

Memorandum 2005-47

**Revision of No Contest Clause Statute
(Scope of Study)**

This memorandum initiates the Law Revision Commission's study of no contest clauses. The study is mandated by SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122.

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument 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 intended to reduce litigation by persons whose expectations are frustrated by the donative scheme of the instrument.

A copy of the existing California statute — Probate Code Sections 21300-21322 — is set out in the Exhibit to this memorandum.

SCR 42 (CAMPBELL)

SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122, directs the Law Revision Commission to make this study:

WHEREAS, The California Law Revision Commission is authorized to study topics approved for study by concurrent resolution of the Legislature; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the California Law Revision Commission shall, in consultation with the Senate and Assembly Judiciary Committees, do the following:

(1) Conduct a comprehensive study, and prepare a report, concerning the apparent advantages and disadvantages of the state's no contest clause provisions, set forth in Part 3 (commencing with Section 21300) of Division 11 of the Probate Code.

(2) Review the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.

SCR 42 is effective immediately.

This measure began life as a bill to repeal the existing no contest clause statute and replace it with a statute that would (1) make a no contest clause unenforceable and (2) allow an award of attorney's fees to the prevailing party in a will or trust contest if the opposing party acted without reasonable cause. See SB 296 (Campbell), as introduced. It was sponsored by the State Bar Trusts & Estates Section.

The measure ran into trouble in committee. The bill was diverted to another purpose and this resolution — SCR 42 (Campbell) — was introduced in its place to direct a study of the matter by the Law Revision Commission.

LAW REVISION COMMISSION BACKGROUND

The Law Revision Commission is responsible for the basic law that governs enforcement of a no contest clause. The law is the result of a 1989 Commission study, although it has been amended a number of times since its 1990 enactment.

The Commission took the position at that time that effective enforcement of a no contest clause is necessary to deter an unmeritorious will or trust contest:

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

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. Opposed to a probable cause exception are the policy of the law to honor the intent of the donor and to discourage litigation. 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 causes 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.

Recommendation Relating to No Contest Clauses, 20 Cal. L. Revision Comm'n Reports 7, 11-12 (fns. omitted) (1990).

This position evolved after the Commission had tentatively recommended that a no contest clause should not be enforceable if there was "probable cause" for a challenge. The State Bar Probate Section was critical of that position and convinced the Commission that full and effective enforcement of a no contest clause is essential to prevent excessive litigation challenging wills and trusts.

What has caused the about face of the State Bar on this issue? We will undoubtedly learn more in the course of this study.

It is important to note that the Commission's recommendation on this matter included within it a Trojan Horse that would ultimately prove to undermine the efficacy of a no contest clause:

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. ... The [proposed law] makes clear that a request by a beneficiary for declaratory relief 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.

Recommendation Relating to No Contest Clauses, 20 Cal. L. Revision Comm'n Reports 7, 12 (fns. omitted) (1990).

In the 15 years since enactment of the statute allowing declaratory relief, litigation over no contest clauses has erupted. Appellate decisions involving declaratory relief come up regularly — we see two or three new ones every year. We have heard from practitioners that it is almost malpractice for a probate litigator not to request declaratory relief on behalf of a disappointed client.

The staff thinks the system now needs to be fixed. The question is, How?

ISSUES

SCR 42 requires that the Commission make this study "in consultation with the Senate and Assembly Judiciary Committees." Those committees have a lively interest in the topic, and were instrumental in converting it from a bill to a study. We have consulted with lead staff for both committees. The following discussion

represents a synopsis of some of the policy considerations, factual issues, and legal questions, among others, they think need to be taken into account by the Commission in the process of this study.

Overview — Public Policy

An initial premise is that it is good public policy to effectuate the decedent's intent. That is because (1) our system is based on private property and the ability of an owner to do with that property as the owner wishes, and (2) honoring the decedent's intent tends to limit discord and litigation among family members.

The purpose of a no contest clause is to create a disincentive for a disappointed heir to challenge the decedent's disposition of property. For that reason, effectuating a no contest clause furthers the policy of honoring the decedent's intent. Generally speaking, to make a no contest clause ineffective would tend to run contrary to the public policy we are trying to effectuate.

