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## Testamentary Freedom Vs. the Natural Right to Inherit: The Misuse of No-Contest Clauses As Disinheritance Devices

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# TESTAMENTARY FREEDOM VS. THE NATURAL RIGHT TO INHERIT: THE MISUSE OF NO-CONTEST CLAUSES AS DISINHERITANCE DEVICES

ALEXIS A. GOLLING-SLEDGE\*

## ABSTRACT

*Testamentary freedom is the bedrock of inheritance law. The freedom is curbed in some respects in order to allow spouses and other groups access to an estate. However, there is no restriction on a parent's ability to disinherit their children. This note is a critique of the permitted disinheritance of children in the name of testamentary freedom. According to John Locke, the right to inherit emanates from natural law and should be recognized as such. Through forced heirship, as recognized in other modern nations, the U.S. can respect the natural right of children to inherit and leave room for testamentary freedom. Forced heirship can alleviate the unjustifiable harms imposed on adult children and preserve familial relationships after the death of a parent. Until forced heirship is recognized, disinherited beneficiaries seeking access to an estate must navigate around laws governing no-contest clauses, devices that are often used to disinherit children. In California, that path is through its probable cause exception to no-contest clauses and the intentional interference with an expected inheritance tort. Until forced heirship is recognized, courts should not permit no-contest clauses to effectuate disinheritance but restrict enforcement of no-contest clauses for protecting estates from complicated ownership disputes and outsiders attempting to gain access to an estate.*

## INTRODUCTION

Above all else, inheritance law in the United States prioritizes testamentary freedom. The law even permits a parent to disinherit his child. Unlike many other nations, no statutory protections from disinheritance exist for adult children in the United States.<sup>1</sup> Disinheritance, or the threat thereof, imposes great harm on adult children and families. A right to inherit

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1. One state, Louisiana, protects children up to age twenty-four and in very limited circumstances. *See infra* notes 143-46 and accompanying discussion.

emanates from natural law and should be recognized as such. The natural right to inherit ought not cede to testamentary freedom but work in tandem through forced heirship, whereby children are guaranteed a portion of their parents' estates.

Disinheritance is often effectuated by court enforcement of no-contest clauses.<sup>2</sup> No-contest clauses condition a beneficiary's right to take the share provided in the will or trust upon an agreement to acquiesce to its terms.<sup>3</sup> No-contest clauses should be enforced to protect estates from poaching by strangers and to avoid resolution of messy ownership disputes;<sup>4</sup> no-contest clauses should not be used to disinherit children.

The traditional family is the basis of inheritance law.<sup>5</sup> Some argue that the traditional family has evolved so dramatically in modern times that it is no longer a workable framework.<sup>6</sup> Non-traditional families are now the norm, leaving non-marital children and children of divorce vulnerable to disinheritance. All children, regardless of age, have a natural right to inherit a share from their parents and that the protections that exist for surviving spouses should extend to all children through forced heirship.<sup>7</sup> Forced heirship will preserve and strengthen the family paradigm, promote social mobility, and is consistent with the law's favor for vibrant markets and limits on deadhand control.<sup>8</sup>

No-contest clauses are a popular disinheritance device that may impose a penalty for challenging a will. Many states provide a narrow exception for beneficiaries to challenge a will containing a no-contest clause without triggering a penalty. California provides a probable cause exception that permits a successful challenge to a will containing a no-contest clause.<sup>9</sup> In 2007, California undertook a close look at the law governing no-contest clauses and made revisions,<sup>10</sup> making its law primed for examining the

2. LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 12 (Stanford Law Books 2009).

3. CAL. PROB. CODE § 21310(c) (West 2011).

4. *See infra* notes 64-66, 87-92.

5. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200-01 (2001).

6. *Id.* at 204.

7. *See infra* notes 186-224 and accompanying text.

8. Deadhand control allows a decedent's control of wealth to influence the conduct of a living beneficiary; esp., the use of executory interests that vest at some indefinite and remote time in the future to restrict alienability and to ensure that property remains in the hands of a particular family or organization. The Rule Against Perpetuities restricts certain types of deadhand control. *See Deadhand Control*, BLACK'S LAW DICTIONARY (ed. 2019).

9. *See infra* notes 53-54 and accompanying text.

10. Revision of No Contest Clause Statute, 37 CAL. L. REVISION COMM'N REPORTS 359 (2007) [hereinafter Revision Report].

contours of the probable cause exception. This note will also discuss the purpose of no-contest clauses for respecting testamentary freedom. That purpose will be juxtaposed with the actual practice of using no-contest clauses to disinherit children. This note argues that these clauses are misused to disinherit children and that such misuse is inconsistent with the clauses' purpose. Testamentary freedom should work in tandem with the right to inherit by providing statutory protection from disinheritance,<sup>11</sup> as it does for surviving spouses.

Part I will introduce the tension between testamentary freedom, specifically disinheritance, in inheritance law and the natural right to inherit. Part II will describe the rationale behind testamentary freedom and the purpose of no-contest clauses. Part II will also discuss the limits of testamentary freedom and identify the negative effects of disinheritance on families and children. Part III will argue for a natural right to inherit and advocate for protection of all children from disinheritance by instituting forced heirship. Part III will also introduce policy rationales for forced heirship and models from civil law countries. Finally, Part III will introduce other avenues to avoid disinheritance under the current law.

## I. INTRODUCTION TO NATURAL LAW

Testamentary freedom is the guiding principle behind succession law and one of many important American values.<sup>12</sup> It is essentially the power or right to distribute one's property after death to whomever one chooses and in any manner.<sup>13</sup> All of the freedoms we value in the U.S., including individual liberty and property rights are limited because these freedoms may not infringe upon the rights of others. By contrast, testamentary freedom permits a decedent to infringe upon a natural right to inherit. In this way, the "deadhand" controls her beneficiaries. In many instances, the law limits deadhand control, such as with the Rule Against Perpetuities<sup>14</sup> and the provision of an elective share for surviving spouses.<sup>15</sup> Yet, the law fully allows the deadhand to pervade the lives of beneficiaries without ever

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11. Adam Dayan, *The Kids Aren't Alright: An Examination of Some of the Flaws in American Law Regarding Child Disinheritance, the Reasons that Children Should be Protected, and a Recommendation for the United States to Learn from the Australian Model that Protects Children Against Disinheritance*, 17 CARDOZO J. INT'L & COMP. LAW 375, 402 (2009).

12. FRIEDMAN, *supra* note 2, at 46.

13. *Id.* at 19.

14. The Rule Against Perpetuities invalidates testamentary dispositions that go beyond a life in being plus 21 years. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

15. FRIEDMAN, *supra* note 2, at 125.

having to face the life-altering consequences and family disruption that can ensue.<sup>16</sup>

Natural law, as generally understood, stands at the intersection of law and morality. It answers the question of *what is the law, as it ought to be?*<sup>17</sup> Natural law is the theory that law is fixed and exists independently of what the law may presently be.<sup>18</sup> It is the law of nature as distinguished from the law of man.<sup>19</sup> Philosophers use reason to discover natural law and have at times found conflict between natural law and man-made, or positive, law.<sup>20</sup> For example, the American Revolution was justified in terms of natural law.<sup>21</sup> The Revolutionaries argued that British law (man-made or positive law) infringed natural law, individuals' "self-evident," "unalienable" rights, "endowed by their Creator."<sup>22</sup>

Legal philosophers resolve conflict between natural and positive law by identifying the different objectives between the two philosophies. As stated, philosophers studying natural law use reason to find law as fixed in nature,<sup>23</sup> whereas lawmakers create positive law by considering the common good to achieve the best societal outcome.<sup>24</sup> This note endorses the right to inherit as natural law, consistent with the views of John Locke and the practices of other industrialized countries.

