#L-636

ns60o
10/04/88

Memorandum 88-69

Subject: Study L-636 - No Contest Clause (Comments on Tentative Recommendation)

Background

The Commission's tentative recommendaion on no contest clauses was distributed for comment in July. We have received the letters attached as Exhibits 1 to 18 commenting on the tentative recommendation. This memorandum analyzes the comments. General comments are discussed immediately below. Specific comments are discussed in Notes inserted in the copy of the tentative recommendation that is attached to this memorandum.

General Reaction

Reaction to the tentative recommendation was generally favorable. Persons who expressed unqualified approval include:

> William M. Butler of Santa Clara (Exhibit 2) ("I heartily recommend codification of the present California law as you propose.")
> E. Burdette Boileau of Pomona (Exhibit 5) ("feel very comfortable with the recommendations being made")
> Robert H. Faust of Arcadia (Exhibit 10) ("I approve")
> Elizabeth R. McKee of Richmond (Exhibit 12) ("approval")
> Robert J. Berton of San Diego (Exhibit 14) ("The Tentative Recommendation is a welcome reform and should be enacted.")
> Henry Angerbauer of Concord (Exhibit 17) ("I agree with your conclusions without any changes and suggest you propose this to the legislature to be implemented into law.")
> Richard H. Keatinge of Los Angeles (Exhibit 18)

A number of persons who expressed general approval also further elaborated on the reasons for their support. Typically, they felt that the tentative recommendation would strengthen the intent of the decedent and prevent unwarranted will contests; codification of existing law would forestall the judicial swing to an undesirable "probable cause" exception to enforcement of a no contest clause. A sampling of these comments is set out below.

Barbara A. Beck of San Jose (Exhibit 4) ("My clients frequently are concerned about how to prevent contests by dissatisfied persons which could frustrate their desires and cause expense and work unnecessarily for their designated representatives. I would definitely support retaining California's traditional rule to allow enforcement of the clause regardless of the beneficiary's probable cause in making the contest.")

Paul Gordon Hoffman of Los Angeles (Exhibit 8) ("My colleagues and I have noted with dismay the apparent upsurge in probate litigation matters, and I am certain that creating a good-faith exception would encourage even more such litigation. Testators are often well aware of the litigious nature of one or more of their relatives, and often ask (without any prompting from the lawyer) that a 'no contest' clause be inserted to try to protect against the expense and emotional harrassment which they anticipate will follow their deaths.")

Michael Patiky Miller of Palo Alto (Exhibit 13) ("Unlike other changes which have been proposed, this revision will reduce the ambiguity now present in advising clients on potential contests.")

See also the comments of Thomas R. Thurmond of Vacaville (Exhibit 9) concerning the need to implement the decedent's intent and minimize the ability of others to interfere, and the comments of William E. Fox of Paso Robles (Exhibit 16) concerning the recent increase in will contest litigation as blackmail by precluding an estate from early distribution.

Presumption of Undue Influence

Two related matters have also been raised concerning will contests, which logically can be addressed at the same time as no contest clauses. The first matter is raised by Jim Willett (Exhibit 19), who points out that the statutory presumption of undue influence where a will makes a devise to a subscribing witness (Probate Code § 6112) should not apply if the subscribing witness is a trustee and the devise is to the trustee in a fiduciary capacity. The staff agrees with Mr. Willett's point (see analysis prepared by Bob Murphy attached as Exhibit 20), and would add specific language to Probate Code Section 6112 to make clear that "This subdivision does not apply where the subscribing witness is a trustee and the devise is to the trust or to the trustee in a fiduciary capacity."

Appointment of Personal Representative Pending a Will Contest

Another matter is raised by Bob Berton (Exhibit 14), who is a former member and chairman of the Commission. Mr. Berton points out that when there is a will contest before appointment of a personal representative, a battle ordinarily erupts over who will be appointed as personal representative pending resolution of the will contest. His experience is that eventually the court resolves the dispute by appointing an independent person, unaffiliated with either side of the will contest. He suggests that matters could be simplified by mandating this result in the statute in the first instance, so that "in the case of a will contest, before the appointment of a personal representative of the deceased's estate, the court shall appoint an independent administrator unless all of the parties to the will contest can agree upon who shall serve."

This makes some sense to the staff, assuming that the will contest is legitimate. But what about the situation, which our commentators remark on, where the contest is simply a procedural device to disrupt the estate administration and force a settlement with a person who has been disinherited? Wouldn't mandatory appointment of an independent personal representative in such a situation simply play into the hands of the contestant? Perhaps there could be a presumption in favor of appointment of an indepedent personal representative, unless the contest appears to be spurious. Of course this approach would not eliminate litigation over appointment, which is Mr. Berton's intent.

An alternative would be simply to make clear the option of the court to appoint an independent personal representative, without providing standards, and leave the decision to the court as at present. Such a provision could be added to Section 8250 (will contest) to read, "Pending resolution of the objection, the court may appoint as personal representative any person who appears proper under the circumstances of the case, including but not limited to appointment of a special administrator agreed to by the parties, or the public administrator or other disinterested person."

Conclusion

The Commission needs to resolve these matters and also to review the specific concerns raised about the tentative recommendation to determine whether any changes are needed before making a final recommendation to the Legislature on no contest clauses.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

ROBERT K. MAIZE, JR.
A PROFESSIONAL LAW CORPORATION

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July 27, 1988

California Law Revision Commission
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94303-4739

Re: No contest clause

Ladies/Gentlemen:

I have had an opportunity to review the tentative recommendations in regards to the provisions covering a no contest clause.