On the other hand, we don't want to stifle a legitimate contest of an instrument that does not effectuate the decedent's true intent, due to fraud, undue influence, or the like. But how can we distinguish between a legitimate and an illegitimate contest? If standards of evidence and proof are too high, extensive litigation will be required. The question is, does the no contest clause law, in its current form, strike the right balance in terms of deterrent? If not, what needs to be done?

Generally, settlement would be preferable to litigation in this area. But the economics of litigation may suggest that, absent a no contest clause, there may be undue pressure to settle a meritless will or trust contest.

Effect of No Contest Clause

A study of the appellate cases that have ineluctably eroded the value of the no contest clause as a deterrent to litigation is likely to reveal increasingly complex family and social relationships (including multiple layer extended families involving several marriages and many step and in law relationships). The cases may also demonstrate increasingly sophisticated decedents (and their attorneys) who develop tricky estate planning devices with unintended results, to the dismay of intended heirs. Eliminating the no contest clause could facilitate litigation and deprive the court of a way to cut short what could be a long battle between heirs and estate administrators.

There is some skepticism about the State Bar's intentions, given the fact that during our initial study they wanted to fully effectuate the no contest clause and

now they want to make it unenforceable. Could this reflect a change in the leadership of the bar from estate planners to litigators?

One factual issue we should attempt to determine is whether making a no contest clause ineffective would increase will and trust contest litigation. Experience in other jurisdictions could be useful on this point. Factors to consider also include (1) the cost of will and trust contest litigation and (2) whether the cost is a deterrent in the case of the emotions that typically surround a decedent, family issues, disappointed expectations, grief, etc.

A second factual issue is what are the costs involved in will or trust contest litigation? Are the costs sufficiently substantial that the disputants will have an incentive to settle rather than fight the contest. If a no contest clause is unenforceable, perhaps it will be an easy decision for a disgruntled heir to file a contest, since a settlement that exceeds the cost of an attorney is likely. A no contest clause could raise the stakes. Would that have the effect of encouraging or discouraging settlement? Which result is preferable?

A third factual issue is the extent to which a will or trust contest may be filed in propria persona. If pro per litigation is common, then the dynamics of fighting versus settlement may change, since a pro per has no attorney fees and may or may not be motivated to settle. It is possible that pro per litigation is so minimal that this will not be a factor.

A fourth factual issue is what is the experience in other jurisdictions. Are there any instances where a no contest clause was made unenforceable? Did that result in increased litigation or not?

Role of Declaratory Relief

An argument for making a no contest clause unenforceable is that litigation over the no contest clause itself is becoming more prevalent. But is that the fault of the no contest clause, or the fault of the California statute that encourages declaratory relief? If we were to curtail use of declaratory relief, rather than eliminate the no contest clause completely, would that reduce litigation?

We should look at possible fixes to the declaratory relief process, including:

(1) Simplifying declaratory relief litigation by limiting use of extrinsic evidence. That could help rein in runaway litigation and convert a complex case into a simple one. The tendency at present may be to try the merits of the case in the declaratory relief proceeding.

(2) Limit the issues that may be tried in the declaratory relief proceeding. We cannot keep the proceeding simple if we allow court determination of collateral issues. Ordinarily there will not be enough evidence in the declaratory relief framework to warrant court determination of substantive issues.

(3) Look at the exemptions to the definition of a “challenge” under the statute. Has the Legislature exacerbated the problem by writing in too many exemptions and effectively neutralizing the effect of a no contest clause?

(4) Should declaratory relief simply be eliminated because it is a way around the no contest clause? Making declaratory relief readily available may actually encourage rather than discourage will and trust contest litigation.

Other Issues

We should examine the effectiveness of other options to help effectuate the decedent’s intent, including:

(1) Require a higher standard of proof to break an instrument. Would this be too much of a burden, given that intent is subjective?

(2) Is the threat of an award of litigation expenses a deterrent to will and trust contest litigation? The psychology of a disappointed heir or an heir that believes there has been fraud or undue influence may be that the litigation cost is a small price to pay to vindicate rights. Purely economic decisionmaking may not occur in this forum.

(3) What about making the no contest clause ineffective if the court determines the contestant had probable cause to challenge the instrument? Does a will or trust contestant inevitably think there is probable cause, so this standard would not act as a deterrent to unmeritorious litigation? The experience in other jurisdictions that use this system may be instructive on this point.

