

## Memorandum 88-11

Subject: Study L-636 - No Contest Clause (Draft of Tentative Recommendation)

At the January 1988 meeting the Commission decided to retain the basic California rule of strict application of a no contest clause even though the contest was made with probable cause. The Commission directed the staff to prepare a draft that would codify the California rule. The draft should include exceptions for a contest based on forgery or execution of a subsequent instrument. The draft should also include an exception for contest of a gift to the person who prepared, or assisted in the preparation of, the instrument.

Related matters that were raised at the meeting but that the staff was not expressly directed to include in the draft are whether an attempt to modify the terms of a trust could be considered to be a contest of the trust, whether a declaratory relief procedure should be provided to determine whether a particular action would amount to a contest within the meaning of a no contest clause, and whether litigation expenses should be awarded against an unsuccessful contestant regardless of the applicability of the no contest clause.

Attached as Exhibit 1 is a staff draft to implement these decisions.

The draft does not address the issue of whether an attempted trust modification is a contest. The resolution of this issue depends on the terms of the no contest clause and the nature of the attempted modification. This matter must be resolved by the court on a case by case basis. The staff draft makes clear that general case law construing no contest clauses continues to be valid except to the extent an express statutory provision governs the matter.

The staff draft does give the court some guidance by providing that a no contest clause is to be strictly construed. The Commission should consider whether such a rule of construction is appropriate. The staff has included this rule because of complaints in the legal literature that there is a lack of predictability in the case law and

that this lack is caused in part by shifting judicial attitudes toward the no contest clause. Since the general bias of the law is to avoid a forfeiture, the staff draft incorporates the strict construction rule.

The staff draft does address the issue of declaratory relief. The staff believes the existing declaratory relief provision of the Code of Civil Procedure is an adequate basis to obtain a determination whether a particular action would amount to a contest within the meaning of the no contest clause. The staff draft adds to this the rule that a proceeding for declaratory relief is not a contest, notwithstanding language in the no contest clause that might seem to apply. The draft does not allow an instrument to vary this or other rules governing no contest clauses, since the rules are based on public policy grounds.

The staff draft does not write into the law any new litigation expense rules. We believe the general rule that the court may in its discretion order costs to be paid by any party as justice may require (Section 1002 in AB 2841) is adequate, given the proposed statutory scheme.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT 1

Staff Draft

Tentative Recommendation  
relating to  
No Contest Clause

A will, trust, or other instrument may contain a no contest, or *in terrorem*, clause to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is designed to reduce litigation by persons whose expectations are frustrated by the donative scheme of the instrument.<sup>1</sup>

While some jurisdictions refuse to recognize the validity of a no contest clause,<sup>2</sup> and most allow the clause to be given effect only against a person who makes a contest without probable cause,<sup>3</sup> California continues to follow the traditional, and now minority, rule to allow enforcement of the clause regardless of the beneficiary's probable cause in making the contest.<sup>4</sup>

In the course of its study of probate law and procedure the California Law Revision Commission has reexamined the policies involved in enforcement of no contest clauses. In favor of a probable cause exception are the policy of the law to facilitate full access of the courts to all relevant information concerning the validity and effect

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1. For a general discussion of no contest clauses, see Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 *Hastings L.J.* 45 (1963).

2. See, e.g., *Florida Stat.* § 732.517 (1981); *Indiana Code* § 29-1-6-2 (1976).

3. See, e.g., *Uniform Probate Code* § 3-905; *Restatement of the Law, 2d, Property: Donative Transfers* § 9.1 (1981).

4. See, e.g., *Estate of Hite*, 155 *Cal.* 436, 101 *Pac.* 443 (1909).

of a will, trust, or other instrument, and to avoid forfeiture.<sup>5</sup> Opposed to a probable cause exception are the policy of the law to honor the intent of the donor and to discourage litigation.<sup>6</sup> The Commission believes that the balance between these conflicting policies achieved by existing California law is basically sound. The no contest clause is effective to deter unmeritorious litigation but does not hinder a contest or an appropriate settlement in cases where the grounds for contest are strong. On the other hand, a probable cause exception would encourage litigation and would shift the balance unduly in favor of contestants. The existing law gives the donor some assurance that the donor's estate plan will be honored.