Generally I have no concern with those provisions, except that I am going to have difficulty working with the proposed section 21307. The difficulty presented is that a certain amount of the estate planning that I do is in regards to saving estate taxes when property ultimately passes to the children of a husband and wife and saving estate taxes and generation-skipping taxes when that same property ultimately passes to generations below those of the children of the husband and wife.

Because of the unlimited marital deduction rules for estate tax purposes and the generation rules for the generation-skipping tax these tax saving measures are of primary importance to the lineal descendants (and expected heirs) of the husband and wife, so that some of the estate planning work that I do in these cases has in fact been initiated by the children.

The actual participation of the husband and wife in these decisions range from all decisions being made by them to acquiescence to all the children's requests. However, when I am performing estate planning services and a beneficiary is participating in the decisions being made, the effect of the proposed section 21307 is to cast some uncertainty on the planning that I am doing to save taxes, and thereby increasing the uncertainty that the plan will in fact will be carried into effect.

I am not saying that the proposed section does not have a sound basis for consideration, but I need to be able to provide to my clients some reassurance that the plan being proposed will be carried into effect so that the current efforts and expenses will provide their intended benefit.

Very truly yours,

ROBERT K. MAIZE, JR.,
A Professional Law Corporation

by:
Robert K. Maize, Jr.

RKM:jas

ASSOCIATES
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July 28, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tenative Recommendation re:
PROBATE LAW AND PROCEDURE
NO CONTEST CLAUSE

Gentlemen:

I have read your tentative recommendation relating to No Contest Clauses contained in Wills offered for probate within the State of California. Your recommendaton is #L-636 dated July, 1988.

I heartily recommend codification of the present California law as you propose.

Thank you for the opportunity to comment on this matter.

Yours very truly,

William M. Butler

WILLIAM M. BUTLER

WMB/kc

JEROME SAPIRO
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August 1, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA, 94303-4739

Re: #L 636
Tentative Recommendation
No Contest Clause

Honorable Commission Members:

I write in response to your invitation for comments concerning the tentative recommendation relating to the No Contest Clause.

1. Proposed §21301 has closing sentence "The common law governs enforcement of a no contest clause to the extent this part does not apply.

I found no definition of common law in the proposed revision of the Probate Code. However, Civil Code §22.2 provides "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all of the courts of this State.

It seems that with a modern revision of the Probate Code, resort to the common law of England is antiquated.

As to matters to which the proposed revisions do not apply, it would be better to have California applicable case law, if any, and judicial construction or interpretation control. This would still allow resort to decisions of other jurisdictions to assist the Courts.

Certainly the common law of England should not control the interpretion the construction, interpretation or application of our revised Probate Code or any part thereof.

2. I support liberal construction of the No Contest Clause, rather than the strict construction provided in §21304.

Provision for liberal construction does honor the intention of the donor-testator and would discourage litigation. The inclusion of a no contest clause by a testator is for the purpose of carrying out his wishes and estate plan.

Strict construction takes away a protection that is otherwise afforded and which a testator thinks exists.

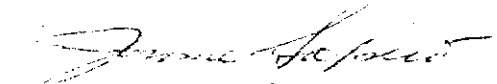
I disagree with the comment that "Strict construction is consistent with the public policy to avoid forfeiture".

Where an unsustained attack on a Will occurs, there is a loss of something which the attacker or contestor never had. The effort of the attacker is to frustrate the plan and intentions of the testator. Should not the attacker be barred from taking under the Will that he or she attacks? I think so. This is and should be a known risk. It is not truly a forfeiture of that which the attacker never had and was dissatisfied with the prospect of later having.

It is requested that the Commission reconsider the foregoing proposals and appropriately change its recommendation.

Thank you for allowing me to participate.

Respectfully,



Jerome Sapiro

JS:mes

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August 1, 1988

California Law Revision Commission
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94303-4739

Re: Recommendation Re Probate Laws - No Contest Clause

Dear Sir:

I have reviewed your Tentative Recommendation Relating to Probate Law and Procedure - No Contest Clause dated July, 1988.

I support the recommendation and agree with maintaining the validity of no contest clauses. My clients frequently are concerned about how to prevent contests by dissatisfied persons which could frustrate their desires and cause expense and work unnecessarily for their designated representatives. I would definitely support retaining California's traditional rule to allow enforcement of the clause regardless of the beneficiary's probable cause in making the contest.

Very truly yours,

Barbara Beck

BARBARA A. BECK

BAB:mm

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PLEASE REPLY TO:
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POMONA, CALIFORNIA 91769

August 3, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Probate Law and Procedure
No Contest Clause

Gentlemen:

I read with interest the recommendation with respect to proposed Probate Code Sections 21300 et. seq. and feel very comfortable with the recommendations being made.

Sincerely,

E. Burdette Boileau
NICHOLS, STEAD, BOILEAU & LAMB
A Professional Corporation

EBB/jh

I R V I N G K E L L O G G
Attorney at Law

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August 3, 1988

California Law Revision Commission
4000 Middlefiled Road, Suite D 2
Palo Alto, Ca 94303-4739

Re: No Contest Clause

Dear Commission:

I want to commend the Commission for addressing this long neglected problem.

I have only these questions or comments on the proposed legislation affecting the problem.

1. In proposed Section 21300. Definitions, I believe subdivision (a) contains two words that need further definitions.

The word, "attack", needs a definition. Of course, the definition for attack cannot contain the word, "contest"; however, "attack" does not appear in Black's Law Dictionary, 4th Edition, and the omission takes us to the general dictionary world. In the RAndom House College Dictionary, Revised Edition, attack has many definitions. The most likely to be applicable are:

To begin hostilities against; to blame or abuse violently; to direct unfavorable criticism against. (None of these seem to apply).

