cases in which contestants were disinherited, it was clear they deserved to be disinherited. But there are a few cases in that batch that are very tenuous. In one Arizona case, the contestants made nine claims that a fiduciary was violating fiduciary duties. The trial court held that the contestants had probable cause that eight of the nine claims were accurate, establishing that the fiduciary was indeed violating his duties. The appellate court reversed and held that even one claim lacking merit was reason for disinheriting the contestants. *In re Shaheen Trust*, 236 Ariz. 498, 341 P.3d 1169 (Ariz.App.Div.2, 2015) This was an awful decision with the weakest of reasoning (that is, that even one frivolous claim could enable contestants to coerce a more favorable settlement). *Eight good causes that the fiduciary was breaching his fiduciary duties, and one cause without merit, and the contestants are disinherited!* If you do not think injustice prevails again and again in the courts, you are happily naive.

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. See for instance, *Ivie v. Smith*, 112013 MOCAS, SD 32222 (Mo.Ct.App. S.D. 2013).; *Callaway v. Willard*, 321 Ga.App. 349, 353; 739 S.E.2d 533, 537 (Ga.App. 2013); *In re Estate of Stralem* 181 Misc.2d 715, 720 (N.Y. Surr.Ct. 1999).

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. *Doolittle v. Exchange Bank*, 241 Cal.App.4th 529; 193 Cal.Rptr.3d 818 (Cal.Ct.App., 1st Dist., 2015). The case included a provision that the trustee could use trust funds to fight contests. The only thing the benefactor did not do was create a chain or consecutive wills. *Doolittle* is an example of a case in which a beneficiary felt so rejected, disappointed, angry, and hostile that no possible threats of disinheritance would discourage her. The only thing to do in such a situation is to protect the other beneficiaries by making the contest as inexpensive as possible–keeping the disinheritance provisions–but making the contest as inexpensive as possible: that's mediation and arbitration. *Doolittle* was also strictly and primarily about the right of a trustee to use trust funds to defend the validity of the trust. There was a beautiful distinction made between trustee/beneficiaries who may stand to gain by a contest regarding the validity of a document and independent trustees who are not beneficiaries and are called upon to defend the validity of the trust versus being neutral in a contest between the beneficiaries.)

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. *In re Estate of Stralem* 181 Misc.2d 715, 720 (N.Y. Surr.Ct. 1999) (quoting Decedent Estate Law § 125, McKinney's Cons Laws of NY, Book 13, at 636; other citations omitted).

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. *In re Estate of Cocklin*. 236 Iowa 98, 107 (1945).

[12]

. John A. Adams,"What Utah Trial Judges Have to Say About Trust and Estate Litigation– Survey Results." CLE. Salt Lake City, Utah. January 12, 2016. See also Adams' article by the same title in the Utah Bar Journal, Vol. 29 No.1. 18-24.

[13]

. *Callaway v. Willard*, 321 Ga.App. 349, 351; 739 S.E.2d 533, 535 (Ga.App. 2013).

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. *In re Estate of Stralem* 181 Misc.2d 715, 720 (N.Y. Surr.Ct. 1999) (quoting Decedent Estate Law § 125, McKinney's Cons Laws of NY, Book 13, at 636; other citations omitted).

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. *Callaway v. Willard*, 321 Ga.App. 349, 353; 739 S.E.2d 533, 537 (Ga.App. 2013).

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. *Ivie v. Smith*, 112013 MOCAS, SD 32222 (Mo.Ct.App. S.D. 2013).

[17]

. *In re Estate of Ferber*, 66 Cal.App.4th 244, 247-49 (App. 4th Dist. 1998).