The law presently allows testamentary freedom to override the natural right of inheritance by permitting a testator to disinherit their children. The natural right of inheritance should not yield to testamentary freedom. Instead, the law should reconcile both testamentary freedom and the right to inherit through forced heirship whereby children are guaranteed a portion of their parents' estates.

## II. FREEDOM OF TESTATION

The freedom to give property to another or to withhold it, known as testamentary freedom, is a fundamental tenet in American estate law. Courts generally respect testamentary freedom, subject to a few rules. A sampling

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16. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 13 (1992).

17. RAYMOND WACKS, *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION* 1 (Oxford University Press 2006).

18. *Id.* at 2.

19. *Id.* at 3.

20. *Id.*

21. *Id.* at 5.

22. WACKS, *supra* note 17; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

23. WACKS, *supra* note 17, at 7.

24. *Id.* at 4.

of such rules include the requirement of paying estate taxes, the requirement of repaying debts to creditors, spousal rights to half or a third of an estate, and the access rights of pretermitted (omitted or unknown) children.<sup>25</sup> Every jurisdiction opens certain access to portions of an estate even if the decedent's intention was to block access.<sup>26</sup> In spite of these protections, one large group can be completely excluded from an estate – children. It is legal and quite easy for a testator to leave nothing to some or all of her children. This note argues that the law should recognize the right to inherit as a natural right and should protect children of all ages from disinheritance.

Justifications for testamentary freedom are based on the decedent's prerogative.<sup>27</sup> Philosopher and progenitor of American property law John Locke recognized a natural right to bequeath.<sup>28</sup> The State of California has expressed that the law should preserve decedent's intent, as it is *her* property.<sup>29</sup> Medieval jurist Henry de Bracton argued that testamentary freedom spurs productivity and saving.<sup>30</sup> Many social scientists agree that without testamentary freedom, wealth maximization will shrink as persons choose to accumulate less.<sup>31</sup> Testamentary freedom also comports with popular attitudes.<sup>32</sup> At the same time, significant portions of society feel that parents generally intend to leave an inheritance for their children and that disinheritance is immoral.<sup>33</sup>

Disinherited children often opt to challenge the validity of a will; such a challenge is their only remedy.<sup>34</sup> Will challenges present many difficulties, including the cost of litigation, bitterness between surviving family members, and obstacles in the law itself. Disinherited children have had some success in gaining access to an estate with claims such as lack of capacity,<sup>35</sup> undue influence,<sup>36</sup> or fraud.<sup>37</sup> Such children have found that it

25. *Estate of Smith*, 9 Cal. 3d 74, 81-82 (Cal. 1973).

26. Deborah A. Batts, *I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1221-22 (1990).

27. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 16 (Wolters Kluwer Law & Business 2017).

28. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

29. Revision Report, *supra* note 10, at 364-65.

30. Hirsch, *supra* note 16, at 8.

31. *Id.*

32. *Id.* at 14.

33. Batts, *supra* note 26, at 1224.

34. SITKOFF & DUKEMINIER, *supra* note 27, at 564.

35. *See, e.g.*, *Gregge v. Hugill*, 1 Cal. App. 5th 561 (Cal. Ct. App. 2016) (grandson petitioning to determine validity of grandfather's trust containing a no contest clause and alleging undue influence).

36. *See, e.g.*, *Lintz v. Lintz*, 222 Cal. App. 4th 1346 (Cal. Ct. App. 2014) (children alleging undue influence against widow).

37. *See, e.g.*, *David v. Hermann*, 129 Cal. App. 4th 672 (Cal. Ct. App. 2005) (older sister

helps to appeal to the judiciary's sense of fairness and appeal to sympathies.<sup>38</sup> Judges and juries are more likely to find undue influence or incapacity if the testator's dispositions seem unfair.<sup>39</sup>

To keep disinheritances airtight and enforceable, many testators and estate planning attorneys utilize no-contest clauses as disinheritance devices.<sup>40</sup> These clauses condition a gift on the beneficiary's decision to not contest the will or trust.<sup>41</sup> Otherwise, the beneficiary risks forfeiture. An example of such a clause is: *If anyone challenges this will, they will receive \$1*. An effective no-contest clause deters potential will challenges by baiting beneficiaries with a sufficient benefit, or else the contestant has nothing to lose.<sup>42</sup> No-contest clauses are enforceable in most states and by the Uniform Probate Code ("UPC").<sup>43</sup> In California, no-contest clauses are applied conservatively because the law disfavors forfeiture and because courts see it as a harsh penalty.<sup>44</sup> No-contest clauses are even enforceable against surviving spouses who assert rights contrary to the decedent's estate plan.<sup>45</sup>

California's Law Revision Commission cites several reasons for the state's enforcement of no-contest clauses. It cites public policies including interests in finality, discouraging litigation, and respecting the testator's intent.<sup>46</sup> There are also interests in the right of a citizen to have his claim determined by law and guarding against abuse of elderly testators and related opportunism.<sup>47</sup> These public policies facilitate the fair and efficient administration of estates and protect testamentary freedom.<sup>48</sup> Practically, the state seeks to avoid the cost, delay, and public exposure involved in litigation over the estate.<sup>49</sup> Though no-contest clauses are used to disinherit children,<sup>50</sup> California cites "discord between beneficiaries"<sup>51</sup> as one of its

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alleging claims of undue influence and fraud against younger sister).

38. SITKOFF & DUKEMINIER, *supra* note 27, at 564.

39. Foster, *supra* note 5, at 210-12.

40. See, e.g., *Burch v. George*, 7 Cal. 4th 246, 265 (Cal. 1994).

41. See, e.g., *Tunstall v. Wells*, 144 Cal. App. 4th 554, 562 n.6 (Cal. Ct. App. 2006).

42. SITKOFF & DUKEMINIER, *supra* note 27, at 302-03.

43. *Id.* at 303.

44. Revision Report, *supra* note 10, at 369-70; See also CAL. PROB. CODE §§ 21303, 21304 (West 2011).

45. *Burch*, *supra* note 40, at 267-68.

46. Revision Report, *supra* note 10, at 364-68. See also CAL. PROB. CODE § 21310(c) (West 2011).

47. See *Lobb v. Brown*, 208 Cal. 476, 490-92 (1929).

48. Revision Report, *supra* note 10, at 395.

49. *Id.* at 364-366, 389.

50. See *infra* notes 72-125.

51. *Gregge*, 1 Cal. App. 5th at 571 (citing *Estate of Schuster*, 163 Cal. App. 3d 337, 342 (Cal. Ct. App. 1984)).

justifications for enforcing the clauses.<sup>52</sup> Despite the lofty goals articulated by the state and its courts, the disinheritance of children carried out by no-contest clauses undermines state interests and destroys family ties.

Despite a testator's best efforts to keep her instruments airtight, there are some loopholes in the law. The UPC and most states, including California, deem no-contest clauses ineffectual if the beneficiary had reasonable or probable cause to contest the will.<sup>53</sup> California courts have yet to develop a full body of case law regarding what constitutes probable cause. Very few cases have successfully challenged wills with probable cause, which would grant a disinherited child access to an estate.<sup>54</sup> In these rare successful will challenges, the entire instrument falls, including the no-contest clause.<sup>55</sup> Unfortunately for beneficiaries, California case law contains plenty of failed will challenges that trigger enforcement of the no-contest clause resulting in a penalty that worked forfeiture on the beneficiary.<sup>56</sup> Even though we have only seen enforcement of no-contest clauses occur in the specific event of a failed will challenge, the clauses are extremely effective at dissuading dissatisfied beneficiaries from a will challenge, especially if a generous gift is dangling in the estate.<sup>57</sup>

Because case law provides so little guidance for what constitutes the probable cause exception to a no-contest clause that avoids triggering a penalty, dissatisfied beneficiaries have tried several strategies. Undue influencers and other bad actors have even tried to take advantage of no-contest clauses to keep their access to an estate.<sup>58</sup> No-contest clauses deter will challenges and thus shield fraud, duress, menace, or undue influence from judicial review.<sup>59</sup> The probable cause exception to a no-contest clause allows courts to hear legitimate challenges while protecting testamentary intent. A disinherited beneficiary who can point to an undue influencer who interfered with an inheritance may have a legal basis to institute a will challenge without triggering the no-contest clause.<sup>60</sup>

Other beneficiaries have successfully invalidated vague no-contest clauses altogether. In California, courts disregard generic no-contest

52. Revision Report, *supra* note 10, at 365.

53. SITKOFF & DUKEMINIER, *supra* note 27, at 303; *see also* UPC §§ 2-517, 3-309.

54. *See infra* notes 117-120.

