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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| CHRISTOPHER FRAHM,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GEORGE APPLEBAUM, as Trustee, etc., et al.,<br><br>Defendants and Appellants. | B204049<br><br>(Los Angeles County<br>Super. Ct. No. BP104602) |

APPEAL from an order of the Superior Court of Los Angeles County. Aviva K. Bobb, Judge. Affirmed.

Oldman, Cooley, Sallus, Gold Birnberg & Coleman, Marc L. Sallus and Peta-Gay Gordon for Defendants and Appellants George Applebaum, Rogers, Clem & Company, and David Couch.

Enterprise Counsel Group, David A. Robinson and Benjamin P. Pugh for Defendant and Appellant Jacqueline Frahm.

Palmieri, Tyler, Wiener, Wilhelm & Waldron and Don Fisher for Plaintiff and Respondent.

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Appellants Jacqueline Frahm, as trustee of the J and L Living Trust, and George Applebaum, as trustee; Rogers, Clem & Company, as named successor trustee; and David Couch as named successor trustee of the Louis Herman Frahm and Sylvia Lee Frahm Living Trust appeal from an order pursuant to Probate Code section 21320[1] ruling that respondent Christopher Frahm's proposed petition for breach of fiduciary duty did not violate the no contest clauses contained in two separate trusts. We affirm. The trial court properly determined that the proposed petition alleging the improper appointment of a trustee and the wrongful transfer of trust assets did not constitute a prohibited contest under the no contest clauses.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Trusts*

On October 4, 1998, husband and wife Louis Herman Frahm (Louis) and Sylvia Lee Frahm (Sylvia)[2] as settlors and trustees established the Living Trust of Louis Herman Frahm and Sylvia Lee Frahm (L & S Trust). The L & S Trust provided that "[a]fter the death of a Settlor, this Trust Agreement shall not be subject to amendment or revocation." The L & S Trust further provided that upon the death of the first settlor (the deceased spouse), the trustees were to divide the trust estate—including any additions made by reason of the deceased spouse's death—into three separate trusts, designated as the Survivor's Trust, the Marital Trust and the Exemption Trust. The Survivor's Trust was to be comprised of the separate property of the "surviving spouse" and the surviving spouse's interest in the community estate. The purpose of the Marital Trust was to qualify for the marital deduction under Internal Revenue Code section 2056 as well as the

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[1] Unless otherwise indicated, all further statutory references are to the Probate Code.

[2] On occasion, we will refer to individuals by their first names for purposes of clarity and not out of disrespect. (E.g., *Zwirn v. Schweizer* (2005) 134 Cal.App.4th 1153, 1154, fn. 2.)

rules and regulations pertaining to that section. Finally, the Exemption Trust was to be comprised of a monetary amount equal to the maximum sum allowable to a trust that does not qualify for the federal estate tax marital deduction. Any in-kind assets deemed to satisfy the Exemption Trust amount were to be valued at their fair market value as determined for federal estate tax purposes.

The L & S Trust gave the surviving spouse the power to amend, revoke or terminate the Survivor's Trust, but expressly withdrew those powers with respect to the Marital Trust and the Exemption Trust. Upon the death of the surviving spouse, none of the trusts were to be amended, revoked or terminated, but the surviving spouse had the obligation to appoint an additional trustee to serve as cotrustee. Also upon the death of the surviving spouse, any remaining assets (less taxes and expenses) in the Survivor's Trust, the Marital Trust and the Exemption Trust were to be distributed to a Child's Trust and divided into equal shares for the benefit of Louis and Sylvia's children Christopher Lee Frahm (Christopher) and Mitchel Louis Frahm (Mitchel).

The L & S Trust contained a no contest clause which provided: "If any beneficiary shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this Trust Agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set aside this Trust Agreement, then in such event such beneficiary shall forfeit and shall cease to have any right or interest in the trust property."

Sylvia died on October 6, 1998. According to the terms of the L & S Trust, Sylvia's death triggered the formation of the three separate sub-trusts. Louis allocated assets, including cash, shares of stock, real estate, personal property and accounts receivable, in the amount of $6,066,670 to the Survivor's Trust, $5,882,452 to the Marital Trust and $184,218 to the Exemption Trust. In August 1999, Louis appointed Mitchel as his cotrustee of the three separate trusts. In 2001 Louis married his second wife Jacqueline Frahm (Jackie), and the two of them established the J and L Living Trust (J and L Trust).