The word, "instrument" needs to be more specific. Should it not be an instrument that purports or is designed to, or has the effect of disposing of property upon the death of an individual. Otherwise, "instrument" is too broad a definition and might include documents unrelated to the purpose of these sections. I agree the argument could be made that the word, instrument, obviously refers to such a document by the context in which it is used. However, I believe that being specific is useful to a person who reads the section without regard to all other sections - which, I agree, is incompetence.

2. My suggestion about the word, "attack", is to mention the procedures within the framework of the "including but not limited to" umbrella. For example: including but not limited to the filing of a lawsuit in order to

obtain a judicial determination that the transferor was mistaken about the facts at the time he or she signed the instrument, (and some other contentions that contestants make). The Statute would then be a guide, but not conclusive about what is an attack. Such a guide would, in my opinion, discourage meritless attacks because the law would be specific, and would benefit those who have legitimate claims.

I have drafted a specific No Contest Section that covers a number of additional attacks that I hope is effective in protecting the intention of the Transferor. I have enclosed this in the expectation that it may be helpful to those who are working on this project. It is the result of discussions with clients and lawyers who are concerned about such attacks.

Sincerely yours,

Irving Kellogg

Irving Kellogg

Enclosure.

"6.4 NO CONTEST CLAUSE

"If any (1) beneficiary of my Will, or (2) heir of mine, or (3) person claiming under any of them (all are referred to as person or persons in this section) -

"(a) contests my Will or this **JOHN DOE 1985 TRUST** to which any of my assets are transferred, or

"(b) attacks any of the provisions of my Will or this **JOHN DOE 1985 TRUST**, or tries to impair or invalidate any of those provisions, or

"(c) contends that any asset of mine standing in my name alone is other than my separate property or that any asset of mine standing in my name and the name of any other person is of a character different than the character on the face of the asset's title document or evidence of title, or

"(d) conspires with or voluntarily assists anyone trying to do any of those acts, in (a), (b) and (c)

then, I specifically disinherit that person or persons; and I do not want any of those persons to receive any of my assets. If all those persons participate in those acts, I give my entire estate to my heirs excluding all those persons in (a), (b), (c) and (d). "Will" includes "Codicils." If anyone is disinherited as a result of the application of this Section, then that person shall be considered to have predeceased me without leaving any issue."

"I specifically intend to preserve (1) the separate property character of my assets shown as owned by me, and (2) my disposition of my assets.

"The Trustee may, at the expense of the trust estate, defend any contest or other attack on this trust or any of its provisions."

(This section uses the word, attack, for lack of a better word, although I have added other language. Therefore, it would be helpful to the Practitioner to have a legal definition of attack.)

Irving Kellogg

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AREA CODE 916

August 5, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Recommendation #1-636
No Contest Clause

Dear Commissioners:

I agree that the no contest provisions should also apply to trusts and otherwise valid instruments.

The proposed rules, in my opinion, will require the careful probate attorney to proceed with an often unnecessary 1060 CCP proceeding to declare that his proposed probate petition will not violate the "no contest provision" prior to filing his petition in the probate court. This may well burden the civil courts and cause additional expense and delay.

As an example: Many petitions to determine heirship (Probate Code 1080) are not deemed to be will contests under existing appellate court decisions.

It seems to me that by reason of Section 21305, the careful lawyer who wishes to avoid a malpractice suit must first take his client into the civil court and have that court confirm what our appellate courts have already concluded. Then, and only then, should he file his petition in the probate court. What a waste!

Very truly yours,

Rawlins Coffman

RAWLINS COFFMAN

RC:mb

P. S. See 2-page attachment reproducing Section 22.66, Volume 3, California Decedent Estate Practice.

R. C.

(2) Review the testator's intent.

(3) Determine the thrust of the client's opposition to the will.

(4) Ascertain whether the clause, if valid and applicable to the client, might be invoked.

(5) Attempt settlement. See §§22.115–22.124.

(6) Consider the many legal remedies short of contest that may be available. See §22.66.

(7) If a will contest is to be filed, research the cases and be prepared to show why the clause should not be invoked.

Even if a will includes a no-contest clause, any interested person may, without forfeiting any benefits under the will, contest a will provision that benefits any witness to the will, whether or not that witness is needed to establish the validity of the will. Prob C §372.5.

For a discussion of actions that do not trigger a no-contest clause, see §22.66.

If a will is invalidated in its entirety, so too is the no-contest clause. For further discussion of no-contest clauses, see Garb, *The In Terrorem Clause: Challenging California Wills,* 6 Orange County BJ 259 (1979).

For a discussion of disinheritance clauses, see §24.12.

C. Other Remedies

§22.66 1. Actions Without Contest

If the beneficiary opposing probate of a will with a no-contest clause wishes to avoid a head-on challenge, a number of proceedings that are not considered contests may be available. Additionally, these remedies may be resorted to at various stages of the probate proceeding and are not subject to the 120-day limitation. Examples are:

(a) Action challenging probate jurisdiction. *Estate of Crisler* (1950) 97 CA2d 198, 217 P2d 370; see chap 5.

(b) Probate of another will. *Estate of Robertson* (1968) 266 CA2d 866, 72 CR 396.

(c) Action against representative. *Estate of Seipel* (1933) 130 CA 273, 19 P2d 808. See also chap 25.

(d) Request for accounting and exceptions to account. *Estate of Kruse* (1970) 7 CA3d 471, 86 CR 391.

(e) Action seeking construction or interpretation of a will. *Estate of Kruse, supra; Estate of Miller* (1964) 230 CA2d 888, 903, 41 CR 410, 419. *Estate of Zappettini* (1963) 223 CA2d 424, 35 CR 843; see chap 24.

