

Memorandum 2006-42

Revision of No Contest Clause Statute

A no contest clause (also called an *in terrorem* clause) is a provision in a will, trust, or other donative instrument, which provides that a person who contests or attacks the instrument takes nothing under the instrument or takes a reduced share. Such a clause is intended to deter litigation by a person who is dissatisfied with the donative scheme of the instrument.

A legislative resolution sponsored by the Executive Committee of the Trusts and Estates Section of the State Bar ("ExComm") directs the Law Revision Commission to conduct a comprehensive study of the law governing no contest clauses:

[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 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122. There is no fixed deadline for completion of the study. However, in its consultation with the Judiciary Committees, the staff predicted that the study would be completed in 2007. See Exhibit p. 1.

This memorandum discusses the policies that weigh in favor or against enforcement of a no contest clause and the different legal approaches to enforcement of a no contest clause that are used in California and in other U.S. jurisdictions.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

Correspondence relevant to that discussion is attached in the exhibit as follows:

- Exhibit p.*
- Nathaniel Sterling, California Law Revision Commission, Letter to Assembly & Senate Committees on the Judiciary (1/17/06) 1
 - Shirley L. Kovar, Executive Committee of the Trusts and Estates Section of the State Bar of California (9/28/06) 4
 - Report of the Fiduciary Litigation Committee of the American College of Trusts and Estates Counsel (“ACTEC”) (10/4/06) 19

The first item in the Exhibit is a letter from the staff to the Judiciary Committees, memorializing the substance of the staff’s consultation with those committees as to how the study will proceed. The second and third items were submitted by Shirley L. Kovar, the ExComm liaison to the Commission on this project. Note that the errors in numbering the sections in the ACTEC report were in the original.

The contents of the memorandum are organized as follows:

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HISTORY OF EXISTING LAW

In 1989, the Commission recommended the codification of basic principles regarding the enforcement of a no contest clause. *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7 (1990). That recommendation was enacted without significant change. See 1989 Cal. Stat. ch. 544.

The Commission decided against following the majority rule of providing a general exception for a contest that is brought with probable cause. Instead, the recommendation codified the then existing rule that a no contest clause is enforceable without regard for whether there is probable cause to bring a contest.

The severity of that approach was reduced by a number of provisions that would make clear or limit the application of a no contest clause. Under those provisions:

- (1) A no contest clause would be strictly construed.
- (2) A contest based on forgery, revocation, or a beneficiary’s involvement in the creation of an instrument would be exempt from a no contest clause that is brought with probable cause.
- (3) A beneficiary could seek a judicial declaration of whether a proposed action would violate a no contest clause. A declaration that the action would not violate the no contest clause would operate as a safe harbor.

The Commission’s recommendation was unanimously endorsed by ExComm.

After that initial enactment, the no contest clause statute was amended four times, as a result of legislation sponsored by ExComm. See See 1994 Cal. Stats. ch. 40 (A.B. 797); 1995 Cal. Stat. ch. 730 (A.B. 1466); 2000 Cal. Stat. ch. 17 (A.B. 1491); 2002 Cal. Stat. ch. 150 (S.B. 1878).

Those amendments made minor adjustments to the provisions recommended by the Commission and added a number of new limitations on the application and enforcement of a no contest clause. The resulting law is described in “Recap of California No Contest Clause Statute,” below.

PROBATE v. NONPROBATE INSTRUMENTS

Many of the no contest clause rules and policies discussed in this memorandum arise from court decisions or statutes that address the application of a no contest clause in a will (as opposed to a trust or other nonprobate instrument).

The Restatement of Property states that the distinction makes no policy difference. No contest clauses in wills and nonprobate instruments serve the same purpose and the same test applies to determine the validity of those clauses in the two comparable situations.” Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003).

California law follows that approach. The no contest clause statute governs any “instrument,” including both wills and nonprobate donative instruments. See Prob. Code § 21300(d). See also Prob. Code § 45 (“instrument” defined).

POLICIES THAT SUPPORT ENFORCEMENT OF NO CONTEST CLAUSE

“No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.” *George v. Burch*, 7 Cal. 4th 246, 254 (1994). Those rationales for enforcement are discussed in more detail below.

Effectuating Transferor’s Intent

The law should respect a person’s ability to control the use and disposition of the person’s own property. That includes the ability to make a gift, either during life or on death. An owner may place conditions on a donative transfer of property, so long as the condition imposed is not illegal or otherwise against public policy. See *Estate of Kitchen*, 192 Cal. 384, 388-89 (1923):

[The] testatrix was at full liberty to dispose of her property as she saw fit and upon whatever condition she desired to impose, so long as the condition was not prohibited by some law or opposed to public policy. The testatrix could give or refrain from giving; and could attach to her gift any lawful condition which her reason or caprice might dictate. She was but dealing with her own property and the beneficiary claiming thereunder must take the gift, if at all, upon the terms offered.

As noted, there will be situations in which a no contest clause is unenforceable as a matter of public policy, notwithstanding the intentions of the transferor. See “Specific Public Policy Exceptions,” below.

Avoiding Litigation

There are a number of good reasons why a person would want to avoid litigation contesting the person’s estate plan. Litigation can add considerable cost and delay to the administration of an estate and can cause familial strife and embarrassment. A disappointed heir may use the threat of litigation to extort a settlement awarding that heir a larger share of the estate. Those reasons are discussed below.

Cost and Delay

The cost of litigation depletes assets that were intended to go to the person’s heirs. That is generally undesirable, but it can also have unexpected effects on the relative value of the gifts given to different heirs. For example, where one heir is given a specifically named asset and the other heir takes the residue of the estate, litigation costs will disproportionately affect the second heir.