Beginning in November 2000, Louis executed a number of amendments to the Survivor's Trust and in January 2006 executed a twelfth amendment thereto (Twelfth Amendment). The Twelfth Amendment amended the disposition of certain assets, providing for a specific bequest of interests in real property to the J and L Trust; revised the composition and distribution of the Child's Trust, renaming the equal shares as the Christopher Share and the Mitchel Share; and appointed George Applebaum (Applebaum) as the sole successor trustee, adding that Christopher was not to serve as a trustee. The Twelfth Amendment also added a no contest clause which precluded a beneficiary from directly or indirectly contesting or attacking any provision of the Survivor's Trust, the J and L Trust or any will executed by a settlor. The no contest clause further specified the types of actions that would be deemed a contest and explained that the clause was not intended "to limit or in any way diminish the rights of any beneficiary of this Trust to question the Trustee regarding any act, decision or exercise of discretion made in connection with its management and administration of this Trust," nor was intended to prevent a beneficiary from seeking an accounting or "seek[ing] to remove the Trustee then serving for cause based upon breach of fiduciary duty, failure to properly administer this Trust or exercise the discretions granted to the Trustee hereunder."

Louis died in November 2006.

***Trial Court Proceedings***

Christopher prepared a verified petition pursuant to sections 850 and 17200 seeking a turnover of assets, an order for imposition of a constructive trust over trust assets wrongfully transferred and an order removing Applebaum as the acting successor trustee of the Marital Trust and the Exemption Trust, and further alleging a breach of fiduciary duty. He alleged that Louis and Mitchel breached their fiduciary duties to him by wrongfully transferring assets out of the Decedents' Trusts to either the Survivor's Trust or the J and L Trust. He attached the proposed petition to an application filed in May 2007 under the "safe harbor" provision in section 21320 seeking a determination that his proposed petition did not violate the no contest clauses contained in both the

L & S Trust and the Survivor's Trust. He asserted his proposed petition was not a contest because it neither challenged the validity of nor sought to set aside the L & S Trust, but rather, alleged a breach of fiduciary duty in connection with the administration of that trust. Similarly, he asserted that the proposed petition was not a contest within the Survivor's Trust's more expansively worded no contest clause because it addressed the administration and management of the trust.

Appellants objected to the safe harbor petition on the ground that the claims asserted in the proposed petition fell within the scope of both no contest clauses. They asserted that Christopher essentially sought a valuation of assets as of the time of Louis's death, contrary to the terms of the L & S Trust; that he indirectly attacked the trustee's ability to transfer and exchange trust property as permitted by the L & S Trust; and that he attacked the trustee's ability to amend the Survivor's Trust as provided in the L & S Trust.

Following a hearing on September 4, 2007, the trial court overruled all objections to Christopher's safe harbor application. Accordingly, in November 2007 it issued an order granting Christopher's application and found that the proposed petition did not violate the no contest clause in either the L & S Trust or the Survivor's Trust. Appellants thereafter appealed. (See § 1304, subd. (d).)

## DISCUSSION

### I. Standard of Review and No Contest Clauses.

The sole issue on appeal is whether the trial court erred in ruling that Christopher's proposed petition was not a contest within the meaning of the no contest clauses in the L & S Trust and the Survivor's Trust. "Where, as here, a trial court rules on a section 21320 application without referring to extrinsic evidence, the appeal presents a question of law and requires us to independently construe the trust to determine whether the proposed petition violates the no contest clause. [Citation.] 'In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it.' [Citations.] We review the trust

de novo, considering the circumstances under which the document was made in order to place ourselves in the position of the trustor to interpret the document. [Citation.] Each case depends upon its own peculiar facts and thus case precedents have little value when interpreting a trust. [Citation.]" (*McIndoe v. Olivos* (2005) 132 Cal.App.4th 483, 487; accord, *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1200.) Likewise, the interpretation of applicable Probate Code provisions and their application to the proposed petition are questions we decide as a matter of law. (See *Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1336.)