For these reasons, the Commission recommends codification of existing California law governing enforcement of no contest clauses. The Commission also recommends a number of significant changes to improve the existing law.

A major concern with the application of existing California law is that a beneficiary cannot predict with any consistency when an activity will be held to fall within the proscription of a particular no contest clause.<sup>7</sup> To increase predictability, the proposed law recognizes that a no contest clause is to be strictly construed in order to avoid a forfeiture. The law also makes clear that a request by a beneficiary for declaratory relief<sup>8</sup> in the form of a judicial determination whether a particular activity would violate a no contest clause does not itself trigger operation of the clause.

Under existing law, a no contest clause is not enforceable against a person who, in good faith, contests a will on the ground of forgery

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5. See, e.g., Selvin, *Terror in Probate*, 16 *Stan. L.Rev.* 355 (1964).

6. See, e.g., N.Y. Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Report No. 8.2.6A (1965).

7. See, e.g., discussion in Garb, *The In Terrorem Clause: Challenging California Wills*, 6 *Orange Co. B.J.* 259 (1979).

8. See Code Civ. Proc. § 1060.

or revocation by execution of a subsequent will.<sup>9</sup> The basis of this exception is that it furthers, rather than contravenes, the testator's intent. This exception is applicable regardless of the manner in which a particular no contest clause is phrased or construed, and therefore should be codified.<sup>10</sup>

Existing California law precludes enforcement of a no contest clause where the challenge is to a gift to an interested witness to a will.<sup>11</sup> This limitation is appropriate because of the danger of fraud or undue influence where a devise is made to a person involved in the execution of the will itself.<sup>12</sup> The rule should be extended beyond witnesses to other persons who prepare or participate in the preparation of the will. Such persons are in an even more sensitive position than a witness to a will.

The proposed statutory exceptions to enforcement of a no contest clause are based on strong public policy grounds. Therefore, the proposed statute should also make clear that the no contest clause may not by its terms override the exceptions.

Although much of the development of the law governing no contest clauses has occurred in relation to wills and will contests, in recent years trusts and other donative transfer instruments have become important estate planning devices and may also include no contest clauses. The issues involved are the same for all such instruments, and the proposed statute applies the rules governing no contest clauses uniformly to trusts and other instruments as well as to wills.

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9. See, e.g., *Estate of Lewy*, 39 Cal. App. 3d 729, 113 Cal. Rptr. 674 (1974) (forgery); *Estate of Bergland*, 180 Cal. 629, 182 Pac. 277 (1919) (revocation by subsequent will).

10. Cf. N.Y. EP&TL § 3-3.5(b)(1) (McKinney 1981).

11. Prob. Code § 372.5.

12. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2321-22 (1982).

The Commission's recommendations would be effectuated by enactment of the following measure.

An act to amend Section 6112 of, and to add Part 3 (commencing with Section 21300) to Division 11 of, the Probate Code, relating to no contest clauses.

*The People of the State of California do enact as follows:*

Prob. Code § 6112 (amended). Witnesses to wills

SECTION 1. Section 6112 of the Probate Code (as amended by AB 2841 of the 1988 Legislative Session) is amended to read:

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness. Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof.

(c) If a devise made by the will to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

~~(d) A provision in a will that a person who contests or attacks the will or any of its provisions takes nothing under the will or takes a reduced share does not apply to a contest or attack on a provision of the will that benefits a witness to the will.~~

Comment. Section 6112 is amended to delete subdivision (d), relating to no contest clauses. This matter is dealt with comprehensively in Sections 21300 to 21306.

Prob. Code §§ 21300-21307 (added). No contest clause

SEC. 2. Part 3 (commencing with Section 21300) is added to Division 11 of the Probate Code, to read:

PART 3. NO CONTEST CLAUSE

§ 21300. Definitions

21300. As used in this part:

(a) "Contest" means a contest of the validity of an instrument or an attack on a provision of an instrument.

(b) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest.

Comment. Section 21300 is intended for drafting convenience. The term "no contest clause" has been used in the literature, as well as the term "in terrorem clause", to describe a provision of the type defined in this section.