(f) Petition to determine heirship. Prob C §1080; *Estate of Basore* (1971) 19 CA3d 623, 96 CR 873; see chap 23.

(g) Action to rescind conveyance of property. *Estate of McCarthy* (1970) 5 CA3d 158, 85 CR 50.

(h) Contest, when in terrorem clause was intended to protect the contestants against diversion of the estate to others. *Estate of Balyeat* (1968) 268 CA2d 556, 74 CR 120.

(i) Action to establish prior contract. *Estate of Watson* (1986) 177 CA3d 569, 223 CR 14; *Estate of Miller* (1964) 230 CA2d 888, 41 CR 410; *Estate of Miller* (1963) 212 CA2d 284, 27 CR 909.

(j) Action to recover property. *Estate of Dow* (1957) 149 CA2d 47, 308 P2d 475.

(k) Petition for modification of family allowance. Prob C §681; see *Estate of Cates* (1971) 16 CA3d 1, 93 CR 696.

(l) Objection to preliminary (Prob C §1000) or final (Prob C §1020.1) distribution. See *Estate of Smith* (1973) 9 C3d 74, 106 CR 774 (objection to distribution as provided for in will); *Estate of Peterson* (1968) 259 CA2d 492, 66 CR 629 (after settlement; charitable bequest in violation of Prob C §31).

(m) Declaratory relief. CCP §§1060–1062.5; *Brown v Superior Court* (1949) 34 C2d 559, 212 P2d 878; *Thompson v Boyd* (1963) 217 CA2d 365, 32 CR 513; *Colden v Costello* (1932) 50 CA2d 363, 122 P2d 959; *McCaughna v Bilhorn* (1935) 10 CA2d 674, 52 P2d 1025; *Estate of Kline* (1934) 138 CA 514, 32 P2d 677.

(n) Exceptions to recommendations of probate commissioner. See *Estate of Lund* (1973) 34 CA3d 668, 110 CR 183.

(o) A petition under Prob C §851.5. See *Estate of Black* (1984) 160 CA3d 582, 206 CR 663 (decedent's unmarried cohabitant of 18 years properly petitioned under §851.5 to enforce claim of *Marvin* interest in estate assets under express and implied contract without violating will's no-contest clause).

On quasi-specific performance of contract to make wills, see §22.78.

§22.67 2. Determination of Ownership in Spousal and Putative Spousal Arrangements

Probate Code §§650–657 (§§13650–13660 as of July 1, 1987) allowing the passage of property to a surviving spouse present a novel problem in contests. When final, an order determining that property is property passing to a surviving spouse or confirming ownership of property belonging to the surviving spouse is conclusive on all persons, whether or not they are alive. Prob C §655(c) (§13657 as of July 1, 1987).

Assume the decedent attempts by will to dispose of certain property he considers his separate property to a friend and that by will he gives all his community property to his spouse. The surviving spouse then files

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August 5, 1988

California Law Revision Commission
4000 Middlefield Road
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Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating To Probate Law and Procedure - No Contest Clause
Study No. L-36

Ladies and Gentlemen:

I commend you for tentatively deciding to recommend that "no contest" clauses be enforced, without regard to the probable cause of the contest. My colleagues and I have noted with dismay the apparent upsurge in probate litigation matters, and I am certain that creating a good-faith exception would encourage even more such litigation. Testators are often well aware of the litigious nature of one or more of their relatives, and often ask (without any prompting from the lawyer) that a "no contest" clause be inserted to try to protect against the expense and emotional harrassment which they anticipate will follow their deaths.

I am particularly pleased to see that living trusts have been included in the statute. A major failing of much of the protective language contained in the Probate Code is the failure to include living trusts within their ambit. In particular, I would encourage your considering extending the provisions of Probate Code §6560 et. seq. (regarding a spouse and children unprovided for in a Will) to a living trust. Similarly, consideration should be given to extending the provisions of Probate Code §6122 (regarding revocations by dissolution of marriage) to a living trust.

Very truly yours,

Paul Gordon Hoffman

PGH17:rr

THOMAS R. THURMOND
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August 5, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: #L-636
No Contest Clause

The proposed revision to the No Contest Clause dated July 1988 generally serves a positive purpose. It is my experience that a testator or trustor uniformly has as a primary objective that the intent of the document be carried out according to his or her wishes. Hence the client favors the inclusion of a no contest clause to minimize the ability of others to circumvent those intentions. For this reason, I fully support the codification of existing California law.

However, I do believe that one proposed provision is unnecessarily overbroad and vague. Proposed section 21307(b) refers to "a person who gave instructions concerning the contents of the instrument." Does this refer only to instructions regarding the drafting of the document? or to the interpretation of it? The wording leaves some question in my mind about what is intended.

Except for the above minor problem, the proposed changes to the No Contest Clause statutes are a helpful and positive move.

Very truly yours,

Thurmond

Thomas R. Thurmond
Attorney at Law

TRT/sr

cc: Cal. Law Rev. File

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August 18, 1988

California Law Revision Commission
4000 Middlefiled Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Sirs:

I have reviewed your Tentative Recommendation relating to Probate Law and Procedure NO CONTEST CLAUSE and wish to advise you that I approve your recommendation.

Very truly yours,

Robert H. Faust

ROBERT H. FAUST

RHF/jk

LAW OFFICES OF
LUTHER & LUTHER
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FAIR OAKS, CALIFORNIA 95628

CHARLES W. LUTHER
FLORENCE J. LUTHER

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August 19, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation
No Contest Clause

Dear Sir or Madam:

Thank you for forwarding to me the California Law Revision Commission tentative recommendations regarding the California Probate Code.