A no contest clause "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch v. George* (1994) 7 Cal.4th 246, 265.) Section 21300, subdivision (d) defines a "'[n]o contest clause'" as "a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court." In turn, section 21300, subdivision (a) defines a "'[c]ontest'" as "any action identified in a 'no contest clause' as a violation of the clause. . . ." "Although no contest clauses are valid and favored by the public policies of discouraging litigation and giving effect to the testator's intent, they are also disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent. [Citations.]" (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1128.)

Under section 21320, "a beneficiary may, without violating a no contest clause, apply to the court for a determination whether a particular act would be a contest provided that no determination of the merits of the petition is required."[3] (*McIndoe v. Olivos, supra,* 132 Cal.App.4th at p. 487.) "'[S]ection 21320 provides . . . a "safe

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[3] Section 21320, subdivision (a) provides: "If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary . . . would be a contest within the terms of the no contest clause."

harbor" for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest [under a particular no contest clause].' [Citation.] If a court determines that a particular proposed action would constitute a contest, the beneficiary will then be able to make an informed decision whether to pursue the contest and forfeit his or her rights under a will *or* to forgo that contest and accede to the will's provisions." (*Estate of Kaila, supra,* 94 Cal.App.4th at p. 1130; accord, *Betts v. City National Bank* (2007) 156 Cal.App.4th 222, 232; *Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1428–1429.)

The primary factor determining whether a particular proposed proceeding constitutes a "contest" is the intent of the drafter of the instrument. ""'Whether there has been a 'contest' within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." [Citations.] "[T]he answer cannot be sought in a vacuum, but must be gleaned from a consideration of the purposes that the [testator] sought to attain by the provisions of [his] will." [Citation.]'" (*Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173.) In interpreting testamentary instruments, ""'[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." [Citation.]'" (*Estate of Kalia, supra,* 94 Cal.App.4th at p. 1131; see also § 21102, subd. (a) ["[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument"]; § 21304 ["[i]n determining the intent of the transferor, a no contest clause shall be strictly construed"].)

## II. The Trial Court Properly Granted Christopher's Safe Harbor Application Under Section 21320.

Christopher's proposed petition challenged two general categories of actions taken by Louis since Sylvia's death. First, Christopher alleged that the L & S Trust did not give the surviving spouse the right to amend or modify the named successor trustee of the three trusts and that, therefore, Louis's appointment of Applebaum lacked authority and Applebaum had wrongfully commenced to act as trustee. Second, Christopher alleged

that Louis and Mitchel breached their fiduciary duties by improperly administering the trusts in that they "wrongfully transferred assets belonging to the Decedent's Trusts to the Survivor's Trusts and/or to the J and L Trust," they made such transfers without adequate value transferred in exchange for the assets, and they sold assets belonging to the Decedent's Trusts and diverted the sales proceeds to the Survivor's Trust and/or the J and L Trust. Finally, Christopher alleged that Mitchel breached his fiduciary duty by delegating his duties as cotrustee to Louis and that Jackie acted in concert with Louis in connection with the trust asset transfers and sales.

We cannot conclude that these allegations amount to a contest in violation of the no contest clause in the L & S Trust. The "Contest Clause" there provided: "If any beneficiary shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this Trust Agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set aside this Trust Agreement, then in such event such beneficiary shall forfeit and shall cease to have any right or interest in the trust property."

Preliminarily, we observe that the no contest clause in the L & S Trust is governed by section 21305.[4] In relevant part, section 21305 states: "(b) Except as provided in subdivision (d), notwithstanding anything to the contrary in any instrument, the following proceedings do not violate a no contest clause as a matter of public policy: [¶] . . . [¶] (6) A pleading challenging the exercise of a fiduciary power. [¶] (7) A pleading regarding the appointment of a fiduciary or the removal of a fiduciary. [¶] (8) A pleading regarding an accounting or report of a fiduciary. [¶] (9) A pleading regarding the interpretation of the instrument containing the no contest clause or an instrument or other document expressly identified in the no contest clause. [¶] . . . [¶] (d) Subdivision (b) shall apply only to instruments of decedents dying on or after January 1, 2001, and to documents that become irrevocable on or after January 1, 2001.