Section 21300 supersedes a portion of subdivision (d) of former Section 6112 [former Section 372.5] ("a provision in a will that a person who contests or attacks the will or any of its provisions takes nothing under the will or takes a reduced share"). Unlike the former provision, this part governs trusts and other donative transfers as well as wills. See Section 21101 (application of division); see also Sections 21100(b) ("instrument" defined) and 24 ("beneficiary" defined).

§ 21301. Application of part

21301. This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent this part does not apply.

Comment. Section 21301 makes clear that this part is not a comprehensive treatment of the law governing no contest clauses. The section preserves the common law in matters not expressly addressed by this part. Such issues, for example, as whether abandonment of a contest violates a no contest clause, whether an attack on the jurisdiction of the court violates the clause, and whether proceedings in estate administration other than a direct contest (including proceedings to set aside a small estate or probate homestead, to establish a family allowance, or to take as a pretermitted heir) violate the clause, continue to be governed by relevant case law except to the extent this part deals directly with the issue. Cf. Section 15002 and the Comment thereto (common law). The resolution of these matters is determined, in part, by the terms of the no contest clause and the character of the beneficiary's contest. See also Section 21304 (construction of no contest clause).

§ 21302. Instrument may not make contrary provision

21302. This part applies notwithstanding a contrary provision in the instrument.

Comment. Section 21302 is new. An instrument may not vary the rules provided in this part, since the rules implement the public policy of ensuring judicial access to information necessary for the proper administration of justice.

§ 21303. Validity of no contest clause

21303. Except to the extent provided in this part, a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause.

Comment. Section 21303 is new. It codifies the existing California law recognizing the validity of a no contest clause. See, e.g., Estate of Hite, 155 Cal. 436, 101 Pac. 433 (1909). A no contest clause is strictly construed. Section 21304 (construction of no contest clause). See also Sections 21301 (application of part) and 21302 (instrument may not make contrary provision).

§ 21304. Construction of no contest clause

21304. A no contest clause shall be strictly construed.

Comment. Section 21304 is new. In the interest of predictability, it resolves a conflict in the case law in favor of strict construction. See, e.g., discussion in Garb, The In Terrorem Clause: Challenging California Wills, 6 Orange Co. B.J. 259 (1979). Strict construction is consistent with the public policy to avoid a forfeiture. See, e.g., discussion in Selvin, Comment: Terror in Probate, 16 Stan. L.Rev. 355 (1964).

§ 21305. Declaratory relief

21305. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary brings proceedings under Section 1060 of the Code of Civil Procedure for a declaration whether a particular act by the beneficiary would be a contest within the terms of the no contest clause.

Comment. Section 21305 is new. Code of Civil Procedure Section 1060 provides that, "Any person interested under a deed, will or other written instrument ... may, in cases of actual controversy relating to the legal right and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior, municipal or justice court for a declaration of his rights and duties in the premises, including a determination of any



question of construction or validity arising under such instrument ... Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." Section 21305 resolves a conflict in the case law concerning whether proceedings for declaratory relief may be held to violate a no contest clause. See, e.g., discussion in Garb, *The In Terrorem Clause: Challenging California Wills*, 6 Orange Co. B.J. 259 (1979). This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).

#### § 21306. Forgery or revocation

21306. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest on any of the following grounds:

- (a) Forgery.
- (b) Revocation by a subsequent instrument.

Comment. Section 21306 is new. It codifies existing case law. See, e.g., *Estate of Lewy*, 39 Cal. App. 3d 729, 113 Cal. Rptr. 674 (1974) (forgery); *Estate of Bergland*, 180 Cal. 629, 182 Pac. 277 (1919) (revocation by subsequent will). This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).

#### § 21307. Interested preparer or witness

21307. (a) A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits a person who prepared or assisted in the preparation or execution of the instrument.

(b) As used in this section, a person who prepared or assisted in the preparation or execution of an instrument includes but is not limited to an attorney, estate planner, or other person who drafted or transcribed the instrument, a person who gave instructions concerning the contents of the instrument, and a person who acted as a witness to the instrument.

Comment. Section 21307 adds a probable cause limitation to, and expands and generalizes former subdivision (d) of Section 6112 [former Section 372.5], which provided that a no contest clause does not apply to a contest or attack on a provision of the will that benefits a witness to the will. This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).