55. Cal. Prac. Guide: Probate, Litigation (b) (Rutter Group 2019) ¶ 15:85.

56. *See infra* notes 107-116.

57. *Estate of Ferber*, 66 Cal. App. 4th 244 (Cal. Ct. App. 1998); *see also Wells*, 144 Cal. App. 4th at 562 n.6.

58. Revision Report, *supra* note 10, at 388.

59. *Id.* at 362.

60. *Gregge*, 1 Cal. App. 5th at 570.



clauses.<sup>61</sup> The clauses must be drafted with particularity and specificity regarding who is covered and what type of actions apply.<sup>62</sup> Courts require the testator to clearly indicate an intention to disinherit, “by express words or necessary implication.”<sup>63</sup> A disinherited child may consider an argument that the no-contest clause is insufficient and fails to be sufficiently clear in identifying to whom it applies.

This note argues that the use of no-contest clause is proper in two instances: to protect against poaching from strangers and to avoid litigating complicated ownership issues.<sup>64</sup> Many testators’ financials and assets become intermingled. It can be administratively difficult to reorganize and re-characterize ownership of assets.<sup>65</sup> Real estate may be mortgaged. Partnerships and limited liability corporations may possess ownership. Co-tenancies and gifts may be unaccounted for. Community property and separate property may not be clearly delineated. One revenue stream may be the unknown source of funds for another person or venture. The purpose of no-contest clauses should be to guard against opportunism and poorly organized estates.<sup>66</sup> Their use should be limited to shielding from poachers and minimizing expense and delay.

A high-profile example of such a scenario is in the case of Anna Nicole Smith. The attorney who drafted Anna Nicole Smith’s testamentary no-contest clause admitted in court proceedings that he wrote it too broadly.<sup>67</sup> The no-contest clause stated that no one other than Anna’s living son would inherit.<sup>68</sup> Sadly, Anna’s son passed away after the creation of the will, and Anna never updated the will. According to Anna’s attorney, the purpose of the no-contest clause was to guard against claims on Anna’s estate by her estranged mother or others.<sup>69</sup> However, this broad no-contest clause had the practical effect of disinheriting Anna’s newborn daughter.<sup>70</sup> The court ultimately decided that certain ambiguities in the trust would favor the newborn child.<sup>71</sup> Thanks to the judge, Anna’s daughter was the sole beneficiary of Anna’s estate.

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61. Aviles v. Swearingen, 16 Cal. App. 5th 485, 492 n.4 (Cal. Ct. App. 2017).

62. *Id.*

63. SITKOFF & DUKEMINIER, *supra* note 27, at 581.

64. *Ferber*, *supra* note 57.

65. Revision Report, *supra* note 10, at 367-68.

66. Donkin v. Donkin, 58 Cal. 4th 412, 425 (Cal. 2013).

67. SITKOFF & DUKEMINIER, *supra* note 27, at 582.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

### A. No-Contest Clauses as Disinheritance Devices

Challenging a will containing a no-contest clause is risky. A court may find that a contestant brought a contest without probable cause and thus triggered the no-contest clause. The following cases, all from California Courts of Appeal, demonstrate scenarios in which the court found that beneficiaries did not bring a *direct* contest and, therefore, that they did not risk triggering the no-contest clause.

#### 1. Challenges Found to Be Indirect Contests

In *Donkin v. Donkin*,<sup>72</sup> trust beneficiaries petitioned the court to interpret an ambiguous trust amendment.<sup>73</sup> The court held that the beneficiaries' challenge did not constitute a direct contest. The court determined that the petition was only an effort to interpret an amendment in the face of suspected misconduct by the successor trustees.<sup>74</sup> The court viewed this type of inquiry as consistent with public policy and reasoned that it was critical that the beneficiaries were not challenging the execution of the trust amendment, or alleging that it was void, but only seeking to clarify how the trust amendment should be applied because of an ambiguous clause.<sup>75</sup> The court held that even arguing in favor of one interpretation over a different interpretation did not violate the no-contest clause.<sup>76</sup> *Donkin* stands for the proposition that requests to interpret or clarify an instrument will not trigger the no-contest clause and result in disinheritance.

In *Johnson v. Greenelsh*,<sup>77</sup> the court held that a beneficiary challenging a testator's mental capacity to exercise rights under a trust was not a direct contest. The beneficiary petitioned to compel arbitration challenging the testator's withdrawal of trust assets and the appointment of successor trustee. The court found that the beneficiary did not seek to thwart the estate plan<sup>78</sup> but sought to determine a settlor's capacity.<sup>79</sup> The court reasoned that the contest was not directed at the instrument itself but at separate documents appointing the successor trustee and the memorandum notifying the trustees of testator's withdrawal of assets.<sup>80</sup> The court pointed out that

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72. *Donkin*, 58 Cal. 4th at 425.

73. *Id.* at 415.

74. *Id.* at 433-34.

75. *Id.* at 434-35.

76. *Id.* at 437.

77. *Johnson v. Greenelsh*, 47 Cal. 4th 598, 604 (Cal. 2009).

78. *Id.* at 599.

79. *Id.*

80. *Id.*

even though the result of this successful indirect contest would mean that the beneficiaries would receive a larger portion of the trust estate, as long as it was consistent with what was set forth in the trust and consistent with trustee's fiduciary obligations, it was not a direct contest.<sup>81</sup> Because this challenge to restore property to the survivor's trust was based on a lack of capacity claim and not a challenge to unravel the decedent's plan, the court held that it did not violate the no-contest clause.<sup>82</sup> *Johnson v. Greenelsh* demonstrates that a successful challenge to documents other than the trust itself does not necessarily trigger the no-contest clause, even if beneficiaries may receive a larger portion of the estate.

In *Estate of Ferber*,<sup>83</sup> the court declared the right of beneficiaries to challenge the actions of the fiduciaries without violating the no-contest clause, as long as the challenges were not frivolous.<sup>84</sup> The court reasoned that a no-contest clause that sought to insulate the executor completely from removal in order to guard against vigilante beneficiaries violated the public policy behind court supervision of probate matters and overseeing errors or misconduct in execution.<sup>85</sup> The court determined that a no-contest clause was unenforceable against valid objections to the fiduciary's accounting or valid attempts to remove the fiduciary.<sup>86</sup> *Ferber* stands for the proposition that courts favor reasonable supervision of fiduciaries.

In *Estate of Dayan*,<sup>87</sup> the court held that defendant had not violated the no-contest clause because he did not directly challenge the alleged invalidity of a protected instrument.<sup>88</sup> He only contended that he was entitled to a one-third interest in the real property due to a quitclaim deed conveyed prior to the execution of the will.<sup>89</sup> The court reasoned that the gravamen of defendant's action was to enforce rights, not to invalidate any portion of the will.<sup>90</sup> The court found that the opposition to the petition for an order to establish that testator's estate had title to real property in its entirety was not a direct contest.<sup>91</sup> The court concluded that the testator did not intend for a will provision that directed her executor to transfer "all title, rights and

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81. *Id.* at 607-09.