By deterring contest litigation, a no contest clause preserves the corpus of the estate and the transferor’s plan for the disposition of those assets.

Discord Between Heirs

A dispute over the proper disposition of a decedent’s estate can pit family members and friends against one another. The dispute may be protracted, emotional, and destructive of important personal relationships.

A transferor may execute a no contest clause in order to avoid just that sort of discord. For example, in *Estate of Ferber*, 66 Cal. App. 4th 244 (1998), the transferor had served as the personal representative of his father’s estate, which was open for 17 years. He did not want his own representative to go through the same difficulties: “Due to his angst over this state of affairs and its negative

impact on his health and quality of life, ... he directed his attorneys to prepare the strongest possible no contest clause." *Id.* at 247.

Privacy

A contest proceeding may bring to light "matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial..." *Estate of Hite*, 155 Cal. 436, 441 (1909) (quoting *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898)). "Unless forfeiture clauses are given effect, the resulting squabbles between disappointed kinfolk would often lead to 'disgraceful family exposures,' as a result of which "the family skeleton will have been made to dance." Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 Hastings L.J. 45 (1963) (citations omitted).

An effective no contest clause can prevent that sort of public airing of private matters.

Settlement Pressure

A disappointed heir may attempt to extract a larger gift from the estate by threatening to file a contest. So long as the amount demanded is less than the cost to defend against the contest, there will be pressure to accede to the demand, regardless of its merits.

A no contest clause can be used to avoid that result. The potential contestant's bargaining position is much reduced if filing a nuisance suit would forfeit the gift made to that person under the estate plan.

Forced Election

In some cases, the proper disposition of a transferor's property may be complicated by difficult property characterization issues.

For example: a decedent is survived by his wife of many years. It was a second marriage for both spouses, each of whom had significant separate property assets of their own. Over the years of their marriage it became increasingly difficult to characterize ownership of their assets: gifts were made (or implied), accounts were mingled, community property contributions were made to separate property business interests, etc. Rather than put his heirs to the expense and delay that would be required for a thorough property characterization, the transferor uses a no contest clause to cut the Gordian knot.

The transferor claims that all of the disputed assets are his separate property, gives a gift to his surviving wife that is clearly greater than the amount she would recover if she were to contest the property characterization, and includes a no contest clause. This forces the surviving spouse to make a choice between acquiescing in the decedent's estate plan and taking the amount offered under that plan, or forfeiting that amount in order to pursue her independent rights under community property law.

If the offer made in the estate plan is fair to the surviving spouse, she can save the estate a considerable amount of money and time by waiving her community property interest in the assets claimed by the decedent (thereby avoiding the need to engage in costly tracing and property characterization).

Similar facts were at issue in *George v. Burch*, 7 Cal. 4th 246, 265-66 (1994):

[Estate] planning for many married couples now entails allocating a lifetime of community and separate assets between the current spouse and children from a previous marriage. The difficulties inherent in ascertaining community interests in otherwise separate property pose a significant challenge to the testator or testatrix. If the testator or testatrix errs in identifying or calculating the community interests in his or her property, costly and divisive litigation may ensue and testamentary distributions in favor of one or more beneficiaries might unexpectedly be extinguished. As both the Legislature and courts have long recognized, no contest clauses serve an important public policy in these situations by reducing the threat of litigation and uncertainty.

The dissent in *George v. Burch* would not have enforced the no contest clause: "enforcement of a no contest clause to penalize the assertion of community property rights does not serve the underlying purpose of no contest clauses — to permit the testator or trustor to dispose of his or her own property as desired...." *Id.* at 287 (Kennard, J., dissenting).

On the other hand, a surviving spouse's acceptance of a gift under a deceased spouse's estate plan can be seen as acquiescence in the property characterization expressed in the plan: "While it is the law that a testator can only dispose of his own property, he may assume to dispose of that which belongs to another, and such disposition may be ratified and confirmed by its owner, by the acceptance, under the will, of a donation, necessarily implying such ratification and confirmation." *George v. Burch*, 7 Cal. 4th at 265 (citations omitted).

There are other situations, besides the disposition of marital property, that may give rise to a forced election of the type described above. For example,

business partners may also have mingled assets in a way that would make proper division difficult, or there may be a disputed debt owed by the decedent to an heir. In such cases, a no contest clause and a sufficiently generous gift can resolve the matter without litigation.

Continuity of Law

Consideration must be given to the fact that many estate plans have been drafted in reliance on existing law. Any change in the law governing the enforcement of a no contest clause could result in significant transitional costs, as transferors are required to review their estate plans and make whatever changes make sense under the new law. If a transferor dies before adjustments can be made, the estate plan may operate in an unintended way.

That may be of particular concern in California, where the law is fairly complex and careful drafting may have been required to achieve the transferor's purpose.

Note also that the Assembly Judiciary Committee expressed skepticism as to whether there is actually a significant problem with the enforcement of no contest clauses in California that would justify disturbing settled law. Consistent with that concern, the resolution was amended to specifically direct us to consider the "potential benefits of maintaining current law." See Assembly Committee on Judiciary Analysis of SCR 42 (July 5, 2005), pp. 6-8.

POLICIES THAT WEIGH AGAINST ENFORCEMENT OF NO CONTEST CLAUSE

It is true that a person generally has the right to dispose of property on death as that person sees fit. The law does not require that an estate plan be wise or fair.

However, it is also true that the public has important policy interests in the proper execution and administration of estates, which justify significant regulation.