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[4] Section 21305 has been repealed but will remain in effect until January 1, 2010. (Stats. 2008, ch. 174, §§ 1 & 3, operative Jan. 1, 2010.)

However, paragraphs (9), (11), and (12) of subdivision (b) shall only apply to instruments of decedents dying on or after January 1, 2003, and to documents that become irrevocable on or after January 1, 2003. [¶] . . . [¶] (f) The term 'pleading' in subdivision (b) includes a petition, complaint, response, objection, or other document filed with the court that expresses the position of a party to the proceedings." Here, Louis, the surviving spouse, died in November 2006; the L & S Trust provided that "[o]n the surviving spouse's death, none of the trusts may be amended, revoked or terminated." Thus, the decedent died and the operative document became irrevocable after the relevant statutory dates.[5]

As a threshold matter, Christopher's claims do not even fall within the scope of the no contest clause, as they neither challenge the validity of the L & S Trust nor seek to set aside its terms. But they would not amount to a contest even if they were within the clause's purview. The proposed petition raises issues squarely within section 21305, subdivision (b)(6) regarding the exercise of fiduciary power in connection with the transfer and sale of trust asserts, and within subdivision (b)(7) regarding the improper appointment of Applebaum as trustee. By statute, these claims do not violate the L & S Trust's no contest clause as a matter of public policy.

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[5] Appellants' argument that section 21305 does not apply is based on *Estate of Rossi, supra,* 138 Cal.App.4th 1325. But the court there interpreted a different subdivision of section 21305 to preclude application of section 21305 to an instrument executed before January 1, 2001. Subdivision (c) of section 21305 states: "Subdivision (a) [which addresses certain actions that do not constitute a contest unless expressly identified in a no contest clause] does not apply to a codicil or amendment to an instrument that was executed on or after January 1, 2001, unless the codicil or amendment adds a no contest clause or amends a no contest clause contained in an instrument executed before January 1, 2001." Construing this subdivision, the *Rossi* court explained in part that "[s]ubdivision (c) also applies to a situation, not applicable here, where the instrument is executed before January 1, 2001, and a codicil or amendment to it adds or amends a no contest clause." (*Estate of Rossi, supra,* at p. 1338.) The court clarified, however, that the application of section 21305, subdivision (c) applied to the specificity requirements contained in subdivision (a). (*Estate of Rossi, supra,* at pp. 1338–1339.) The court did not extend its reasoning to the distinctly different language in section 21305, subdivisions (b) and (d).

Nor would we reach a different conclusion under the applicable common law. Prior to the enactment of section 21305, case law established that public policy allowed a trust beneficiary to seek a judicial determination as to whether a trustee could be removed without fear of forfeiture. Interpreting a no contest clause similar to that in the L & S Trust, the Court of Appeal in *Estate of Bullock* (1968) 264 Cal.App.2d 197, 201, explained the rule as follows: "There can be no question that there is a well-recognized public interest that estates of decedents be administered in such a manner that there can be no doubt with reference to the correctness of the proceedings and in a manner calculated to promote faith in the judicial system. Ordinarily trusts are made for the protection of the beneficiaries who may or may not be sufficiently informed and vigilant to manage large sums of money and conversely it would seem that trusts are not made for the benefit of trustees. Supervision of the trustee was contemplated in these trusts. Surely the testatrix and trustor did not mean thereby that to question the manner of administering the trust estate would constitute a forfeiture by a beneficiary. Surely the testatrix or trustor did not intend to inhibit the beneficiaries from seeking to have made proper accountings and distribution. She surely did not intend to participate in establishing a principle of law which would be dangerous in its effect and which would create a potential instrument of defense in the hands of a faithless or negligent fiduciary. [¶] Assuming that the beneficiaries did bring an action to oust the trustee, we think that in itself is not necessarily opposing, contesting, attacking or seeking to impair, invalidate or to set aside the will or any trust under the will. In other words it is difficult to see how under the circumstances any such action would or could thwart the will of the testatrix as expressed." (See also *Estate of McCarthy* (1970) 5 Cal.App.3d 158, 167–168 [action to rescind property transfer did not violate a no contest clause in a will].)