82. *Johnson*, 47 Cal. 4th 598 at 609.

83. *Ferber*, *supra* note 57.

84. *Id.* at 254-55.

85. *Id.* at 253.

86. *Id.* at 255.

87. *Estate of Dayan*, 5 Cal. App. 5th 29 (Cal. Ct. App. 2016).

88. *Id.* at 721.

89. *Id.*

90. *Id.*

91. *Id.*

interests” in the real property to apply to defendant’s one-third interest.<sup>92</sup> We learn here that the court will permit questions of title and ownership to proceed without violating the no-contest clause.

The preceding cases demonstrate the kinds of challenges, indirect contests, permitted by California Courts of Appeal without triggering the no-contest clause. Challenges that do not trigger the no-contest clause include 1) an interpretation of a trust amendment, 2) attacks on documents other than the instrument itself, 3) fiduciary supervision, and 4) title and ownership disputes. However, these successful indirect contests may not go far enough in granting a disinherited beneficiary access to an estate.

As discussed, no-contest clauses are generally enforceable; but with some limitations.<sup>93</sup> The majority rule, as codified in the UPC and recognized in California,<sup>94</sup> is the probable cause exception.<sup>95</sup> The exception limits enforcement of no-contest clauses to *direct contests brought without probable cause*.<sup>96</sup> Under this exception, a beneficiary avoids the penalty in the no-contest clause if there was probable cause to institute the direct contest.<sup>97</sup> Whether there has been a direct contest<sup>98</sup> depends upon the circumstances of the case and the language used in the clause. As seen above, a court may find that a particular challenge was actually an indirect contest,<sup>99</sup> which will not trigger the clause.<sup>100</sup> The standard for a finding of probable cause is if at the time of filing, 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.<sup>101</sup>

If a disinherited beneficiary takes her chances to challenge a testator’s will, the goal is to do so without triggering the no-contest clause. An unsuccessful direct contest contains no probable cause,<sup>102</sup> results in

92. *Dayan*, 5 Cal. App. 5<sup>th</sup>.

93. Revision Report, *supra* note 10, at 374.

94. CAL. PROB. CODE § 21311(a)(1) (West 2010).

95. Revision Report, *supra* note 10, at 374.

96. See § 21311(a); see also *Donkin*, 58 Cal. App. 4th at 412.

97. LAWRENCE H. AVERILL, JR. UNIFORM PROBATE CODE IN A NUTSHELL 197 (5th ed., 2001).

98. A “direct contest” is defined as a “contest that alleges the invalidity of an instrument... or any of the terms...based on any specified grounds including lack of capacity or undue influence.” Revision Report, *supra* note 10, at 401.

99. An indirect contest is an action (other than a direct contest) that attempts to invalidate an instrument or its term(s). CAL. PROB. CODE § 21300(c) (West 2010).

100. *Donkin*, 58 Cal. App. 4th at 426.

101. The law applies to any instrument, whenever executed, which became irrevocable on or after January 1, 2001. CAL. PROB. CODE § 21311(b) (West 2010).

102. *Alvarez v. Superior Court*, 154 Cal. App. 4th 642, 653 n.4 (Cal. Ct. App. 2007).

enforcement of the no-contest clause,<sup>103</sup> and certainly triggers forfeiture. A disinherited beneficiary wants to avoid this scenario. Conversely, a successful direct contest certainly constitutes probable cause thus entitling the beneficiary to a share<sup>104</sup> and avoiding the no-contest clause and any forfeiture. The law is clear that indirect contests do not trigger no-contest clauses.<sup>105</sup> The cases of *Donkin*, *Johnson*, *Ferber*, and *Dayan* demonstrate what constitutes an indirect contest.<sup>106</sup> The probable cause exception applies only to successful direct contests. A direct contest brought with probable cause would avoid triggering enforcement of a no-contest clause, thus granting a disinherited beneficiary access to an estate from which she was improperly denied the natural right to inherit. We proceed to explore direct contests and what constitutes probable cause in California Courts of Appeal.

## 2. Challenges Found to be Direct Contests with No Probable Cause

Direct contests brought without probable cause are exactly the type of challenge that guarantees that the no-contest clause will be triggered. The following cases illustrate judicial sensitivity towards a perceived effort to frustrate the decedent's wishes, or testamentary intent. In each of these cases, the court found that the beneficiary's challenge was a direct contest brought without probable cause, which would trigger a no-contest clause.

In *Urick v. Urick*,<sup>107</sup> the court engaged in a full probable cause analysis in the context of deciding a motion to strike. Brother-beneficiary conceded that his mother had handwritten a note disinheriting him but alleged that she did not later sign amendments prepared by an attorney.<sup>108</sup> He alleged that his mother had reinstated her trust in full with her son as beneficiary.<sup>109</sup> After the mother's death, sister-beneficiary filed a reformation petition to remove brother-beneficiary based on information that she did not have at that time but hoped to find in communications revealing mother's testamentary intent.<sup>110</sup> The court rejected the sister's challenge and said that the allegations fell short as a matter of law. The court found that sister-beneficiary lacked a reasonable basis to believe the relief she requested would be granted based on the information available to her or after

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103. *Donkin*, 58 Cal. App. 4th at 426; *see also* CAL. PROB. CODE §§ 21311, 21315 (West 2010).

104. *Id.*

105. Revision Report, *supra* note 10, at 395.

106. *See supra*, notes 72-92 and accompanying discussion.

107. *Urick v. Urick*, 15 Cal. App. 5th 1182 (Cal. Ct. App. 2017).

108. *Id.* at 1197-98.

109. *Id.*

110. *Urick*, 15 Cal. App. 5th at 1198.

discovery.<sup>111</sup> The court reasoned that the sister did not meet the burden for relief, even if the probate court was likely to eliminate brother-beneficiary's interest.<sup>112</sup> *Urick* illustrates that one must have reasonable knowledge of facts and relief for the court to permit a will challenge.<sup>113</sup>

In *Schwartz v. Schwartz*,<sup>114</sup> the court held that a trust beneficiary's petition for an order directing a trustee to divide the property of a survivor's trust equally between himself and beneficiary under the terms of the trust violated the no-contest clause. The court reasoned that the beneficiary triggered the clause through her failure to give any force or effect to a handwritten change to the settlor's will. The court found that the no-contest clause covered any attempt to void the instrument.<sup>115</sup> The court found that the clear purpose of the beneficiary's petition was to defeat testamentary intent by nullifying the handwritten note and distributing the trust in a way not contemplated or specified in settlor's estate plan.<sup>116</sup> *Schwartz* is illustrative of the court's willingness to penalize beneficiaries who challenge valid writings.

*Urick* and *Schwartz* are worst-case scenarios for disinherited beneficiaries. Disinherited beneficiaries must avoid attempts to thwart an estate plan. Further, disinherited beneficiaries must only challenge instruments if there is a reasonable basis of knowledge on which to proceed.

### 3. Challenge Found to be Direct Contest with Probable Cause

As discussed, a beneficiary's goal is to avoid triggering the no-contest clause by bringing a direct contest *with* probable cause. In *Doolittle v. Exchange Bank*,<sup>117</sup> a beneficiary commenced an action to invalidate two trust amendments on the grounds of undue influence and lack of testamentary capacity.<sup>118</sup> The court found that the trust directive ordering trustee to defend against challenges at the expense of the trust did not penalize the beneficiary. The court reasoned that the trust directive was not an element of trust's no-contest clause unless the contest was brought

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111. *Id.*

112. *Id.*

113. Here, the procedural posture in reviewing the motion to strike did not yet trigger the no contest clause, but the court held that the challenger made a prima facie showing that the petition lacked probable cause; *see id.* at 1197.