The law regulates the creation, modification, and revocation of a donative instrument, in order to ensure that the transferor has the necessary capacity to act and is free from coercion, fraud, or undue influence. Creditor claim procedures exist to protect third parties who have an independent interest in estate assets. The law provides default rules, such as the rule providing a share for a pretermitted heir, to implement the likely intentions of a person who has failed to express a clear intention on an important matter. The law provides a standard

of care and rules for accountability to govern the conduct of a trustee or other fiduciary.

The courts have acknowledged that a no contest clause may be trumped by important public policies. See *Estate of Kitchen*, 192 Cal. 384, 388-89 (1923) (no contest clause enforceable “so long as the condition was not prohibited by some law or opposed to public policy.”)

Specific policy concerns are discussed below.

Forfeiture Disfavored

Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy. Accordingly, a no contest clause should be applied conservatively, so as not to extend the scope of application beyond what was intended: “Because a no contest clause results in a forfeiture ... a court is required to strictly construe it and may not extend it beyond what was plainly the testator’s intent.” *George v. Burch*, 7 Cal. 4th 246, 254 (1994). See also Prob. Code § 21304 (no contest clause to be strictly construed).

Some practitioners believe that the courts have strayed too far from the rule of strict construction, with undesirable results. See “Liberal Construction,” below.

Access to Justice

As a general matter, a person should have access to the courts to remedy a wrong. A no contest clause works against that policy, by threatening a significant loss to an heir who exercises that right. In one of the earliest decisions holding that a no contest clause is unenforceable (in Indiana, one of the two states that currently prohibits enforcement), the court based its holding on the importance of access to justice:

[It] is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.

Mallet v. Smith, 6 Rich. Eq. 12, 20 (S.C. 1853).

Judicial Action Required to Determine Transferor’s Intentions

In order to effectuate a transferor’s intentions, it is necessary to ascertain those intentions. In some situations, a judicial proceeding may be necessary to do

so. In those cases, a no contest clause could work against the effectuation of the transferor's intentions, by deterring action that is necessary to determine or preserve those intentions. Areas of specific concern are discussed below.

Capacity

In order to execute a donative instrument, a transferor must have the requisite mental capacity. See Prob. Code §§ 811-812 (capacity to convey property and contract), 6100.5(a) (capacity to make will).

If a person lacks the legal capacity to execute a donative instrument, then the instrument is not a reliable expression of the person's intentions and should not be enforced.

A no contest clause that deters inquiry into the transferor's capacity may work against effectuation of the transferor's intention, by preserving an invalid instrument.

Genuineness

The law establishes formalities for the creation, modification, and revocation of a donative instrument. See, e.g., Prob. Code §§ 6110-6113 (execution of will); 6120-6124 (revocation and revival of will); 15200-15201, 15206 (creation of trust); 15401-15402 (revocation of trust by settlor).

Those formalities help to guarantee the authenticity of an instrument as a genuine expression of the transferor's intentions. For example, the rules for witnessing the execution of a will help to verify the capacity of the executor and to avoid a forgery.

The policy of effectuating a transferor's intentions depends on the instrument being an actual expression of the transferor's intentions. A no contest clause can deter efforts to prove that an instrument is actually a forgery or is otherwise invalid.

Duress, Menace, Fraud, and Undue Influence

A donative instrument that is executed as a result of duress, menace, fraud, or undue influence does not reflect the transferor's freely given consent. It should not be enforced. See Section 6104 (will procured by duress, menace, fraud, or undue influence is ineffective); Civ. Code §§ 1565-1575 (contract procured by duress, menace, fraud, or undue influence is voidable).

A no contest clause can deter judicial inquiry into whether a person who executed a donative instrument acted freely. That can shield abuse from effective review. A clever wrongdoer may intentionally take advantage of that fact.

Judicial Interpretation of Instrument

If a provision of a donative instrument is ambiguous, it may be difficult to determine the transferor's intentions. Different heirs may argue for different meanings. Judicial construction of the instrument may be necessary to resolve the matter. See 64 Cal. Jur. 3d *Wills* § 355 (2006) (construction of will); Prob. Code § 17200(b)(1) (construction of trust).

To the extent that a no contest clause would deter the heirs from seeking judicial construction of an ambiguous provision, it works against the policy of effectuating the transferor's intentions.

Judicial Modification of Instrument

There may be instances where the meaning of a donative instrument is clear, but there is an unanticipated change in circumstances that would make the instrument ineffective to implement the transferor's purpose. In such a case, it may be appropriate to seek judicial modification of the instrument.

For example, a court may modify or terminate a trust, on the petition of a trustee or beneficiary, "if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust." Prob. Code § 15409.

In such a case, a no contest clause could deter heirs from seeking a judicial modification of an instrument that is necessary in order to effectuate the transferor's actual intentions.

Judicial Supervision of Fiduciary

Important public policies are served by judicial supervision of an executor, trustee, or other fiduciary and such supervision should not be impeded by the operation of a no contest clause: "No contest clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision." *Estate of Ferber*, 66 Cal. App. 4th 244, 253-54 (1998).

Misuse of Forced Election

As discussed in “Forced Election” above, a no contest clause may be used to force an heir to choose taking whatever is offered under the transferor’s estate plan, or forfeiting that gift in order to assert the person’s independent interest in the estate assets (e.g., by filing a creditor’s claim or disputing ownership or dispositive control of marital property).

Such a forced election may be entirely fair, where the amount offered to the heir is sufficiently large to justify acquiescence in the estate plan. Costly litigation will be avoided and the details of the transferor’s estate plan can be implemented as intended.

