

#L-636

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Memorandum 89-41

Subject: Study L-636 - No Contest Clauses (AB 158)

A copy of the Commission's recommendation relating to no contest clauses is attached to this Memorandum. The recommended legislation contained in this Recommendation would be effectuated by the enactment of Assembly Bill 158.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

No Contest Clauses

January 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

FORREST A. PLANT
CHAIRPERSON
EDWIN K. MARZEC
VICE CHAIRPERSON
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ANN E. STODDEN
VAUGHN R. WALKER

December 1, 1988

To: The Honorable George Deukmejian
Governor of California
and
The Legislature of California

This recommendation proposes legislation that codifies, clarifies, and makes uniform the California law governing no contest (or in *terrorem*) clauses in wills, trusts, and other donative transfer instruments. A key feature of the codification is to preserve existing California law that precludes enforcement of a no contest clause where the challenge affects a gift to an interested witness. The recommended legislation would extend this rule to challenges that affect gifts to persons who draft or transcribe the instrument or who give directions concerning dispositive or other substantive provisions of the instrument; these persons are in an even more sensitive position than witnesses.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Forrest A. Plant
Chairperson

RECOMMENDATION

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 honor the intent of the donor and to discourage litigation.⁶ The Commission believes that the balance between these conflicting policies achieved

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 (1976); Ind. Code § 29-1-6-2 (1979).

3. See, e.g., Uniform Probate Code § 3-905 (1982); Restatement (Second) of Property: Donative Transfers § 9.1 (1983).

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

5. See, e.g., Selvin, *Comment: 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).

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 relief⁸ in the form of a petition for construction of the instrument to determine 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

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

8. Section 21305 of the proposed law expressly authorizes a petition for construction of an instrument under the Probate Code. Only such a petition, and not an independent proceeding under Code of Civil Procedure Section 1060, is given express immunity by the proposed law.

the ground of forgery 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 directions concerning dispositive or other substantive provisions of the instrument. These 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

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).

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

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.

PROPOSED LEGISLATION

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

Probate Code § 6112 (amended). Witnesses to wills

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.

Probate Code §§ 21300-21307 (added).

PART 3. NO CONTEST CLAUSE

§ 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 ("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 ("instrument" 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. This 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. 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. 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 are intended to 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 otherwise 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).

§ 21305. Declaratory relief

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).

Comment. Subdivision (a) of Section 21305 is new. It 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).

§ 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 that is limited to either or both of the following grounds:

- (a) Forgery.
- (b) Revocation.

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).

§ 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 directions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no contest clause in 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, 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 directions concerning dispositive or other substantive provisions 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).