With respect to the No Contest Clause recommendation, I believe I will have further comments in the future, but at the moment I would like to comment on the proposed section 21307- "Interested Participants."

I believe subsection 21307(b) is too vague and general in that the section as written could invite litigation which would involve persons who merely gave general instructions concerning the contents of the instrument and in fact did not participate at all in the drafting of the instrument. It would appear that that section should be omitted completely or should be more complete in the reference to the type of "instructions" the Legislature has in mind.

Thank you for considering these comments.

Very truly yours,

LUTHER & LUTHER
A Professional Corporation

By Florence J. Luther
FLORENCE J. LUTHER

FJL:saw.1

ELIZABETH R. MCKEE
PROBATE LEGAL ASSISTANT SERVICES
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August 24, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Madam/Sir:

I am writing to let you know of my approval of your recent tentative recommendations pertaining to CREDITORS' REMEDIES and the NO CONTEST CLAUSE that was sent to me for review.

However, I do hope that if in the future when codes are to be repealed and others to become effective, more thought would be used in arrangement of the replacement codes. I still have to look for the conversion chart showing the new code numbers.

Very truly yours,

Elizabeth R. McKee

Elizabeth R. McKee

ERM:hs

WEINBERG, ZIFF & MILLER
ATTORNEYS AT LAW

DAVID C. WEINBERG
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August 29, 1988

Law Revision Commission
Attn: N. Sterling, Esq.
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

RE: L-636 "No Contest Clause"

Dear Nat:

I have reviewed the above proposal and think it is a well thought-out revision and improvement. Unlike other changes which have been proposed, this revision will reduce the ambiguity now present in advising clients on potential contests.

This change was reviewed by the Probate Section Executive Committee of the Santa Clara County Bar Association and the revision was well received.

Could you ask one of your administrative people to contact me regarding the transmittal of studies? I have agreed to review all revisions for the local bar associations, yet I know that I have not been sent all of the materials.

Feel free to contact me if you want further clarification.

Sincerely,

M. Miller

Michael Patiky Miller

MPM:lk

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August 29, 1988

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear John:

After having reviewed the Tentative Recommendation relating to Probate Law and Procedure, entitled "No Contest Clause," dated July 1988, I have the following comments. The Tentative Recommendation is a welcome reform and should be enacted. In the area of will contests, you might also want to consider another reform that I would consider salutary.

Usually, will contests are filed before the admission of the will to probate and, therefore, before the appointment of the executor named in the will. Thus, once the will contest is filed, there is not only opposition to the admission of the will, but, also, to the appointment of the executor named in the will. Early on in the probate proceedings the court is burdened with, what I perceive to be, usually lengthy and not very meaningful litigation with respect to who should be appointed to administer the estate pending the will contest. I believe this litigation mainly arises because the Probate Code is not clear with respect to the judge's alternatives in such situations. The executor named under the will that is subject to contest asserts that he or she should be temporarily appointed administrator since the deceased evidenced the desire to appoint that person under the will. The contestants, obviously, contend that the will is invalid for any number of reasons and, therefore, do not want the person named as executor in the will to serve. At the initial probate hearing, the court is often burdened with argument, affidavits, etc., with respect to which proposed administrator will best serve the estate. Almost invariably, the court rules "a plague on both your houses"

and appoints an independent administrator, separate from either of the warring factions.

Perhaps, there should be a Probate Code section that provides in the case of a will contest, before the appointment of a personal representative of the deceased's estate, the court shall appoint an independent administrator unless all of the parties to the will contest can agree upon who shall serve.

Sincerely,

ROBERT J. BERTON

RJB:jb

Memo 88-69

EXHIBIT 15

Study L-636

IRWIN D. GOLDRING
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August 31, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: L-636
No Contest Clause

Gentlemen:

As I have expressed previously to the Commission, I am opposed to the concept of a "second bite" which is afforded through the procedure established under proposed Probate Code § 21305.

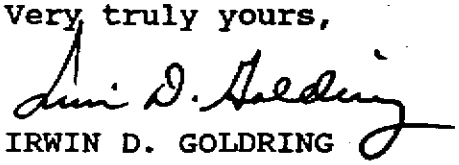
Experience tells me allowing the declaratory relief action will encourage litigation and be used as a hammer to extort settlements from proper estate beneficiaries thus thwarting the intention of many testators. I believe this procedure will be far more burdensome to estates, their prompt resolution and distribution and their proper beneficiaries than will be the benefit to would be claimants.

However, I am sanguine enough not to believe this letter will change the minds of the Commissioners. I do believe, though, there can be some amelioration of this burden. There are a great number of contestants who have nothing to lose. Thus, even a declaration by a court that what is intended to be done will constitute a contest will not necessarily avoid that contest. Therefore, if a person who seeks declaratory relief is told by the Court that what is proposed will constitute a contest, and if that person contests the Will anyhow, and loses, there should be some penalty payable by that contestant beyond loss of the contest.

A real penalty should then pertain, the minimum of which should be responsibility for costs and attorney's fees for the other side.

I believe there should also be some additional substantial monetary penalty, perhaps based upon the amount being sought. Further, the contestant should be required to post a bond at least equal in amount to the amount being sought under the contest.

Very truly yours,



IRWIN D. GOLDRING

IDG:bjy

WILLIAM E. FOX
ATTORNEY AT LAW
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September 5, 1988

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Re: Probate Law and Procedures Relating to No Contest Clauses

Gentlemen:

I have reviewed your recommendations regarding changes in connection with the no contest clauses in probate of wills.

I concur with the recommendations which you have made concerning the necessary amendments that should be made in reference to this matter.

