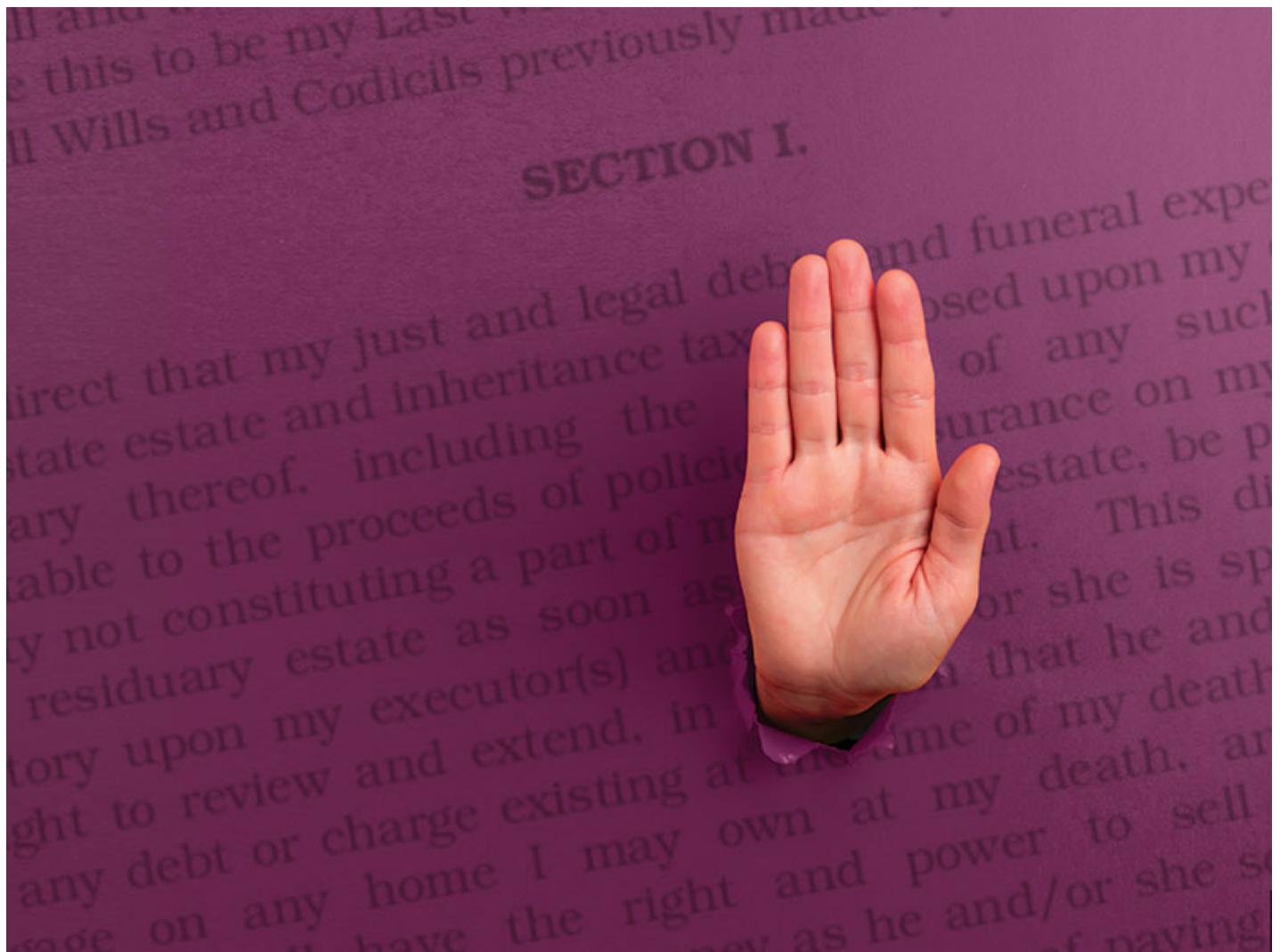


Dealing with no-contest clauses

What is a no-contest clause, and what do executors need to know?