However, there are reasons for concern about the use of a no contest clause to force an election:

(1) **The heir may settle for less than what is due.** Suppose that a surviving spouse has good reason to believe that the transferor’s estate plan would transfer \$100,000 of property that is actually owned by the surviving spouse. If it would cost \$30,000 to adjudicate the matter, then the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the hassle and delay of litigation are significant detriments, the surviving spouse might accept even less.

(2) **The estate plan may be inconsistent with the heir’s own dispositional preferences.** For example, a surviving spouse would have liked her share of a vacation home to pass to her children from a former marriage. Under community property law, she should be free to make that disposition of her own interest in the property. Instead, the transferor’s estate plan transfers the entire home to **his** children from a former marriage. A no contest clause may coerce the surviving spouse into accepting that result, even though it is contrary to her own preferences as to the disposition of property that is by law under her control.

These problems result from the “take it or leave it” nature of a forced election. The transferor is given unilateral control to frame the choice, without an opportunity for negotiation. The choice may be framed benevolently, so as to benefit everyone concerned, or it may be framed cynically or carelessly, offering a choice between two undesirable results.

SUMMARY OF ENFORCEMENT APPROACHES

In all but two states, a no contest clause is enforceable. However, enforcement is subject to two significant restrictions:

(1) In most states, a no contest clause will not be enforced if there is probable cause to bring the contest. That is the rule provided in the Uniform Probate Code. In California, a form of probable cause exception applies to a handful of specified types of contests.

(2) A no contest clause will not be enforced if enforcement would conflict with an important public policy. This has led to a number of specific public policy exceptions to enforcement. Some derive from court holdings, while others have been enacted by statute. California law includes several public policy exceptions.

In addition to the question of whether a no contest clause will be enforced, many states provide special rules of construction that can limit or clarify the application of a no contest clause. One important example is the declaratory relief procedure provided in California, which can be used to determine whether a specific contest would violate a specific no contest clause. Those rules are also discussed below.

GENERAL RULE: NO CONTEST CLAUSE ENFORCED

In all but two states, the general rule is that a no contest clause does not violate public policy and is enforceable. See, e.g., Prob. Code § 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.”). That rule respects a person’s right to control the disposition of property on death and the legitimate desire to avoid litigation.

That general rule has been limited by a number of exceptions, which are described below.

MAJORITY EXCEPTION: PROBABLE CAUSE

Twenty-eight states will not enforce a no contest clause if there is probable cause to bring the contest. That is the rule of Uniform Probate Code Sections 2-517 and 3-905 (1990).

Seventeen states have adopted the Uniform Probate Code language. See Alaska Stat. §§ 13.12.517, 13.16.555 (**Alaska**), A.R.S. § 14-2517 (**Arizona**), Colo. Rev. Stat. § 15-12-905 (**Colorado**), Haw. Rev. Stat. § 560:3-905 (**Hawaii**), Idaho Code § 15-3-905 (**Idaho**), Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (**Maine**), Mich. Comp. Las Ann. § 700.2518 (**Michigan**), Minn. Stat. Ann. § 524.2-517 (**Minnesota**), Mont. Code Ann. § 72-2-537 (**Montana**), Neb. Rev. Stat. § 30-24.103 (**Nebraska**), N.J. Stat. Ann. § 3B:3-47 (**New Jersey**), N.M. Stat. Ann. § 45-2-517 (**New Mexico**), N.D. Cent. Code § 30.1-20-05 (**North Dakota**), 20 Pa.C.S.A. § 2521 (**Pennsylvania**), S.C. Code Ann. § 62-3-905 (**South Carolina**), S.D. Codified Laws § 29A-3-905 (**South Dakota**), Utah Code Ann. § 75-3-905 (**Utah**).

Another 11 states have adopted a probable cause exception that is not derived from the Uniform Probate Code. In some of those states, good faith is also expressly required. See *South Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917) (good faith also required) (**Connecticut**); *In re Cocklin's Estate*, 17 N.W.2d 129, 136 (Iowa 1945) (good faith also required) (**Iowa**); *In re Foster's Estate*, 190 Kan. 498, 500 (1963) (good faith also required) (**Kansas**); Md. Estates and Trusts Code Ann. § 4-413 (**Maryland**); *Hannam v. Brown*, 114 Nev. 350, 357 (1998) (**Nevada**); *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952) (**North Carolina**); *Tate v. Camp*, 245 S.W. 839, 844 (Tenn. 1922) (**Tennessee**); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Ct. App. 1954) (**Texas**); *In re Estate of Chappell*, 127 Wash. 638, 646 (1923) (**Washington**); *Dutterer v. Logan*, 103 W. Va. 216, 221 (1927) (**West Virginia**); *In re Keenan's Will*, 188 Wis. 163, 179 (1925) (**Wisconsin**).

The Restatement (Third) of Property states that probable cause exists if, at the time of instituting a proceeding, there is evidence that “would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.” Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003).

Advantages of Probable Cause Exception

A probable cause exception offers three significant advantages:

Broadened Access to Justice

A probable cause exception strikes a balance between the transferor's interest in deterring litigation and an heir's right of access to the courts. Where there is good reason to believe that a contest has merit, there is an increased public interest in allowing the contest to proceed to resolution. Restatement (Second) of Property (Wills & Don. Trans.) § 9.1 (1983).

Fraud Prevention

A probable cause exception would help to avoid the problem of a wrongdoer who uses a no contest clause to shield fraud or undue influence from effective review. If there is good reason to believe foul play was involved in the execution of a donative instrument, an heir can bring a contest without risking forfeiture. That narrows the scope for abuse.

