

## Second Supplement to Memorandum 89-47

Subject: Study L-636 - 1989 Legislative Program (No Contest Clauses)

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association has written to Assembly Member Friedman opposing the provisions of AB 158 relating to no contest clauses. See Exhibit 1 to Memorandum 89-47. The basis of their opposition is that the no contest clause provisions would enable a contestant, in the guise of "interpreting" a no contest clause, actually to obtain a complete trial on undue influence.

Their concern apparently is with proposed Section 21305, which provides:

21305. (a) A beneficiary may petition for construction of an instrument to determine whether a particular act by the beneficiary would be a contest within the terms of a no contest clause.

(b) A no contest clause is not enforceable against a beneficiary to the extent a petition by the beneficiary is limited to the procedure and purpose described in subdivision (a).

This is a point the Commission has heard before. The Commission has sought to draw the section narrowly to make clear that the section is not intended to permit a trial on the merits but only a determination whether a particular petition, motion, or other act of a contestant (e.g., a petition to determine community and separate assets, or a petition to determine heirship) would amount to a "contest" within the meaning of the particular no contest clause. Declaratory relief is available right now under Code of Civil Procedure Section 1060 for this purpose. The Commission's recommendation provides the alternative of probate court determination rather than a civil action. It also encourages probate court determination by denying relief from the no contest clause in a civil action.

Besides narrowly drawing the section, the Commission has also added reinforcing language to the Comment:

Comment. Subdivision (a) of Section 21305 authorizes a petition for construction of an instrument under the Probate Code. An action for declaratory relief under Code of Civil Procedure Section 1060 would not qualify for protection under subdivision (b), which is limited to a petition for construction of the instrument.

Subdivision (b) is new. It avoids the conflict in the case law concerning whether proceedings for declaratory relief may be held to violate a no contest clause by providing a "safe harbor" for a beneficiary who satisfies the requirements of subdivision (a). Cf. Garb, The In Terrorem Clause: Challenging California Wills, 6 Orange County B.J. 259 (1979). Under subdivision (b), if a beneficiary petitions for construction of an instrument to determine whether a particular act would be considered "an attack in a proceeding on an instrument or on a provision in an instrument" within the meaning of the no contest clause, the petition cannot itself be considered an attack on the instrument or provision if made under subdivision (a). Subdivision (b) is not intended to enable a determination of the merits of an attack, but only whether a particular act would be considered an attack. Subdivision (b) 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).

Evidently, the Los Angeles County Bar group did not have the Commission's Comment before it when it considered AB 158. This experience indicates to the staff, however, that the statute itself could be clearer. To take care of the Los Angeles County Bar problem, and to avoid others having the same problem, the staff suggests the statute be revised to read:

21305. (a) A beneficiary may ~~petition for construction of an instrument to determine~~ apply to the court for a determination whether a particular motion, petition, or other act by the beneficiary would be ~~a contest within the terms of a no contest clause~~ if unsuccessful, cause a no contest clause to be enforceable against the beneficiary.

(b) A no contest clause is not enforceable against a beneficiary to the extent ~~a petition~~ the application by the beneficiary is limited to the procedure and purpose described in subdivision (a) and does not require a determination of the merits of the motion, petition, or other act by the beneficiary.

If this revision is adopted, corresponding adjustments will be made in the Comment.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary