

## First Supplement to Memorandum 88-69

Subject: Study L-636 - No Contest Clause (Further Comments)

Attached to this memorandum as Exhibit 1 are provisions of the no contest clause recommendation, redrafted to implement decisions made by the Commission at the October meeting. We will continue review of this matter at the next Commission meeting, commencing with Section 21301 (application of part) on page 6 of the tentative recommendation.

Exhibit 2 is a letter from the State Bar commenting on comments received on the tentative recommendation. The Commission has previously reviewed the material in the letter relating to Probate Code Section 6112. The other points made in the letter are:

§ 21307. Interested participant. The State Bar agrees with the staff suggestion to elaborate subdivision (b) to make clear that a no contest clause is not applicable to a contest of a provision that benefits "A person who gave instructions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no contest clause in the instrument."

Appointment of personal representative pending a will contest. The State Bar disagrees with the staff suggestion that "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." They believe the court's current discretion in the matter is adequate. They also believe that automatic appointment of an independent administrator would tilt the balance too heavily in favor of a contestant.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Exhibit 1

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

SEC. . Section 6112 of the Probate Code (as amended by 1988 Cal. Stats. ch. 1199) 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.

(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 presumption does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity.

~~(e)~~ (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.

~~(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. New Subdivision (c) of Section 6112 is amended to make clear that, where the will is witnessed by a person to whom a devise is made 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 a case, it may still be proven as a question of fact. See new subdivision (d) (last sentence).

The references to a "subscribing" witness are deleted from new subdivision (c) in recognition of the fact that a will need not be signed at the end.

Former subdivision (d), relating to no contest clauses, is deleted. This matter is dealt with comprehensively in Sections 21300 to 21307.

#### § 21300. Definitions

21300. As used in this part:

(a) "Contest" means an attack in a proceeding 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. ◀  
Under subdivision (a), an "attack" may initiate a proceeding  
(e.g., a contest by petition to revoke probate of a will) or may occur  
as an objection in a proceeding (e.g., a contest by objection to  
probate of a will). ◀

Subdivision (b) uses the term "no contest clause". This term 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 former subdivision (d) of 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).

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Re: Response to 88-69, No-Contest Clauses

Dear Jim:

On behalf of Team 3 of the Executive Committee, this will respond to Memorandum 88-69, no-contest clause. As you recall, the Executive Committee has previously supported the memorandum as written, and continues to support the package. However, comments to the memorandum have raised three proposals on which we wish to comment.

1. Section 21307: The meaning of instruction.  
The section as written provides that a no-contest clause is not enforceable with respect to a provision that benefits a person "who gave instructions concerning the contents of the instrument." As a matter of clarification, the team was uniformly in favor of the language contained in the note which would replace the foregoing with "a person who gave instructions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no-contest clause in the instrument."

2. Section 6112: Trustee as devisee. Under this section, the fact that a witness to a will also is a devisee under the will creates a presumption of undue influence. Jim Willett's comment to the memorandum points out that the section would by its terms apply to a trustee, who does not receive personal benefit from the devise. We agree that the presumption should not operate

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in this circumstance but suggest that the problem exists not only with respect to trustees but with respect to other fiduciaries (e.g., executors and custodians) as well. Therefore, we suggest that the additional sentence in subparagraph (c) of 6112 be added in the following form: "This subdivision does not apply where the subscribing witness is a person to whom the devise is made solely in a fiduciary capacity."

3. Appointment of special administrator pending the outcome of a will contest. We do not favor a special provision for appointment of an independent administrator in the event of a will contest. We believe the court's current discretion in this regard to be adequate and believe that the automatic appointment of an independent administrator weighs the procedural scales much too heavily in favor of a contestant.

Sincerely,



Anne K. Hilker  
Captain, Team 3

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