However I would like to point out to your honorable commission that the contest of wills has increased tremendously in the last few years. Actually it is almost blackmail in many cases. The County Clerk here in San Luis Obispo County advises me that it seems probable that it has increased by about 20% just in the last two or three years. The reason that these contests are being filed is due to the fact that it can prevent an estate from being distributed at an early date. Even though you might have a priority, it still takes a substantial length of time to get to trial.

Yours very truly,

William E. Fox

WILLIAM E. FOX

WEF/kat

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

9/15/88

California Law Revision Commission

I received two Tentative Recommendations from you 1. Creditors Remedies, which I am not able to comment on and
2 No Contest Clause.

With regard to the latter I agree with your conclusions without any changes and suggest you propose this to the legislature to be implemented into law.

Thanks for requesting my recommendations

Sincerely

Henry Angerbauer

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September 28, 1988

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Dear John,

I have reviewed the Commission's tentative recommendations regarding Creditors' Remedies, and Probate Law and Procedure, from July 1988, and believe that the proposed amendments to and additions of the following sections should be approved:

I. CCP Section 686.020: Enforcement of Judgment After Death of Judgment Debtor.

CCP Section 695.070: Property Subject to Lien After Transfer.

CCP Section 701.680(c)(1): Revival of Junior Liens Where Execution Sale Set Aside.

II. Probate Code Section 6112: Witnesses to Wills.

Probate Code Section 21300-21307: No Contest Clause.

Very truly yours,

Richard H. Keatinge

Richard H. Keatinge

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July 27, 1988

Mr. John DeMoully
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Probate Code 6112 and 32

Dear Mr. DeMoully:

I recently had an occasion to see the effect of Section 6112 of the Probate Code and the adding of definitions to the Code. The second sentence of subdivision (b) of Section 6112 provides there is a presumption of undue influence by a person who is a witness to a Will and devisee thereof, assuming there are not two other disinterested witnesses.

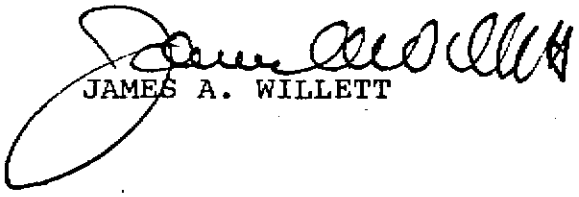
That section was considered by the court for an interpretation which would require a presumption of undue influence to apply when one of the witnesses to the Will was named as the testamentary trustee. Section 34(b) of the Probate Code provides that in the case of a devise to a trust, the trustee is the devisee. In this particular case, the trustee was not related to the decedent and had no interest in the estate except in his role as trustee as well as executor. It is well established that a Will in which a person is both a witness and executor, if he does not otherwise share in the Will, is not affected by any such disability of presumed undue influence. The witness who is designated as trustee of a testamentary trust, or even of a preexisting inter vivos trust, is defined as a devisee and, thus, potentially a party who, merely because of being a trustee, creates a presumption of undue influence in the execution of the Will and potential voiding of the Will.

I would think that the result obtained is not intentional. If that were intended and anticipated and debated at the time of the enactment of Section 6112 and 32(b), then I have no complaint now. However, it's my perception that it would not be the intent of the law to create this presumption under the

circumstances I describe above. Surely there is nothing in the trustee relationship in and of itself that should create such a result. Obviously, there may be many occasions when a person is a witness to a Will and is already a trustee under an inter vivos trust or named as trustee in the Will and has no other interest in the estate. It seems, therefore, that some modifying language in Section 6112(b) or perhaps in Section 32(b) is appropriate to resolve what I regard as a potential unfortunate interpretation problem.

This letter is sent by me personally and has no connection to my activities as a member of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.

Very truly yours,



JAMES A. WILLETT

JAW:kt

EXHIBIT 20

Probate Code Section 6112 provides that, "[u]nless 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." Attorney James Willett writes to say that this language may create a problem in view of Probate Code Section 34 defining "devisee." Under Section 34, if the devise is to a trust or trustee, "the trustee is the devisee and the beneficiaries are not devisees." Mr. Willett is concerned that if a testamentary trustee witnesses a will, there will be a presumption of undue influence. (The presumption voids only the devise to the witness, not the entire will. See 1983 Comment to Section 6112.)

This question was addressed under a predecessor code section in Estate of Tkachuk, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (1977). In that case, the devise was to the Union Church. The will was witnessed by a minister of the church, Andrew Myczka, who was also a member of the executive commitee of the church and, by church law, was a legal trustee of church property. The court held that Myczka was an interested witness within the meaning of the statute, but that the statute did not apply because the devise was not "to a subscribing witness":

> The beneficial bequest in the case at bench is to the Union Church and is not to Myczka, the subscribing witness. . . . Although respondent Myczka may tangentially and peripherally be benefited by the bequest to the church, the statute voids only beneficial bequests *to a subscribing witness,* and does not include language voiding bequests where there is an indirect benefit to a subscribing witness. *Id.* at 17.

Like its predecessor section, Section 6112 requires that the devise be "to a subscribing witness." So the *Tkachuk* case still appears to be good law, unless it has been changed by the definition of "devisee" in Section 34. It seems unlikely that Section 34 changes the *Tkachuk* case, because the term "devisee" is not used in Section 6112.

Moreover, the purpose of the definition of "devisee" in Section 34 is not to change the *Tkachuk* case, but rather is to distinguish the trustee from beneficiaries.