114. *Schwartz v. Schwartz*, 167 Cal. App. 4th 733 (Cal. Ct. App. 2008).

115. *Id.* at 744-45.

116. *Id.*

117. *Doolittle v. Exchange Bank*, 241 Cal. App. 4th 529 (Cal. Ct. App. 2015).

118. *Id.* at 544-45.

without probable cause.<sup>119</sup> While the directive reduced the beneficiary's share if she prevailed in litigation, the court stated that it had the same effect on others if the beneficiary did not prevail.<sup>120</sup> Here we learn that a court may look to whether the challenging beneficiary will benefit from the litigation. A finding of undue influence or lack of testamentary capacity certainly constitutes probable cause.

### *B. Restraints on Testamentary Freedom*

As shown, disinherited beneficiaries, including children, have barely any roadmap to avoid triggering the no-contest clause. The deadhand is strong against children. However, certain groups cannot be disinherited because of guaranteed statutory access to an estate's funds.

Surviving spouses are protected from disinheritance with a guaranteed right to one-third or one-half of the estate.<sup>121</sup> Some states, such as California, provide protection for omitted (i.e., unknown or unborn) children of testators through "preemption" statutes.<sup>122</sup> Louisiana is the only state that protects living children up to age 24 and all disabled children from disinheritance.<sup>123</sup> The state (through taxes) and creditors are guaranteed what is owed from an estate.<sup>124</sup> These protections impose significant restraints on testamentary freedom by preventing the testator from excluding spouses, omitted children, the state, and creditors from an estate. Yet, no state protects all children from disinheritance. Children who are expressly given nothing are largely left without a remedy.<sup>125</sup> All children, regardless of age or need, should be added to the list of groups guaranteed access to an estate with a right of inheritance for the same reasons that guarantees exist for surviving spouses.

Surviving spouses have widespread protection from disinheritance. All separate property<sup>126</sup> states except Georgia<sup>127</sup> have enacted statutes to protect surviving spouses from disinheritance.<sup>128</sup> Spousal protections against

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119. *Id.* at 544.

120. *Id.* at 537.

121. Batts, *supra* note 26, at 1246-48.

122. CAL. PROB. CODE § 21620 (West 2019).

123. LA. CIV. CODE ANN. art. 1493. Louisiana law is influenced by the Napoleonic Codes of 1825 of the French civil system, which included protections against disinheritance of children. Now, Louisiana protects children up to age twenty-four as well as disabled children from disinheritance.

124. Dayan, *supra* note 11, at 385.

125. FRIEDMAN, *supra* note 2, at 42.

126. In some common-law states, property titled to one spouse or acquired by one spouse individually during marriage. See *Separate Property*, BLACK'S LAW DICTIONARY.

127. SITKOFF & DUKEMINIER, *supra* note 27, at 32.

128. FRIEDMAN, *supra* note 2, at 18-19.

disinheritance are built into the community property system, like California.<sup>129</sup> In separate property states, the common law reflects the notion that a husband is responsible for finances and that a wife's responsibility is domestic.<sup>130</sup> Community property law is based on the theory of an economic partnership in which half of what is acquired during marriage also belongs to the spouse.<sup>131</sup> In California, if one spouse dies without a will, the surviving spouse can inherit all community property.<sup>132</sup> If there is a will, virtually all states provide that a spouse who is dissatisfied with her provision may opt for an elective share of either one-third or one-half of the estate.<sup>133</sup> Spouses are very well protected in the law.

The law protects spouses in several factual scenarios. The law supposes that surviving spouses contribute to the acquisition of property,<sup>134</sup> even if no tangible contributions were made at all. The protection may ensure that spouses are entitled to any assets that are titled in the testator's name alone.<sup>135</sup> The testator may have minor children left to be cared for by the surviving spouse. The surviving spouse may have relied solely on the testator's income and not have any finances of their own. Through statutes, each state ensures that surviving spouses are safe from any unfair treatment by the decedent, whether justified or rashly decided.

These factual scenarios may also exist for children of testators, but disinherited children are not provided with the guarantee of any share.<sup>136</sup> Adult children may have relied on parents for financial support or even provided care to the parent. Adult children may have been supporting the parent financially without any formal titled ownership. Adult children may have been born of a previous or subsequent partner and suffered unfair treatment. A disinherited child may be victim to a parent's rash decision-making or harsh punishment. Family members may simply be unable to make amends. Arguably, a child's interest may be stronger than that of a surviving spouse.<sup>137</sup> Spouses voluntarily enter a marriage and have the potential to remarry while children do not choose their parents.<sup>138</sup> All children, regardless of age, should be protected from disinheritance just as

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129. *Id.* at 16.

130. *Id.*

131. *Id.*

132. CAL. PROB. CODE § 100(a) (West 2017).

133. *Donkin*, *supra* note 66, at 431.

134. *Dayan*, *supra* note 11, at 384.

135. SITKOFF & DUKEMINIER, *supra* note 27, at 542; UPC Art. II, Part 2, gen. cmt. (1990, rev. 2008).

136. *Foster*, *supra* note 5, at 220.

137. *Batts*, *supra* note 26, at 1199-1200.

138. *Id.*



spouses are.<sup>139</sup>

Most states and the UPC<sup>140</sup> prevent disinheritance of unknown children and children born after the decedent's death through pretermitted heir statutes.<sup>141</sup> These statutes protect against unintentional disinheritance in case of mistake or oversight.<sup>142</sup> Similar statutes should be enacted to protect living children, regardless of age, from all disinheritance, whether intentional or unintentional. This type of forced share would account for any unfair circumstances that may arise and would preserve the natural right to inherit.

In Louisiana, where the French Civil Code was adopted, a testator may not disinherit a child that is a forced heir from an estate unless an exception applies.<sup>143</sup> "Forced heir" is defined narrowly as a child under the age of 24 or physically or mentally incapacitated.<sup>144</sup> Louisiana allows for disinheriting a forced heir only for specific statutory exceptions such as violence, commission of a crime, or no contact with the parent without just cause for two years during adulthood.<sup>145</sup> The forced share is one-fourth of the estate for one child and one-half of the estate for two or more children.<sup>146</sup> Louisiana's law is based on the right idea that minor and young adult children should be protected from disinheritance, but it does not go far enough. Louisiana's law should be expanded to include children of all ages and adopted in other jurisdictions.

American inheritance law encourages those who have earned real and personal property during their lifetimes to provide for their family after death.<sup>147</sup> In light of the social changes that predominate modern American society, including fewer marriages, blended families, single-parent households, and same sex marriages,<sup>148</sup> the traditional family paradigm may no longer be a relevant framework on which to base inheritance law.<sup>149</sup> Social norms have changed and many desire to leave property and assets to

139. Batts, *supra* note 26, at 1223.

140. UNIF. PROBATE CODE § 2-302 (2010).

141. Batts, *supra* note 26, at 1223.

142. Foster, *supra* note 5, at 220.

143. LA. CIV. CODE ANN. art. 1494 (1996).

144. Katherine Shaw Spaht, et. al., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409, 416 (1990).

145. LA. CIV. CODE ANN. art. 1621(a) (2012).

146. LA. CIV. CODE ANN. art. 1495 (1996).

147. Foster, *supra* note 5, at 205-206.

148. Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family* 42 ACTEC L.J. 341, 343-44 (2017); *see also* SITKOFF & DUKEMINIER, *supra* note 27, at 90.