NEXT STEPS

Timing

The resolution imposes no deadline for submission of our report to the Legislature. But there is interest in this topic in the Legislature. However, given the number and size of our other high priority topics, the staff would give this one a medium priority. We would try to make immediate and steady progress on it, but not at the expense of any of the high priority studies.

To this end, the staff believes **we can productively begin now to assemble background information** — the cases and literature on the California statute, the statutes of other jurisdictions and experience under them, the factual issues we have identified. Once we have organized and digested the information, we may be at a point where we can productively take up this matter without impacting other projects.

In addition, **we would request the State Bar to provide us with information** concerning its change of position on this issue. They should have plenty of material, since they have gone to the extent of sponsoring legislation on it. The information will be instructive. The bar may also be able to provide us with some of the other factual information we need, such as the cost of litigating a will or trust contest and the frequency of pro per litigation.

Once we actually get rolling on this, the staff predicts it will not take long to complete. The question is finding the time. At this point, the staff does not think we will be able to complete the project during 2006 without unduly impacting high priority projects, and we would so report to the Judiciary Committees.

Report to Judiciary Committees

We intend to use this memorandum, and any Commission decisions in connection with it, as the basis for a description of the scope of this study that we submit to the Assembly and Senate Judiciary Committees.

SCR 15 (Morrow) would require the Commission, when it commences a new study, to report on the scope of that study to the Chair and Vice Chair of each of the Judiciary Committees. SCR 15 has not yet been adopted (it is pending in Assembly Appropriations Committee). Moreover, the measure relates only to a study undertaken by the Commission pursuant to its general authority; the measure does not address a study such as this that the Legislature has specifically directed.

Nonetheless, we believe it is a good idea to keep those committees apprised of the Commission's work, regardless of whether the scope report is technically required. That is particularly true on this study, given the legislative mandate that we conduct the study in consultation with the Judiciary Committees.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

PROB. CODE §§ 21300-21322

PART 3. NO CONTEST CLAUSE

CHAPTER 1. GENERAL PROVISIONS

21300. As used in this part:

(a) “Contest” means any action identified in a “no contest clause” as a violation of the clause. The term includes both direct and indirect contests.

(b) “Direct contest” in an instrument or in this chapter means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on one or more of the following grounds:

- (1) Revocation.
- (2) Lack of capacity.
- (3) Fraud.
- (4) Misrepresentation.
- (5) Menace.
- (6) Duress.
- (7) Undue influence.
- (8) Mistake.
- (9) Lack of due execution.
- (10) Forgery.

(c) “Indirect contest” means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in subdivision (b), and that does not contain any of those grounds.

(d) “No contest clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court.

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.

21302. This part applies notwithstanding a contrary provision in the instrument.

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.

21304. In determining the intent of the transferor, a no contest clause shall be strictly construed.

21305. (a) For instruments executed on or after January 1, 2001, the following actions do not constitute a contest unless expressly identified in the no contest clause as a violation of the clause:

(1) The filing of a creditor's claim or prosecution of an action based upon it.

(2) An action or proceeding to determine the character, title, or ownership of property.

(3) A challenge to the validity of an instrument, contract, agreement, beneficiary designation, or other document, other than the instrument containing the no contest clause.

(b) Except as provided in subdivision (d), notwithstanding anything to the contrary in any instrument, the following proceedings do not violate a no contest clause as a matter of public policy:

(1) A pleading seeking relief under Chapter 3 (commencing with Section 15400) of Part 2 of Division 9.

(2) A pleading under Part 3 (commencing with Section 1800) of Division 4.

(3) A pleading under Part 2 (commencing with Section 4100) of Division 4.5.

(4) A pleading regarding an order annulling a marriage of the person who executed the instrument containing the no contest clause.

(5) A pleading pursuant to Section 2403.

(6) A pleading challenging the exercise of a fiduciary power.

(7) A pleading regarding the appointment of a fiduciary or the removal of a fiduciary.

(8) A pleading regarding an accounting or report of a fiduciary.

(9) A pleading regarding the interpretation of the instrument containing the no contest clause or an instrument or other document expressly identified in the no contest clause.