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A no-contest clause is a provision intended to discourage court action against a will. If a beneficiary challenges the will in court unsuccessfully, the bequest is revoked and re-assigned to another beneficiary.

An Alberta Court of Appeals case from last year, *Marwhinney v. Scobie* (2019 ABCA 76), was important in establishing the power — but also the limitations — of no-contest clauses.

Barbara Stratton, a partner at Bennett Jones LLP in Edmonton who argued the case, says no-contest clauses are meant to stop “fishing expeditions,” or beneficiaries trying to get more from the estate without a valid reason.

“I’ve only seen them a handful of times in the 27 years I’ve been in this line of work,” Stratton says of the clauses, which has led to a lack of understanding about how they can be used.

However, the clarity offered in *Marwhinney* may encourage lawyers and their testators to use the clauses more frequently when family dynamics make litigation a strong possibility, she says.

From an executor’s perspective, the presence of a no-contest clause doesn’t affect the day-to-day administration of the estate or how the executor communicates with beneficiaries, says Barbara Kimmitt, a partner at Bennett Jones in Calgary, who also argued the case.

The clause doesn’t prevent beneficiaries from requesting information or asking questions of the executor, or from seeking the court’s advice and direction, for example.

“I would say it’s business as usual for an executor — until a claim comes up,” she says.

If a claim is made, Kimmitt says the executor’s job is to defend the will, although there’s some debate on how strong that defence should be.

“If there’s a no-contest clause in there that’s properly drafted, the executor needs to pay attention to that,” she says. This would include notifying challengers of the intention to enforce the no-contest clause, and engaging legal counsel to defend the will’s validity.

“You can’t just ignore it if a claim is filed,” she says.

Before getting to that point, however, Kimmitt suggests letting beneficiaries know about the clause in a cover letter when the will is sent out, in the interest of preventing litigation.

“There’s no legal obligation to do that,” she says, but “it might be a good tactic.”

No contest, no problem

No-contest clauses aren’t effective in every jurisdiction, says Joni Metherell, partner at Pushor Mitchell LLP in Kelowna, B.C.

B.C.’s Wills, Estates and Succession Act is very “user-friendly,” she says, and grants spouses or children a wide latitude to challenge a disinheritance on the grounds of legal or moral obligations owed by the will maker.

“The law is pretty settled in B.C.,” Metherell says. “These clauses don’t bind the courts,” and the *Mawhinney* ruling won’t have an impact.

If a would-be beneficiary does end up challenging a will with a no-contest clause, Metherell says the executor should remain neutral, and simply provide documentation and other assistance to give context to the potential claim.

“They’re not to take an active, participatory role in terms of saying whether the testator was correct, or justified or not, in doing what they’ve done,” she says. Actively defending the will against any challenge may make the executor personally liable for legal costs.

Things become “murky” if the executor is also a beneficiary, and if it appears that they are taking a position that supports their own gift under a will, Metherell says.

“It opens the door for someone to say, ‘Look, don’t spend the estate’s money to protect your own gift,’” she says.

“But one of the executor’s duties is to propound the will. So it can be difficult for them to navigate those roles and know when, and when not, to be using estate funds in litigation.”

As Metherell explains, that contradiction should cause the executor to think hard about their role — and to seek legal advice on how to “silo” the roles of executor versus beneficiary defending a gift.

Limits of the no-contest clause

Statutory rights: A no-contest clause does not override the claims of spouses, minor children, disabled beneficiaries or others with statutory rights for maintenance.

Clarifications and interpretations: A request for the court to clarify or interpret clauses in the will does not trigger a no-contest clause.

Claims against the executor: Challenges brought against the executor (e.g., for negligence, double-dealing, breach of trust) are distinct from challenges to the will.

Wills variations: In B.C., a no-contest clause has little effect on challenges due to the province’s Wills, Estates and Succession Act.

Requests from beneficiaries: A no-contest clause does not prevent beneficiaries from asking questions, requesting information or demanding speedier payment of bequests.