149. Wright, *supra* note 148, at 344; Foster, *supra* note 5, at 234-35; SITKOFF & DUKEMINIER, *supra* note 27, at 64.

individuals outside of the traditional family (i.e. stepchildren, caregivers, charity, friends, etc.).<sup>150</sup> As a result, the parent-child relationship is left vulnerable to alienation and disaffection.<sup>151</sup> Children born out of wedlock, children of one-parent households, and children of previous marriages are especially at risk of disinheritance<sup>152</sup> if a parent no longer has, or perhaps never had, any role in the child's life.<sup>153</sup> Non-custodial parents may not consider the child "a natural object of their bounty."<sup>154</sup> Some children, due to circumstances outside of their control, may not have had the ability, opportunity, or invitation to nurture a relationship with a parent. Parents may have never had the courage to develop a relationship with their children. In light of the testamentary freedom to easily disinherit children,<sup>155</sup> the law should do more to protect vulnerable children as the traditional family paradigm becomes increasingly less relevant.

When deciding to disinherit children, parents may weigh any number of reasons, arbitrary or punitive.<sup>156</sup> The law permits parents to ostracize children because the parent was unmarried to or divorced from the co-parent.<sup>157</sup> Parents may not approve of certain lifestyle choices, unsavory behavior, substance abuse, or other health needs. Parents may perceive the child as financially secure not in need of an inheritance.<sup>158</sup> Parents may also have concerns about potential misuse, mismanagement, debt, poor advice, or waste.<sup>159</sup> It is questionable whether many children with inheritances truly *deserve* to inherit; yet they still do. Disinheritance should not be used to punish or express disapproval of the child for misdeeds, disappointment, or for circumstances outside of the child's control.

There are several property management options that address such paternalistic concerns without resorting to disinheritance.<sup>160</sup> Any of these same concerns can also apply to spouses, yet surviving spouses are legally entitled to a significant portion of an estate without question. Spouses have the potential to remarry or squander an inheritance. Stepparents may

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150. Foster, *supra* note 5, at 245.

151. Batts, *supra* note 26, at 1201.

152. Wright, *supra* note 148, at 354.

153. FRIEDMAN, *supra* note 2, at 13.

154. "Natural object of the decedent's bounty" is a popular phrase in succession law referring to children of testators. FRIEDMAN, *supra* note 2, at 83.

155. FRIEDMAN, *supra* note 2, at 12.

156. Wright, *supra* note 148, at 368.

157. Foster, *supra* note 5, at 214-15.

158. Wright, *supra* note 148, at 368.

159. Batts, *supra* note 26, at 1229.

160. Instead of disinheritance, decedent should opt for guardianship, conservatorship, custodianship, or trusteeship. See SITKOFF & DUKEMINIER, *supra* note 27, at 125-27.

completely disavow children of the decedent. Children should not have to earn an inheritance, nor should they lose an inheritance for bad behavior or circumstances outside of their control. A child's natural right to inherit should not yield to arbitrary and unfair exercises of testamentary freedom.

Disinheritance can take a psychological and emotional toll on adult children.<sup>161</sup> Besides the financial impact, an inheritance is a connection to a loved one after death.<sup>162</sup> Even when the parent and child were not very close, disinheritance can be very difficult to come to terms with.<sup>163</sup> A disinherited heir may feel hurt, treated unfairly, and betrayed.<sup>164</sup> A will challenge may be the only recourse for these emotional injuries and personal rejection, especially when other siblings, distant relatives, friends, and others are left with gifts.<sup>165</sup>

Instead of permitting parents to disinherit children deemed as unworthy, states could adopt universally agreeable rules that govern who should be barred from inheritance.<sup>166</sup> Every jurisdiction has adopted slayer laws, which prohibit a person who has killed another from inheriting from his victim.<sup>167</sup> California disinherits anyone guilty of "physical abuse, neglect, or fiduciary abuse of an... older or dependent adult."<sup>168</sup> The UPC bars a parent from inheriting from a child whose parental rights could have been terminated.<sup>169</sup> Such examples may be universally agreeable reasons to disinherit children.

### III. NATURAL RIGHT OF INHERITANCE

Philosopher and progenitor of American property law John Locke recognized the right to bequest<sup>170</sup> and an unqualified, natural right to unlimited inheritance<sup>171</sup> in his general theory of property set forth in the *Two Treatises*.<sup>172</sup> American property law recognizes the breadth of the right to bequest as testamentary freedom.<sup>173</sup> However, the right to inherit is only

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161. Foster, *supra* note 5, at 242.

162. Foster, *supra* note 5, at 243.

163. *Id.*

164. Nelson v. Daniels, 1995 WL 535200 (Ohio App. Sept. 5, 1995).

165. SITKOFF & DUKEMINIER, *supra* note 27, at 564.

166. Batts, *supra* note 26, at 1260.

167. SITKOFF & DUKEMINIER, *supra* note 27, at 127.

168. FRIEDMAN, *supra* note 2, at 33.

169. UNIF. PROBATE CODE § 2-114 (2010).

170. Leslie Kendrick, *The Lockean Rights of Bequest and Inheritance*, 17 LEGAL THEORY 145, 146 (2011).

171. *Id.* at 145.

172. LOCKE, *supra* note 28.

173. John C. P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful*

recognized in intestate law.<sup>174</sup> American law is unique in its regard of the right to inherit as subordinate to a decedent's testamentary freedom.<sup>175</sup> Locke's unqualified, unlimited inheritance theory remains at odds with the permitted disinheritance of children in American law.<sup>176</sup>

In dicta, the Supreme Court has acknowledged the right to inherit as a natural right.<sup>177</sup> Yet, case law continually treats inheritance as a statutory right and privilege.<sup>178</sup> Though the regulation and taxation of estates is inarguably legal positivism, there is no basis to conclude that the inheritance right itself is man-made.<sup>179</sup> The right to inherit is recognized by Locke and predates the statutory right to testamentary freedom.<sup>180</sup> In all states and the UPC, the default rule for testators who die intestate<sup>181</sup> is that each and every child of a testator has an inheritance right.<sup>182</sup> Intestate law seeks to reflect the probable intent of a decedent by creating majoritarian default rules.<sup>183</sup> Intestate law's recognition of the right to inherit is strong evidence that it is indeed a natural right.<sup>184</sup> As the law stands, a child's natural right to inherit can be infringed by testamentary freedom. Both natural rights recognized by Locke, the rights to bequest and inherit, should work in tandem<sup>185</sup> and unrestricted by the other.

The American legal system should adopt a forced heirship regime that protects children from disinheritance because such a regime will maintain

*Interference with Inheritance*, 65 STAN. L. REV. 335, 341 (2013).

174. Default rules that govern when someone dies without a will. See SITKOFF & DUKEMINIER, *supra* note 27, at 63.

175. See *Shapira v. Union National Bank*, 315 N.E.2d 825, 828 (Ohio Ct. Com. Pl. 1974).

176. See *Coolidge v. Long*, 282 U.S. 582, 609 (1931) ("Since no one has the natural right either to own property or to transfer to others at his death, but derives the power so to do solely from the state...").

177. *United States v. Perkins*, 163 U.S. 625, 628 (1896)

Though the general consent of the most enlightened nations has, from the earliest historical period, recognized as natural right in children to inherit the property rights of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good.

178. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898) ("the right to take property by devise or descent is the creature of the law, and not a natural right, -- a privilege...").