Deterrence of Frivolous Contests

A no contest clause would continue to deter a contest that is plainly lacking in merit. A frivolous suit, brought to embarrass other heirs or coerce a settlement, would still be deterred by the threat of forfeiture.

Disadvantages of Probable Cause Exception

A probable cause exception has the following significant disadvantages:

More Unsuccessful Contests

A probable cause exception should produce an increase in contest litigation, including contests that, while reasonable, are ultimately unsuccessful.

An unsuccessful contest can impose all of the harms that the transferor sought to avoid: cost, delay, acrimony, disruption of the donative scheme, and embarrassment. It offers no countervailing benefit to the contestant or the other heirs. The only benefit is an abstract one, the social benefit of having fairly resolved a dispute.

Unexpected Forfeiture

In many cases, it will be relatively easy to determine whether there is probable cause to bring a contest. However, the standard does not provide a bright line and there will inevitably be cases in which it is difficult to judge whether probable cause exists.

An heir who believes in good faith that there is probable cause to bring a contest may be proven wrong, and may face forfeiture as a result. That would be a rather harsh penalty for an innocent error in judgment.

On the other hand, the uncertainty may serve to deter contests that really should not be brought. A contestant who fears that a contest may be too weak to establish probable cause can easily avoid forfeiture, by not bringing the contest.

More Latitude for Coerced Settlement

A probable cause exception may also broaden the scope for a disappointed heir to coerce a settlement. So long as the heir can frame a contest that has a significant likelihood of prevailing, regardless of its actual merits or importance, the contestant can threaten the estate with litigation costs and delay. That may give the contestant the leverage needed to exact a better deal than the one that was intended by the transferor.

Forced Election Undermined

One of the advantages of a no contest clause is that it can be used to avoid a complicated property characterization dispute by forcing the heir to either accept the estate plan in toto (including both the gift to the heir and the estate plan's characterization of property ownership) or contest the transferor's purported ownership of estate assets (forfeiting the disposition offered under the plan, in favor of whatever can be achieved through the courts).

The utility of a forced election does not depend on the transferor's characterization of property being correct. To the contrary, it is most useful where characterization is uncertain.

This means that, in many situations where a forced election would be useful, the heir would be able to establish probable cause to contest ownership of the purported estate assets. That would eliminate the threat of forfeiture, disabling the transferor's ability to force an election. The heir could choose to take under the estate plan **and** contest ownership of estate assets. This defeats the purpose of the forced election.

It may be that an estate plan could be drafted so as to force an election without the use of a no contest clause. In fact, there are California cases in which the court held that an estate plan imposed a forced election, despite the absence of a no contest clause. A forced election arises if the instrument expressly requires an election or if the transferor purports to dispose of a surviving spouse's property and it is clear that an assertion of community property rights would be inconsistent with the transferor's intentions. See *Estate of Murphy*, 15 Cal. 3d 907, 913 (1976).

However, there is a risk that a statutory limitation on the enforcement of a no contest clause could be held applicable to an express "forced election clause" in a donative instrument. Although the two types of clauses might differ in the

language used to draft them, it might be hard to differentiate between the two in terms of their substantive effect.

Selective Application of Probable Cause Exception

In New York and Oregon a contest that is based on a claim of forgery or revocation is not enforced if there is probable cause to bring the contest. See New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); O.R.S. § 112.272(2).

A similar rule exists in California, except that the standard is “reasonable cause” rather than probable cause. See Prob. Code § 21306.

“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.

Prob. Code § 21306(b). Note that Section 21306 also applies to “an action to establish the invalidity of any transfer described in Section 21350.” See Section 21350 (limitation on transfer to drafter and others).

In addition, Probate Code Section 21307 provides an exception for a contest, brought with **probable cause**, of 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.

The general policy served by these exceptions is straightforward enough. If there is good reason to believe that an instrument is a forgery, or has been revoked, or makes a transfer to certain interested persons, then there is an increased public interest in verifying that the instrument is genuine, operative, and was not the product of undue influence.

SPECIFIC PUBLIC POLICY EXCEPTIONS

California and other states have established a number of specific public policy exceptions to the enforcement of a no contest clause. Those exceptions are discussed below.

Construction and Reformation of Instrument

In order to effectuate the transferor's actual intentions it may be necessary to seek judicial construction of an ambiguous provision or the modification, reformation, or termination of an instrument that has become incompatible with the transferor's intentions. The need to determine the transferor's actual intentions may trump the transferor's desire to avoid litigation.

[It] is the privilege and right of a party beneficiary to an estate at all times to seek a construction of the provisions of the will. An action brought to construe a will is not a contest within the meaning of the usual forfeiture clause, because it is obvious that the moving party does not by such means seek to set aside or annul the will, but rather to ascertain the true meaning of the testatrix and to enforce what she desired.

Estate of Miller, 230 Cal. App. 2d 888, 903 (1964).

In many jurisdictions, an action to determine or better effectuate the intentions of a transferor (through construction or modification of an instrument) is exempt from the application of a no contest clause. Specific examples are described below.

Construction of Instrument

In California, a pleading regarding the interpretation of an instrument containing a no contest clause (or referenced in a no contest clause) is exempt from the application of a no contest clause. Prob. Code § 21305(b)(9).

A similar exception exists in Arkansas, Iowa, and New York. *Ellsworth v. Arkansas Nat'l Bank*, 109 S.W.2d 1258, 1262 (Ark. 1937); *Geisinger v. Geisinger*, 41 N.W.2d 86, 93 (Iowa 1950); New York Est. Powers & Trusts § 3-3.5(b)(3)(E) (McKinney 2006).