Nonetheless, we can make it clear that there is no presumption of undue influence when a trustee witnesses a will by amending Section 6112 as follows:

> Probate Code Section 6112 (amended). Who may witness a will
>
> 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.
>
> (c) 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. This subdivision does not apply where the subscribing witness is a trustee and the devise is to the trust or to the trustee in a fiduciary capacity.
>
> ~~(c)~~ (d) If a devise made by the will to an interested witness fails because the presumption established by subdivision ~~(b)~~ (c) 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.
>
> Comment. Section 6112 is amended to make clear that, where the will is witnessed by a trustee and the devise is to the trust or the trustee in a fiduciary capacity, the presumption of undue influence does not apply. This is consistent with Estate of Tkachuk, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (1977). Even though fraud or undue influence is not presumed in such case, it may still be proven as a question of fact. See subdivision (d) (last sentence).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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.[1]

While some jurisdictions refuse to recognize the validity of a no contest clause,[2] and most allow the clause to be given effect only against a person who makes a contest without probable cause,[3] 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.[4]

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 of a will, trust, or other instrument, and to avoid forfeiture.[5] Opposed to a probable cause exception are the policy of the law to

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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., Fla. Stat. § 732.517 (1981); Ind. Code § 29-1-6-2 (1976).

3. See, e.g., Uniform Probate Code § 3-905 (1982); Restatement (Second) of Property: Donative Transfers § 9.1 (1981).

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

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

honor the intent of the donor and to discourage litigation.[6] 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.[7] To increase predictability, the proposed law recognizes that a no contest clause is to be strictly construed in determining the donor's intent. This is consistent with the public policy to avoid a forfeiture absent the donor's clear intent. The law also makes clear that a request by a beneficiary for declaratory relief[8] 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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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 County B.J. 259 (1979).

8. See Code Civ. Proc. § 1060. The proposed law also expressly authorizes a petition for construction of an instrument under the Probate Code; in an appropriate case such a proceeding may be more expeditious than a civil action for declaratory relief.

or revocation by execution of a subsequent will.[9] 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 therefor should be codified.[10]

Existing California law precludes enforcement of a no contest clause where the challenge is to a gift to an interested witness to a will.[11] 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.[12] The rule should be extended beyond witnesses to other persons who prepare or participate in the preparation of an instrument, specifically persons who draft or transcribe the instrument or who give instructions concerning the contents of the instrument. 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 also makes 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 P. 277 (1919) (revocation by subsequent will).

10. *Cf.* N.Y. Est. Powers & Trusts Law § 3-3.5(b)(1) (McKinney 1981). The proposed law extends this rule to revocation by any means, whether by execution of a subsequent instrument or otherwise.

11. Prob. Code § 6112(d) [former Section 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 21307.

Note. The references to a "subscribing" witness should also be deleted from subdivision (b), since a will is no longer required to be executed by signing "at the bottom." See Section 6110.

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 an attack on an instrument or on a provision in 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 24 ("beneficiary" defined) and 45 [former Section 21100(b)] ("instrument" defined).

Note. In subdivision (a), Irving Kellogg of Beverly Hills (Exhibit 6) is unhappy with the perfunctory definition of a contest as an "attack" and would expand the definition to list specific types of attack, such as will contest, characterization of assets, and the like. The Commission has considered this concept before and declined to do it, since whether a particular type of attack violates a no contest clause depends on the specific no contest clause and what the decedent intended by it. Thus, the basic provision making a no contest clause enforceable states that "a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause." The staff can see no advantage in trying to be more specific than this.

In subdivision (b), Mr. Kellogg suggests that the term "instrument" requires definition. He apparently failed to read the Comment, which refers to the existing Probate Code definition of instrument: "'Instrument' means a will, trust, deed, or other writing

that designates a beneficiary or makes a donative transfer of property." In fact, two commentators noted with approval the application of the no contest provision to trusts as well as wills. See Rawlins Coffman (Exhibit 7) ("I agree that the no contest provisions should also apply to trusts and otherwise valid instruments."), and Paul Gordon Hoffman (Exhibit 8) ("I am particularly pleased to see that living trusts have been included in the statute. A major failing of much of the protective language contained in the Probate Code is the failure to include living trusts within their ambit.")

<u>§ 21301. Application of part</u>

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.

<u>Comment.</u> 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 a contest that is later abandoned 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).

<u>Note.</u> Jerome Sapiro of San Francisco (Exhibit 3) objects to incorporation of the common law of England. See Civil Code § 22.2. We have encountered this sort of concern before in other contexts, and dealt with it in Comments. The Comment to Section 15002 (Trust Law), for example, states:

> *Section 15002 is a special application of the rule stated in Civil Code Section 22.2 (common law as rule of decision in California courts) ... As used in this section, the "common law" does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions.*

We could repeat this Comment here to help allay concerns.

§ 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 are intended to implement the public policy of ensuring judicial access to information necessary for the proper administration of justice.

Note. John C. Hoag of Ticor Title Insurance has written us a note (not reproduced) concerning this section: "Thus, donor's freedom to anticipate and address the contingency of a will contest is further circumscribed." While it is true that this section limits the potential scope of a no contest clause, the Comment points out the reason for the provision. If we accept the public policy grounds that support the few other limitations that appear in this part, then Section 21302 follows as a necessary consequence.

§ 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 P. 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. In determining the intent of the transferor, 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. *Cf.* Garb, *The In Terrorem Clause: Challenging California Wills*, 6 Orange County B.J. 259 (1979). Strict construction is consistent with the public policy to avoid a forfeiture. *Cf.* Selvin, *Comment: Terror in Probate*, 16 Stan. L. Rev. 355 (1964). As used in this section, the "transferor" is the testator, settlor, grantor, owner, or other person who executes an instrument. See Section 81 ("transferor" defined).