179. Francis W. Matthys, *Nature of the Right to Inherit Property*, 12 NOTRE DAME L. REV. 7 (1936).

180. *Id.*

181. Default rules that govern when someone dies without a will. See SITKOFF & DUKEMINIER, *supra* note 27, at 63.

182. FRIEDMAN, *supra* note 2, at 4; see also SITKOFF & DUKEMINIER, *supra* note 27, at 79.

183. SITKOFF & DUKEMINIER, *supra* note 27, at 63.

184. Batts, *supra* note 26, at 1224.

185. Dayan, *supra* note 11, at 402.

and perpetuate the social family unit that is traditionally deemed essential for a stable and productive society.<sup>186</sup> Disinheritance can lead to family discord, division, and social and emotional consequences. Popular attitudes suggest that disinheritance is viewed as morally reprehensible and can lead to fracturing of families and fraternal competition.<sup>187</sup> Will challenges cause family relationships to disintegrate based on anger and disappointment that hinge on inheritance.<sup>188</sup> The law should recognize the natural right to inherit for the preservation of family ties.<sup>189</sup>

While the decedent is dead and gone, the survivors must carry out deadhand control while dealing with loss. A dissatisfied heir may file suit to gain access to an estate, causing bitterness and resentment among family, often between surviving spouses and children.<sup>190</sup> Nasty quarrels may ensue, leaving existing relationships broken and hateful.<sup>191</sup> Bad situations involving grief become much worse.<sup>192</sup> Certainly, the testator has earned everything that is being left behind, but he cannot take anything with him. The deadhand should not have complete controlling power. Once a testator dies, the interests of survivors should be prioritized.<sup>193</sup> Forced heirship can dramatically alleviate disputes between family members and limit deadhand influence on family relationships that inevitably go on after the decedent's death.

Forced heirship was “designed to alleviate disharmony among children by limiting inequality that a parent might impose.”<sup>194</sup> When a sibling is disinherited, greed can take hold and loyalties can be challenged.<sup>195</sup> Equality through forced heirship can preserve or jumpstart sibling relationships especially for half-siblings, adopted siblings, and stepsiblings after the death of a parent. The law should enforce a measure of equality among all of a

186. Foster, *supra* note 5, at 204.

187. Batts, *supra* note 26, at 1224.

188. See, e.g., Drake v. Pinkham, 217 Cal. App. 4th 400 (Cal. Ct. App. 2013) (suit between sister versus sister and brother-in-law over mother's trust).

189. FRIEDMAN, *supra* note 2, at 85.

190. See, e.g., Lintz v. Lintz, 222 Cal. App. 4th 1346 (Cal. Ct. App. 2014) (disinherited son and daughter claim elder abuse and undue influence on decedent's third wife who had been advantaged by changes to trust instruments).

191. See, e.g., Urick v. Urick, 15 Cal. App. 5th 1182 (Cal. Ct. App. 2017) (son files petition after sister sought to reform trust to eliminate his share after mother's handwritten note disinherited him).

192. FRIEDMAN, *supra* note 2, at 96.

193. *Id.* at 85.

194. Shaw Spaht, *supra* note 144, at 412.

195. See, e.g., Tunstall v. Wells, 144 Cal. App. 4th 554 (Cal. Ct. App. 2006) (expressing apprehension that sister could collude with any one of her sisters to have that sister contest will and so deny other sisters' gifts and acknowledging such mean-spiritedness as punitive but not illegal or against public policy).

decedent's children.<sup>196</sup>

An inheritance can change the course of a person's life, and forced heirship may encourage individual freedom. Such a windfall has the potential to relieve incredible hardship or spur new opportunities.<sup>197</sup> An inheritance can impact one's ability to buy a home, receive an education, set aside for retirement funds, aid in crisis, pay healthcare costs, fund start-up costs for a business, and much more.<sup>198</sup> Financial resources dictate quality of life by providing structure, creating a livelihood, determining where we reside, and defining our self-image and class in society.<sup>199</sup> Some critics argue that inheritance causes children to lead less productive lives, though increasingly long life expectancies largely rebuff this notion.<sup>200</sup> The idea of a "trust fund kid" is a trope; children are typically middle-aged or older, not silver-spooned twenty-somethings when parents pass away.<sup>201</sup> With the threat of disinheritance always looming, children may tend to appease their parents and take fewer risks in life in order to maintain access to an inheritance. In addition, the motivation to be successful does not derive from an expected inheritance but from the very idea that whatever we earn will be passed down to our children, perhaps out of love or a sense of immortality.<sup>202</sup>

In addition to protecting the natural right to inherit, forced heirship may encourage active land markets. American law fundamentally disfavors restraints on alienation.<sup>203</sup> Public policy dictates that land should always be alienable and available for sale on the market.<sup>204</sup> Forced heirship is likely to result in shared property by multiple owners. Multiple owners may find it cumbersome to collectively manage property. A more vibrant land market may emerge as multiple owners opt to sell instead of dealing with the administrative burden involved in co-tenancies, etc.

A guaranteed right to inherit for children of testators would complement, not conflict, with state interests. So long as children have a recognized right of inheritance from their parents, the state is less compelled to intervene.<sup>205</sup> A forced share would result in fewer will challenges and less

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196. Batts, *supra* note 26, at 1224.

197. Foster, *supra* note 5, at 242-43.

198. *Id.*

199. *Id.*

200. Batts, *supra* note 26, at 1221.

201. *Id.*

202. *Id.* at 1224.

203. SITKOFF & DUKEMINIER, *supra* note 27, at 4.

204. FRIEDMAN, *supra* note 2, at 22.

205. Batts, *supra* note 26, at 1223.

use of judicial resources.<sup>206</sup> State resources can go to other welfare assistance, public education, criminal justice, etc. If a decedent parent has the assets to fund new investments, educational pursuits, home buying, or other ventures, then she should do so before the state.<sup>207</sup> States have an opportunity to serve the public interest of wealth spreading and wealth-preservation<sup>208</sup> by considering the adoption of forced heirship in inheritance law.

Modernized countries around the world statutorily protect children from disinheritance. Forced heirship is widely recognized in civil law countries in Europe as well as Scandinavian countries.<sup>209</sup> In those countries, all descendants are statutorily guaranteed some portion of the decedent's estate.<sup>210</sup> These regimes elevate kinship and promote stability and solidarity among families.<sup>211</sup>

Many countries have family maintenance systems, which differ from forced heirship.<sup>212</sup> In family maintenance systems, popular in the Commonwealth,<sup>213</sup> dissatisfied dependents<sup>214</sup> can initiate court proceedings to resolve conflict and gain access to an estate by appealing to a judge's discretion.<sup>215</sup> Courts in these common law countries have the power to override a decedent's will on equitable grounds.<sup>216</sup> The Australian system uses a variety of factors to ensure that the testator's children are cared for.<sup>217</sup> China's law also encompasses a broad range of conduct that grants rewards, imposes punishment, and permits courts to alter a share by any amount,<sup>218</sup> even to nonfamily members who provided caregiving.<sup>219</sup>

American inheritance law remains in the firm grip of the deadhand.<sup>220</sup> The U.S. is unlikely to ever adopt a system resembling family maintenance largely because it would increase litigation in our probate system.<sup>221</sup> Forced

206. *Id.* at 1225.

207. *Id.* at 1239.

208. Hirsch, *supra* note 16, at 41.

209. Batts, *supra* note 26, at 1211.

210. *Id.*; see also FRIEDMAN, *supra* note 2, at 12.

211. Batts, *supra* note 26, at 1222.

212. *Id.* at 1213-16.

213. The Commonwealth countries are former territories of the British Empire who also have a common law system.

214. FRIEDMAN, *supra* note 2, at 43.

215. Batts, *supra* note 26, at 1216.

216. SITKOFF & DUKEMINIER, *supra* note 27, at 566, 570.

217. Dayan, *supra* note 11, at 404.

218. Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 84 (1998).

219. *Id.* at 100.