Modification or Termination of Trust

In California, a pleading seeking relief under the law governing the modification or termination of a trust is exempt from the application of a no contest clause. Prob. Code § 21305(b)(1). This allows the court to make

adjustments to a trust to preserve the settlor's intentions, despite an unforeseen change in circumstances.

Reformation of Instrument

In California, a pleading regarding the reformation of an instrument in order to carry out a transferor's intentions is exempt from the application of a no contest clause. Prob. Code § 21305(b)(11).

Fiduciary Supervision

Public policy imposes a high standard of care on a fiduciary. Report requirements and procedures for challenging a fiduciary's conduct provide an important measure of accountability and supervision.

In order to preserve the court's role in supervising the conduct of a fiduciary, California exempts the following actions relating to the supervision of a fiduciary from the application of a no contest clause:

Exercise of Fiduciary Power

A pleading challenging the exercise of a fiduciary power is exempt from the application of a no contest clause. Prob. Code § 21305(b)(6).

Appointment or Removal of Fiduciary

A pleading regarding the appointment or removal of a fiduciary is exempt from the application of a no contest clause. Prob. Code § 21305(b)(7).

Accounting or Report of Fiduciary

A pleading regarding an accounting or report of a fiduciary, including a petition to compel an accounting or report, is exempt from the application of a no contest clause. Prob. Code § 21305(b)(8), (12).

Waiver of Trustee's Duty to Account or Report

A trust instrument may waive the trustee's obligation to make an accounting or other report to a beneficiary. Prob. Code § 16064(a). A petition to determine whether a trust includes such a waiver is exempt from the application of a no contest clause. Prob. Code § 21305(b)(12).

Conservatorship

A pleading under the conservatorship law is exempt from the application of a no contest clause. Prob. Code § 21305(b)(2). There is also a specific exception for a

pleading in an action under Probate Code Section 2403 (providing for court authorization or approval of conservator action with respect to estate). Prob. Code § 21305(b)(5).

Power of Attorney

A pleading under the Power of Attorney Law is exempt from the application of a no contest clause. Prob. Code § 21305(b)(3).

Settlement or Compromise

A pleading regarding court approval of a settlement or compromise is exempt from the application of a no contest clause. Prob. Code § 21305(b)(10). That makes sense. If the law provides that a fiduciary must seek court approval of a proposed settlement or compromise, those affected by the settlement or compromise should be allowed to participate in the proceeding without fear of forfeiture. Such participation would not add significantly to the litigation burden.

Other Miscellaneous Exceptions

There are a few miscellaneous types of actions that have been exempted from the application of a no contest clause:

Annulment of Marriage

In California, a pleading regarding annulment of marriage is exempt from the application of a no contest clause. Prob. Code § 21305(b)(4).

A bigamous or incestuous marriage is void as a matter of law. Fam. Code §§ 2200-2201. A marriage is voidable if it is procured through fraud or coercion, or if one of the spouses lacks the capacity to marry (based on age or mental state). Fam. Code § 2210. A transferor should not be permitted to coerce heirs into accepting a marriage that is void or voidable.

Objection to Court Jurisdiction

In New York, an objection to the jurisdiction of the court in which a will is offered for probate is exempt from the application of a no contest clause. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006). An heir should not be deterred from raising an objection to the court's jurisdiction.

Disclosure of Relevant Information

In New York, a no contest clause does not apply to an heir's disclosure, to a court or otherwise, of information that is relevant to a probate proceeding. New York Est. Powers & Trusts § 3-3.5(b)(3)(B) (McKinney 2006). It makes sense that an heir should not be sanctioned merely for providing information that is relevant to the ongoing probate process.

Failure to Assent to Probate

In New York, a failure to join in, consent to, or waive notice of a probate proceeding does not trigger a no contest clause. New York Est. Powers & Trusts § 3-3.5(b)(3)(C) (McKinney 2006). This may reflect a policy judgment that forfeiture should not result from mere inaction.

Preliminary Examination in Probate Proceeding

In New York, a no contest clause is not triggered by the preliminary examination of a witness, the person who prepared the will, the nominated executor, or the proponent of the will. New York Est. Powers & Trusts § 3-3.5(b)(3)(D) (McKinney 2006). This appears to be an exception for participation in a routine part of the probate procedure in that state.

No Alternative Disposition

In Georgia, a no contest clause in a will is ineffective unless the will provides an alternative disposition of the assets that would be forfeited under the clause. O.C.G.A. § 53-4-68(b).

Action on Behalf of Minor or Incompetent

In New York and Oregon, an action on behalf of a minor or incompetent to oppose the probate of a will is exempt from the application of a no contest clause. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); O.R.S. § 112.272(3). Presumably, the concern is that a minor or incompetent should not suffer a forfeiture as a result of a decision that is made by another. The guardian may exercise poor judgment, resulting in a significant loss that cannot be recovered.

Forfeiture Contingent on Action of Another

There is little authority on the enforcement of no contest clauses in Louisiana, but one case did recognize a public policy exception to enforcement. A will

provided that **every** heir would forfeit if **any** heir contested the will. The estate would then pass to a named charity. The court held that the condition was unenforceable because it would allow for improper coercion between heirs. *Succession of Kern*, 252 So.2d 507 (La. App., 1971).

Note, however, that other jurisdictions apparently allow a no contest clause to condition a forfeiture of an heir's interest on the actions of another person. The commentary to Section 8.5 of the Restatement (Third) of Property (2003) provides an example: "[A] transferor may provide for the rescission of a gift to a grandchild in the event that the disinherited parent of the grandchild institutes proceedings either to contest the donative document or to challenge any of its provisions." In effect, this allows a transferor to disinherit a person entirely and still deter that person from contesting the estate plan — by threatening the forfeiture of a gift to the disinherited person's loved ones.

