

First Supplement to Memorandum 89-41

Subject: Study L-636 - No Contest Clause (Position of State Bar)

We have received the letter attached as Exhibit 1 from Irv Goldring, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, opposed to subdivision (b) of Section 21307 of the Commission's recommendation on no contest clauses. Section 21307 provides:

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).

This opposition is unexpected, since the Executive Committee has previously been in support of this recommendation. The Bar's concern is that subdivision (b) is overbroad in that it could readily be applied to a simple situation where parents wish to make a child their beneficiary and the child accompanies the parents to the lawyer's office and merely helps them articulate what they want.

The Commission thought it had addressed this situation by the present language in subdivision (b) of "gave directions concerning dispositive or other substantive provisions." However, in light of the

Bar's concern, the Commission should consider a possible further narrowing of the language.

The Bar suggests an approach along the lines that the "dispositive or other substantive provisions of the instrument or no contest clause would not have been included in the instrument but for those directions." The staff is somewhat sympathetic to the Bar's concern about possible overbreadth, but believes the suggested "but for" test goes too far the other direction. As a practical matter, it would be nearly impossible, even in cases of the most obvious undue influence, to show that the suspect provision would not have been included but for the beneficiary's directions. If the contestant could show that, the contestant would have shown undue influence, and the no contest clause would be irrelevant.

The staff suggests, instead, the following provision:

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~~ contents of the provision or who directed inclusion of the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the person who drafted the instrument to include the contents of the provision or the no contest clause.

(c) A person who acted as a witness to the instrument.

Comment. As used in subdivision (b), a person who gave directions concerning dispositive or other substantive ~~provisions of an instrument~~ contents of a provision does not include a person who merely provided information such as birthdates, the spelling of names, and the like. Subdivision (b) only applies where the beneficiary directs the draftsperson of the instrument without concurrence of the transferor. The subdivision does not apply, for example, where the transferor and beneficiary together discuss the contents of the instrument with an estate planner and the transferor agrees that the provision or the no contest clause should be included in the instrument.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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March 24, 1989

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MAR 27 1989

RECEIVED

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

Re: No Contest Clauses

Dear Nat:

Jim Quillinan tells me I managed to confuse everyone. When I wrote the last letter on this subject I had one foot out the door on a vacation and understand your confusion after rereading my letter.

I understand Jim has given you the general concept and concern expressed by the Executive Committee. The example I use is where a parent or parents go to a child and discuss with that child the terms of their dispositive scheme and want the child to help them in dealing with the lawyer and the child accompanies them to the lawyer's office. At the meeting the child articulates for the parents what they want. On the surface it is a very simple situation and does not include any undue influence, but under proposed Section 21307(b) a no contest clause would be vitiated even where appropriate since a contestant would have probable cause under the Section as the particular child who "gave directions". My example assumes that child is also a beneficiary in the Will.

I discussed this with Anne Hilker and we both decided what was needed is some sort of "but for" language. I am sure you are much better at drafting than I, but I will make an attempt with the suggestion the following be added at the end of the current sub-section after first changing the period following the word "instrument" to a comma:

"which dispositive or other substantive provisions of the instrument or no contest clause would not have been included in the instrument but for those directions."

Perhaps, after you have had a chance to mull over my example and the wording you may wish to give me a call. We really feel that the current language, even though suggested by one of our teams, is much too broad, and as I have said before, vitiates the

Nathaniel Sterling, Esq.
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ability to use a no contest clause in alleged undue influence situations.

Sincerely yours,

A handwritten signature in dark ink, appearing to be 'IRWIN D. GOLDRING', written in a cursive style.

IRWIN D. GOLDRING

IDG:hs

cc: Anne K. Hilker, Esq.
James V. Quillinan, Esq.