Note. Jerome Sapiro of San Francisco (Exhibit 3) believes a no contest clause should be liberally construed; he argues that this would honor the intention of the transferor, since the clause was included for the purpose of carrying out the transferor's wishes and estate plan. He does not think the public policy to avoid a forfeiture is

relevant here, since the contestant is not losing anything the contestant ever had, and in fact the contestant was dissatisfied with the prospect of later having it.

The staff believes the section as drafted takes the correct approach. Because of the devastating consequences of a no contest clause, it should not be extended beyond what it clearly applies to. Moreover, liberal construction would have the effect of increasing declaratory relief litigation in order to determine the possible scope of a loosely-phrased no contest clause.

§ 21305. Declaratory relief

21305. (a) A beneficiary may petition for construction of an instrument, or may bring an action under Section 1060 of the Code of Civil Procedure for a declaration, determining 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 or action by the beneficiary is limited to the purposes described in subdivision (a).

Comment. Subdivision (a) of Section 21305 recognizes the availability of declaratory relief under the Code of Civil Procedure and also authorizes a petition for construction of an instrument under the Probate Code. See also Section 1000 (general rules of practice). 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."

Subdivision (b) is new. It resolves a conflict in the case law concerning whether proceedings for declaratory relief may be held to violate a no contest clause. *Cf.* Garb, *The In Terrorem Clause: Challenging California Wills*, 6 Orange County B.J. 259 (1979). Under subdivision (b), if a beneficiary requests a declaration whether a particular act would be considered "an attack on an instrument or on a provision in an instrument" within the meaning of the no contest clause, the request cannot itself be considered an attack on the instrument or provision. 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).

Note. This section was opposed by Rawlins Coffman of Red Bluff (Exhibit 7) on the basis that, before proceeding, the careful attorney will want to get a declaration whether or not a particular action will be held to be a contest. "This may well burden the civil courts and cause additional expense and delay." Irv Goldring of Los Angeles (Exhibit 15) also opposes this provision because it gives a "second bite" to a litigant. He believes it will be used as an additional tool by litigants to extort settlements from proper estate beneficiaries. The staff does not see where the added litigation will come from, since declaratory relief is already available under existing law, as Mr. Coffman's own attachment indicates.

Mr. Goldring is also concerned that a litigious person may make the estate jump through the additional hoop of a declaratory relief action with impunity, since many contestants have nothing to lose anyway. For this reason, he suggests that there should be a penalty against a person who seeks declaratory relief and loses, and then contests the instrument anyway and loses again. "A real penalty should then pertain, the minimum of which should be responsibility for costs and attorney's fees for the other side. I believe there should also be some additional substantial monetary penalty, perhaps based upon the amount being sought. Further, the contestant should be required to post a bond at least equal in amount to the amount being sought under the contest." One might well ask, however, why a litigant in a will contest should be subjected to more severe penalties than litigants generally. The Commission is about to undertake a general study of shifting attorney fees between litigants, and it would seem more appropriate to take up Mr. Goldring's suggestion in that context.

§ 21306. Forgery or revocation

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

(1) Forgery.

(2) Revocation.

(b) Nothing in this section precludes enforcement of a no contest clause against a beneficiary who brings a contest on grounds other than described in subdivision (a) even though the contest includes grounds described in subdivision (a).

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 P. 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).

Note. John C. Hoag of Ticor Title Insurance has written us a note (not reproduced) concerned that subdivision (b) could be read to imply that a no contest clause may be triggered by a declaratory relief

action. That appears far-fetched to the staff, but we could revise the last sentence of the Comment to read: "This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See, e.g., Section 21305 (declaratory relief); see also Section 21301 (application of part)."

§ 21307. Interested participant

21307. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

(a) A person who drafted or transcribed the instrument.

(b) A person who gave instructions concerning the contents of the instrument.

(c) 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. As used in subdivision (b), a person who gave instructions concerning contents of an instrument does not include a person who merely provided information such as birthdates, the spelling of names, and the like. 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).

Note. Thomas R. Thurmond of Vacaville (Exhibit 9) and Florence J. Luther of Fair Oaks (Exhibit 11) both found subdivision (b) ambiguous. Mr. Thurmond asks, "Does this refer only to instructions regarding the drafting of the document? or to the interpretation of it? The wording leaves some question in my mind about what is intended." Ms. Luther is concerned that "the section as written could invite litigation which would involve persons who merely gave general instructions concerning the contents of the instrument and in fact did not participate at all in the drafting of the instrument." We had attempted to address such concerns in the Comment, by noting that a person who merely provides information such as birthdates, etc., is not giving "instructions" within the meaning of this section. Perhaps we need to add more explicit language to the statute itself, e.g., "A person who gave instructions concerning ~~the contents~~ dispositive or other substantive provisions of the instrument or who directed inclusion of the no contest clause in the instrument."

Robert K. Maize, Jr., of Santa Rosa (Exhibit 1) is concerned about the situation where beneficiaries of the decedent have been involved in the development of the decedent's estate plan. "The actual participation of the husband and wife in these decisions range from all decisions being made by them to acquiescence to all the children's requests. However, when I am performing estate planning services and a beneficiary is participating in the decisions being made, the effect of the proposed Section 21307 is to cast some uncertainty on the planning

that I am doing to save taxes, and thereby increasing the uncertainty that the plan will in fact be carried into effect." Mr. Maize states that he needs to be able to provide his clients some reassurance that the estate plan will provide its intended benefit.

The staff agrees that this is a concern, although it must be balanced against the concern that actual fraud, duress, or undue influence may go unchallenged because of a no contest clause. Mr. Maize himself recognizes this, stating that "I am not saying that the proposed section does not have a sound basis for consideration." The trick is to find some sort of middle ground, which the staff believes is achieved by the draft in its present form.