220. FRIEDMAN, *supra* note 2, at 44.

221. SITKOFF & DUKEMINIER, *supra* note 27, at 570.

heirship, on the other hand, has the advantage of simplicity and certainty with no judicial burden.<sup>222</sup> A revision to inheritance law recognizing forced heirship would not be as onerous as family maintenance. In fact, states and estate planners adapted to forced share reforms<sup>223</sup> when spouses received elective share protections in the UPC in 1990.<sup>224</sup>

### *A. Alternative Approaches*

Disinherited children may also look to tort law to access an estate. The Restatement (Second) of Torts<sup>225</sup> and almost half of states now recognize intentional interference with an expected inheritance (“IIEI”) as a valid cause of action in tort.<sup>226</sup> An IIEI claim is an alternative to a will contest whereby a beneficiary does not challenge the will. Rather, she seeks to recover damages from a third party for wrongful interference with an expectation of an inheritance.<sup>227</sup>

A child who can pursue relief in tort rather than probate has many advantages. The statute of limitations in tort is longer than in probate.<sup>228</sup> In tort, the clock starts when the plaintiff could have reasonably become aware of the claim instead of at the decedent’s death.<sup>229</sup> Punitive damages are recoverable, the court may permit testimony from interested witnesses, and the plaintiff can bring a claim prior to the parent’s death.<sup>230</sup> The IIEI action provides plaintiffs with a right to jury trial while a judge adjudicates probate claims and may be less sympathetic.<sup>231</sup> An IIEI claim can be brought prior to the parent’s death.<sup>232</sup> Finally, the IIEI tort has a lower standard of a preponderance of the evidence rather than clear and convincing evidence, which applies in probate claims.<sup>233</sup>

There are also significant obstacles hindering a disinherited child from bringing an IIEI claim. An IIEI claim may not be brought if a will contest is available and if there is a remedy in probate that would provide the injured

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222. Batts, *supra* note 26, at 1225.

223. *Id.* at 1227.

224. Lawrence W. Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, U. MICH. J. L. REFORM 1, 1 (2003).

225. RESTATEMENT (SECOND) OF TORTS § 774B (1979).

226. SITKOFF & DUKEMINIER, *supra* note 27, at 321.

227. *Id.* at 322.

228. Goldberg, *supra* note 173, at 348.

229. SITKOFF & DUKEMINIER, *supra* note 27, at 322.

230. *Id.*

231. Goldberg, *supra* note 173, at 348.

232. SITKOFF & DUKEMINIER, *supra* note 27, at 322.

233. *Id.*



party with adequate relief.<sup>234</sup> IIEI also has the third-party defendant requirement.<sup>235</sup> The standard required to prove an IIEI claim is a reasonable certainty that, but for the defendant's interference, the plaintiff would have received the inheritance.<sup>236</sup> Finally, the tort is new and undeveloped, leaving room for significant trial and error.

The probate system goes to great lengths to preserve a decedent's testamentary intent.<sup>237</sup> It does so without recognizing the natural right to inherit.<sup>238</sup> The courts' recognition of IIEI only goes so far as to not interfere or undermine the probate system's underlying goal of protecting testamentary freedom.<sup>239</sup> IIEI claims are likely to undermine and destabilize the law of probate and create legal uncertainty.<sup>240</sup>

There are not yet indications that IIEI claims may provide a work around for no-contest clauses.<sup>241</sup> *Munn v. Briggs* held that the presence of a no-contest clause was not sufficient to establish an inadequate remedy in probate.<sup>242</sup> The court rejected the plaintiff's argument that his remedy in probate was inadequate because the no-contest clause suppressed his challenge to the instrument in probate.<sup>243</sup> In other words, an argument that a disinherited child must pursue an IIEI claim because a probate claim would trigger a no-contest clause is insufficient. There must be more than just a no-contest clause that deems a probate remedy inadequate. However, there is currently no California case law holding that bringing the IIEI tort itself violates a no-contest clause. A disinherited child may have nothing to lose by bringing an IIEI claim.

Legislatures can adopt forced heirship and preserve testamentary freedom at the same time. Children would not be entitled to the whole estate but to a share. Legislatures may opt to enforce a child's share only after the surviving spouse receives her elective share. The remainder can then be distributed to other family members, charity, and other dependents. Legislatures may enact disqualifying rules such as slayer, parental abuse,

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234. *Munn v. Briggs*, 185 Cal. App. 4th 578 (Cal. Ct. App. 2010) (declining to recognize IIEI because adequate remedy in probate).

235. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1052 (Cal. Ct. App. 2012) (citing *Allen v. Hall*, 974 P.2d 199, 203 (1999)).

236. *Id.* at 1050.

237. CAL. PROB. CODE §§ 6110, 6111 (West 2009).

238. *Goldberg*, *supra* note 173, at 341-42.

239. *Munn*, *supra* note 234. *See also* SITKOFF & DUKEMINIER, *supra* note 27, at 322.

240. *See generally* *Goldberg*, *supra* note 173.

241. *See Munn*, *supra* note 234, at 593 (IIEI tort would potentially undermine new law governing no contest clauses).

242. *See Munn*, *supra* note 234, at 592-93.

243. *Id.*

elder abuse, etc., that will disinherit certain individuals automatically. In these ways, forced heirship would remain consistent with testamentary freedom and the values justifying spousal protections. Forced heirship satisfies the natural right to inherit, promotes equity among all children, satisfies the judicial interest in simple estate distribution with fewer will challenges, preserves family relationships, and accommodates the evolving family paradigm. Finally, a legal right to inherit would not interfere but work in tandem with testamentary freedom.

#### CONCLUSION

The United States should adopt a system that recognizes the natural right to inherit and protects children from disinheritance just as it does for spouses and other groups. Despite other industrialized nations' recognition of the right to inherit, the harm that disinheritance imposes on children and families, and Locke's recognition of a natural right to inherit, the United States continues to permit parents to disinherit their children.

The use of no-contest clauses is improper considering the purposes stated by California courts and the Law Revision Commission. No-contest clauses as disinheritance devices interfere with the natural right to inherit. No-contest clauses should be used to guard against poaching by strangers who seek to encroach upon a decedent's estate or where informal ownership creates confusion. All children, regardless of age or need, should be shielded from disinheritance based on arbitrary and rash decisions by their parents and should instead only be disqualified by the state for truly egregious behavior. Testators who decide to unilaterally punish their children with disinheritance do not have to live with the consequences of their disposition and should not wield the deadhand control that testamentary freedom provides. Statutory protections for surviving spouses and pretermitted children should be expanded to all children. The natural right to inherit should not cede to testamentary freedom; it should work in tandem with it.

California courts go to great lengths to preserve testamentary intent by permitting the use of no-contest clauses to disinherit while failing to recognize the natural right to inherit. Disinherited children do not have a clear legal path for gaining access to an estate containing a no-contest clause even with the probable cause exception. Disinherited beneficiaries who attempt to thwart or circumvent a testator's wishes are met with opposition. It is only when a disinherited beneficiary treads lightly in court by seeking interpretive guidance, asking questions of ownership, making challenges based on lack of mental capacity, or enforcing fiduciary supervision that a court may permit disinherited beneficiaries to make legal challenges. A

disinherited beneficiary seeking to frustrate testamentary intent will not fare well. The HIEI tort, still in its infancy, is not yet developed enough to escape the grip of disinheritance. As case law continues to develop, disinherited children will continue to try gaining access to an estate until legislatures recognize the natural right to inherit and institute a forced heirship regime.

Forced heirship will elevate the natural right to inherit to equal footing with testamentary freedom. As John Locke recognized centuries ago, the natural right to inherit ought to be recognized alongside the natural right to bequest. Forced heirship can accomplish the benefits of more vibrant land markets, preservation of family relationships, and equality among all siblings. Forced heirship can create opportunities for important life investments for middle-aged adults, promote state interests, and result in more efficient use of judicial resources. Above all else, forced heirship is the right thing to do for all children of testators, relieving them of the threat or harsh misery of disinheritance.