(10) A pleading regarding the approval of a settlement or compromise whether or not it affects the terms of an instrument.

(11) A pleading regarding the reformation of an instrument to carry out the intention of the person creating the instrument.

(12) A petition to compel an accounting or report of a fiduciary, if that accounting or report is not waived by the instrument. If the instrument waives an accounting or report of a fiduciary, a petition to determine if subdivision (a) of Section 16064 applies does not constitute a violation of a no contest clause.

(c) Subdivision (a) does not apply to a codicil or amendment to an instrument that was executed on or after January 1, 2001, unless the codicil or amendment adds a no contest clause or amends a no contest clause contained in an instrument executed before January 1, 2001.

(d) Subdivision (b) shall apply only to instruments of decedents dying on or after January 1, 2001, and to documents that become irrevocable on or after January 1, 2001. However, paragraphs (9), (11), and (12) of subdivision (b) shall only apply to instruments of decedents dying on or after January 1, 2003, and to documents that become irrevocable on or after January 1, 2003.

(e) The provisions of paragraphs (6), (9), and (11) of subdivision (b) do not apply if the court finds that the filing of the pleading is a direct contest of an instrument or any of its terms, as defined in Section 21300.

(f) The term “pleading” in subdivision (b) includes a petition, complaint, response, objection, or other document filed with the court that expresses the position of a party to the proceedings.

21306. (a) A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with reasonable cause, brings a contest that is limited to one or more of the following grounds:

(1) Forgery.

(2) Revocation.

(3) An action to establish the invalidity of any transfer described in Section 21350.

(b) “Reasonable cause” is defined for the purposes of this section to mean that the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery.

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 to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause.

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

21308. The statute of limitations for the commencement of any motion, petition, or other act referred to in subdivision (a) of Section 21320 shall be tolled

beginning with the date the application for the court's determination under subdivision (a) of Section 21320 is made and ending with the date the court's determination becomes final.

CHAPTER 2. DECLARATORY RELIEF

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7, Part 8 (commencing with Section 19000) of Division 9, an action pursuant to Section 21305, and an action under Part 7 (commencing with Section 21700) of Division 11, would be a contest within the terms of the no contest clause.

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

(c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required.

(d) A determination of whether Section 21306 or 21307 would apply in a particular case may not be made under this section.

21321. (a) If a proceeding is pending for administration of the transferor's estate, an application under Section 21320 shall be filed in the court in which the proceeding is pending.

(b) If no proceeding is pending for administration of the transferor's estate and the transferor is deceased, an application under Section 21320 may be filed in the superior court in any county in which administration of the transferor's estate would be proper or, if none, in any county in which property affected by the transfer is located or, if none, in any county in this state.

(c) If no proceeding is pending for administration of the transferor's estate and the transferor is living and resides in this state, an application under Section 21320 shall be filed in the superior court in the county in which the transferor resides.

(d) If no proceeding is pending for administration of the transferor's estate and the transferor is living but does not reside in this state, an application under Section 21320 may be filed in the superior court in the county in which property affected by the transfer is located or, if none, in any county in this state.

(e) Notwithstanding any other provision of this section, if the instrument containing the no contest clause is a trust, an application under Section 21320 shall

be filed in the court having jurisdiction over the trust under Chapter 1 (commencing with Section 17000) of Part 5 of Division 9.

21322. (a) If a proceeding is pending for administration of the transferor's estate, notice of the hearing on an application under Section 21320 shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each beneficiary named in the instrument containing the no contest clause whose interest could be adversely affected by the application.

(3) The Attorney General, if the instrument containing the no contest clause (A) involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state or (B) involves or may involve a devise for charitable purposes without an identified devisee.

(b) If no proceeding is pending for administration of the transferor's estate, at least 30 days before the hearing on an application under Section 21320, the applicant shall serve notice of the hearing in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure on all of the following persons:

(1) Each beneficiary named in the instrument containing the no contest clause whose interest could be affected by the application.

(2) Each executor, trustee, or other fiduciary named in the instrument containing the no contest clause.

(3) The Attorney General, if the instrument containing the no contest clause (A) involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state or (B) involves or may involve a devise for charitable purposes without an identified devisee.