The same conclusion is compelled with respect to the no contest clause in the Survivor's Trust. There, the no contest clause provided that the surviving settlor had carefully considered the distributions made through the trust and further stated that any beneficiary under the trust or under the surviving settlor's last will and testament who "should in any manner, directly or indirectly contest or attack this Trust, the J and L

Living Trust dated September 6, 2001, or any of its provisions or the Last Will and Testament of the Surviving Settlor" would have his share revoked and instead distributed through the J and L Trust. In accordance with section 21305, subdivisions (a) and (c), the no contest clause further specified certain types of actions that would be deemed a contest. The no contest clause concluded by stating that the provision was not intended "to limit or in any way diminish the rights of any beneficiary of this Trust to question the Trustee regarding any act, decision or exercise of discretion made in connection with its management and administration of this Trust," to prevent a beneficiary from seeking an accounting, or to "seek to remove the Trustee then serving for cause based upon breach of fiduciary duty, failure to properly administer this Trust or exercise the discretions granted to the Trustee hereunder."

Again, the no contest clause which was added in January 2006 by the Twelfth Amendment to the Survivor's Trust is governed by section 21305, subdivisions (b) and (d). (See *Hermanson v. Hermanson* (2003) 108 Cal.App.4th 441, 443 ["Per section 21305, subdivision (b)(6) and (7), a petition challenging the exercise of fiduciary power and requesting the removal of a fiduciary does not violate a no contest clause in a will as a matter of public policy"].) In view of the unambiguous public policy considerations expressed in the plain language of section 21305, subdivision (b), we must conclude that Christopher's proposed petition does not violate the Survivor's Trust's no contest clause. (See *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 ["If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs'"].)

We reject appellants' efforts to recharacterize the claims in Christopher's proposed petition in order to avoid the reach of section 21305, subdivision (b). Appellants contend that Christopher's proposed petition seeks only to value certain trust assets as of the date of the Twelfth Amendment rather than the date of death of the deceased settlor as specified in the L & S Trust. In turn, they argue that his proposed petition is a contest expressly barred by the Survivor's Trust's no contest clause as "[a]n action or proceeding to determine the character of property." We see nothing in the language of the proposed

petition, however, that supports appellants' argument. Rather, Christopher alleged on information and belief "that Louis and Mitchel wrongfully transferred assets belonging to the Decedent's Trusts to the Survivor's Trust and/or to the J and L Trust," "that such transfers were made without adequate value transferred in exchange for such assets," and "that certain assets of the Decedent's Trusts were sold to third parties and that Louis and/or Mitchel diverted the sales proceeds to the Survivor's Trust and/or to the J and L Trust." According to the allegations in the proposed petition, an attached schedule of assets prepared by Applebaum demonstrated the extent of the asset diversion; nowhere in the proposed petition did Christopher suggest that the assets were improperly valued or apportioned under the L & S Trust.

In view of Christopher's allegations, *Estate of Pittman* (1998) 63 Cal.App.4th 290 does not assist appellants. There, a trust similarly provided for the creation of three separate trusts—a survivor's trust, an exemption trust and a marital trust—upon the first settlor's death. The exemption and marital trusts became irrevocable upon the first settlor's death, while the surviving settlor could amend the survivor's trust. The original trust also contained a schedule of trust assets, divided three ways into community property and each settlor's separate property. (*Id.* at p. 293.) After both settlors died, certain beneficiaries brought an action alleging that the first settlor to die was unaware of the asset schedule or, at a minimum, of the legal effect of characterizing her assets in a particular manner. They sought modification of the schedule to reflect the "correct" property designation. The trial court ruled that the beneficiaries' efforts to recharacterize the trust assets amounted to a contest in violation of the trust's no contest clause, which prohibited any person from seeking to void, nullify or set aside the trust or any of its provisions. (*Id.* at pp. 295, 297, 298.)

In affirming that ruling, the appellate court rejected the beneficiaries' argument that they were not seeking to invalidate a trust provision, but rather, were asserting the settlor's community property interest in certain assets. The court observed that the settlors precisely identified the character of their property and set forth a specific distribution scheme: "The Lee petition sought to disrupt this meticulously drawn

distribution scheme. . . . While we agree that normally a beneficiary's attempt to have property characterized in a particular way is not an attack on the will or provisions within the will, this rule does not apply when the instrument already sets forth how property is to be characterized. Here the [beneficiaries] were not merely seeking to characterize uncharacterized property belonging to [the settlor]; they were seeking to upset the very characterization that [the settlor] agreed to." (*Estate of Pittman, supra*, 63 Cal.App.4th at pp. 303–304.) Here, on the other hand, the proposed petition attached a schedule of assets alleged to be the original allocation under the L & S Trust. According to that schedule, several of the properties that were transferred to the J and L Trust as part of the Survivor's Trust in the Twelfth Amendment were originally allocated to the Marital Trust. Thus, unlike the beneficiaries in *Pittman*, Christopher seeks to enforce rather than thwart the original allocation of trust assets.

Appellants also contend that the proposed petition is a direct contest because the L & S Trust expressly allowed for the trustees to sell, transfer or otherwise encumber trust property. The L & S Trust did contain several provisions concerning the powers of the trustees to sell, exchange or otherwise dispose of trust property, including guidelines for the disposition of assets in the Marital Trust which failed to provide a reasonable income to the surviving spouse as the income beneficiary. But according to the proposed petition, assets were transferred out of the Marital Trust not because they were producing inadequate income, but because the trustees sought to divert assets to the Survivor's Trust and the J and L Trust to the detriment of Christopher. The proposed petition is therefore unlike that in *Hearst v. Ganzi, supra*, 145 Cal.App.4th 1195, where the court found a petition alleging that trustees breached their fiduciary duty of impartiality by favoring the remainder beneficiaries over the income beneficiaries constituted a contest because the trust instrument expressly authorized the trustees to make good faith investment decisions inuring to the benefit of the remainder beneficiaries at the expense of the income beneficiaries. (*Id*. at p. 1200.) Observing that California law provides that a trustee is bound to deal with all beneficiaries impartially unless the trust instrument directs otherwise, the court determined: "The bare allegation in the Proposed Petition that the

Trustees breached their fiduciary duty owed to current income beneficiaries by adhering to a dividend policy which has the effect of favoring the remainder beneficiaries over the current income beneficiaries, without more, is insufficient to state a claim for breach of fiduciary duty to overcome the no contest clause." (*Id.* at p. 1211.) Because the petition in *Hearst* failed to allege the trustees' dividend policy had been "grounded in bad faith or an improper motivation," it constituted a prohibited contest. (*Ibid.*)

Here, on the other hand, neither the L & S Trust nor the Twelfth Amendment to the Survivor's Trust specifically authorized the transfers about which Christopher complains. Likewise, nothing in the L & S Trust expressly allowed for the appointment of Applebaum as successor trustee for the Marital Trust and the Exemption Trust, given that Applebaum was not named as the original successor trustee and those trusts could not be amended after Sylvia's death. The proposed petition alleged that appellants breached their fiduciary duties to Christopher by improperly amending the Marital Trust to add a new successor trustee and wrongfully transferring trust assets from the Marital Trust—conduct not expressly authorized by the L & S Trust. As the *Hearst* court recognized, "'[t]he power of the court is invoked in probate matters, at least in substantial measure, to protect the estate and ensure its assets are properly protected for the beneficiaries.'" (*Hearst v. Ganzi, supra*, 145 Cal.App.4th at p. 1213.) Thus, "'beneficiaries who believe an executor is engaged in misconduct [are allowed] to bring the potential malfeasance to the court's attention without fear of being disinherited . . . .'" (*Id*. at p. 1214; see also *Estate of Ferber* (1998) 66 Cal.App.4th 244, 253 ["'It is always proper for a beneficiary of an estate who believes that the executor is not fulfilling his duty to make the objections which the code permits without risk of suffering a penalty provided by an in terrorem clause'"].)

Accordingly, because Christopher's proposed petition raised claims regarding the removal of an improperly appointed fiduciary and the improper exercise of fiduciary duty—claims that by statute do not run afoul of a no contest clause as a matter of public policy and claims that did not involve conduct specifically authorized by the trust

instruments—the trial court properly granted Christopher's application under section 21320.

**DISPOSITION**

The order determining that Christopher's proposed petition does not violate the no contest clauses in the L & S Trust or the Survivor's Trust is affirmed. Christopher is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