MINORITY RULE: NONENFORCEMENT

By statute, both Florida and Indiana provide that a no contest clause in a will is unenforceable.

The Florida rule was added in 1974. See Fla. Stat. ch. 732.517 ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."). Prior to that, Florida had followed the Uniform Probate Code probable cause rule. The staff does not know whether the 1974 change had a significant effect on the amount of contest-related litigation.

In Indiana, the nonenforcement rule was enacted in 1953. See Ind. Code § 29-1-6-2 ("If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect."). That appears to have been a codification of long standing case law. See *Mallet v. Smith*, 6 Rich. Eq. 12, 20 (S.C. 1853).

Nonenforcement serves the public policy of providing unlimited access to the courts, notwithstanding a transferor's desire to avoid litigation and controversy.

Blanket nonenforcement is the approach that has been proposed by ExComm. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est.

Q., Fall 2004, at 9. The ExComm proposal would also add a fee shifting provision to deter unreasonable contests of specified types. The merits of that proposal are discussed below, under “Possible Reforms.”

SPECIAL RULES RELATING TO INTERPRETATION OF NO CONTEST CLAUSE

Strict Construction

In California, Probate Code Section 21304 provides: “In determining the intent of the transferor, a no contest clause shall be strictly construed.” The Commission Comment to that section explains that “Strict construction is consistent with the public policy to avoid a forfeiture.”

Strict construction is also the rule in many other states. See, e.g., *Kershaw v. Kershaw*, 848 So. 2d 942, 954-55 (Ala. 2002) (**Alabama**); *Estate of Pepler*, 971 P.2d 694, 696 (Colo. App. 1998) (**Colorado**); *Estate of Wojtalewicz*, 418 N.E. 2d 418 (Ill. 1st Dist. 1981) (**Illinois**); *Saier v. Saier*, 366 Mich. 515 (1962) (**Michigan**); *Matter of Alexander*, 90 Misc. 2d 482, 486 (N.Y. 1977) (**New York**); *Estate of Westfahl*, 675 P.2d 21 (Okla. 1983) (**Oklahoma**); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. Ct. App. 1986) (**Texas**).

Presumption Against Application

In California, Probate Code Section 21305(a) provides a list of actions that “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.

A generally phrased forfeiture clause will not apply to the listed actions.

Query whether one could circumvent that limitation with boilerplate stating that a no contest clause is violated by “any action of a type described in Probate Code Section 21305(a)”?

Declaratory Relief

In California, a beneficiary may apply to the court for a determination of whether a particular action would trigger a no contest clause in an instrument

that is or has become irrevocable. See Prob. Code § 21320(a). An action for declaratory relief brought under Section 21320(a) is itself exempt from the application of a no contest clause. This creates a safe harbor, from which a potential contestant can determine, without risk, whether a contemplated contest would trigger a forfeiture.

Note that a court may not make a determination under Section 21320 if to do so it would be required to make a determination of the merits of the underlying dispute.

RECAP OF CALIFORNIA NO CONTEST CLAUSE STATUTE

The preceding sections of the memorandum discuss the rules governing no contest clause enforcement in various U.S. jurisdictions, including California.

Before discussing problems that may exist with California law, it would be helpful to provide a quick recap that focuses exclusively on the rather complex California statute. The substance of the statute is summarized below:

- (1) **A no contest clause is generally enforceable.** Prob. Code § 21303.
- (2) **A no contest clause is to be strictly construed.** Prob. Code § 21304.
- (3) **Certain actions do not violate a no contest clause unless specifically identified in the no contest clause as a violation.** Prob. Code § 21305(a) (creditor claim, property characterization, instrument other than instrument containing clause).
- (4) **A “reasonable cause” exception exists for certain actions.** Prob. Code § 21306 (forgery, revocation, disqualified beneficiary).
- (5) **A “probable cause” exception exists for a contest of the validity of a transfer to certain interested persons.** Prob. Code § 21307.
- (6) **Certain actions are exempt from a no contest clause as matter of public policy.** Prob. Code § 21305(b) (interpretation of instrument, reformation of instrument, modification of trust, supervision of fiduciary, action involving conservator, action involving power of attorney, annulment of marriage, approval of settlement).
- (7) **A declaratory relief procedure is available to determine whether an action would violate no contest clause.** Prob. Code § 21320.

Note that the rules stated as items (3) and (6) above are subject to complex limitations. See Prob. Code § 21305(c)-(d) (prospective application), (e) (exception

inapplicable if court finds specified action is “direct contest” of validity of instrument). Those limitations are discussed below. See “Statutory Complexity.”

PROBLEMS UNDER EXISTING LAW

Recent articles published in the California Trusts and Estates Quarterly have identified the following problems with existing California law on the enforcement of a no contest clause:

- Excessive Litigation
- Uncertain Application
- Fraud and Undue Influence Shielded from Review

In addition, the staff believes that the existing statute may be more complex than is necessary. Those problems are discussed below.

Excessive Litigation

The principal justification for the enforcement of a no contest clause is to avoid litigation. Litigation consumes estate assets, delays administration of the estate, and can upset the transferor’s intentions, tarnish the transferor’s reputation, and cause acrimony and embarrassment for heirs.

Declaratory Relief Litigation

ExComm maintains that, under existing law, a no contest clause does not reduce litigation. Instead, the focus of litigation merely shifts from the merits of the underlying contest to the interpretation of the no contest clause. This results from the widespread use of the declaratory relief procedure:

Prudent practitioners now routinely file petitions for declaratory relief under Probate Code § 21320. Californians now expect to have two levels of litigation when instruments contain a no contest clause: file a Probate Code § 21320 petition and litigate the declaratory relief, and then litigate the substantive issues in another, separate proceeding.

Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 10.

In fact, there may be a need for more than one declaratory relief action in connection with a contest. If, in the course of litigation a contestant discovers new facts that could affect the nature of the contest, a “prudent practitioner will advise her client to file a new petition for declaratory relief. ... Indeed, in any

complex proceeding with discovery producing evidence of new potential claims, a second or third filing pursuant to Probate Code § 21320 is likely.” *Id.*

David A. Baer, an estate planning practitioner in San Francisco, describes some of the practical consequences of declaratory relief litigation under Section 21320. He states that it is common for declaratory relief proceedings to add delays of 18 months or more. If the decision is appealed, that can add another year or more to the delay. He notes that the likelihood that a delay will prejudice the outcome is increased in probate litigation as many of the witnesses will be elderly. “Obviously, such witnesses may pass away, or their memories may fade not just due to the passage of time, but as a result of a dementing illness, or a medical event such as a stroke.” Baer, *A Practitioner’s View*, Cal. Tr. & Est. Q., Fall 2004, at 31.

The articles cited above do not suggest that more **contests** are being filed. It is the declaratory relief remedy, combined with the increased uncertainty that follows from liberal construction of no contest clauses, that is identified as the source of increased litigation. That distinction was not lost on the Assembly Judiciary Committee, which suggested that it might make more sense to limit the availability of the declaratory relief safe harbor than to limit the enforcement of no contest clauses. Assembly Committee on Judiciary Analysis of SCR 42 (July 5, 2005), pp. 4-5.

Empirical Data

It would be helpful if the reported increase in litigation could be verified empirically. The staff asked ExComm if it could provide information on the frequency of contest litigation in California and in other states. ExComm’s letter provides some information. See Exhibit pp. 7-10.

The tables showing the number of appellate decisions in California and New York are helpful in weighing the effect of the declaratory relief provision. California and New York are similar in that each provides for general enforcement of a no contest clause, with a number of specific policy-based exemptions. The principal difference between the two state’s treatment of no contest clauses is the declaratory relief procedure provided in California. New York does not have an equivalent procedure.

In the period from 2000 to 2005, there were 170 contest-related appeals in California and only 12 in New York. If those figures are adjusted for the difference in populations, we find that there were 4.72 contest appeals per

million residents in California, and only .33 contest appeals per million in New York. In other words, California has approximately 14 times more contest appeals per capita than New York.

That data suggests that the availability of declaratory relief is linked to a higher rate of contest-related litigation in California.

The data from Florida is also interesting. Florida does not enforce no contest clauses, yet there are only 44 reported appeals involving contests in the last 16 years. That is an average of .15 appeals per million residents annually. That is far fewer than the number of cases reported for California.

The staff is unsure of how heavily we can lean on ExComm's figures. More information is required. Specifically, how were the figures derived?

It is relatively easy to find and count contest cases in a jurisdiction that enforces a no contest clause, because many of those cases will include an express determination as to whether the case constitutes a contest.

By contrast, in a jurisdiction where a no contest clause is unenforceable, there may be little or no discussion by the court of whether a particular action is a "contest," because that distinction will not be legally significant. This means that a researcher would need to construct a list of actions (and the various terms used to describe those actions) that constitute a contest. The thoroughness of that effort will directly affect the number of cases found and counted.

The staff asked ExComm informally about the methods used to derive the reported numbers and was told only that different committee members had researched the different states, using online research. That raises the possibility that different search methodologies were used for different states. If so, we cannot use the numbers as a reliable way to compare the relative level of contest-related litigation in the different states.

The staff would ask that ExComm provide more detailed information about how the research was conducted. We may also need to do our own research on the issue.

Even if the research methods used by committee members varied between states, we can assume that a single methodology was used to search for contest cases in California. This means that we can safely conclude that there has been a significant increase in contest appeals in California over the last several years.

Uncertain Application

Probate Code Section 21304 requires that a no contest clause be strictly construed. The Commission recommended that rule in order to provide greater certainty as to the application 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. 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.

No Contest Clauses, 20 Cal. L. Revision Comm'n Reports 7, 12 (1990).

Some practitioners believe that the decision in *Burch v. George* marked a departure from strict construction, with undesirable results. "The effect of *Burch* and its progeny has been to destroy certainty as to the meaning of any particular no contest clause." Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 10.

The criticism of *Burch* focuses on the court's use of extrinsic evidence in construing the intended meaning of a no contest clause. Based only on a strict reading of the estate planning instruments, it is not perfectly clear that Mr. Burch intended certain assets to be characterized as his separate property. If not, then the surviving spouse's claim to a community property interest in those assets might not be a violation of the no contest clause.

In construing Mr. Burch's intentions, the court noted the extrinsic fact that the disputed assets had been transferred to his trust. This was significant because the trust instrument characterized "all property now or hereafter added to the trust" as comprising the trust estate, all of which was described by the instrument as his separate property. The court also noted the testimony of the attorney who drew up the estate plan, to the effect that Mr. Burch had expressed a desire to force his surviving spouse to elect between taking under the trust or asserting her community property rights. See generally *Burch v. George*, 7 Cal. 4th 246, 256-60.

The dissent in *Burch* criticized that approach, arguing that

disregarding the literal meaning of the words in the trust instrument in favor of attempting to divine the testator's intent through declarations of his lawyers, is to abandon the rule of strict construction and to resurrect the very conflict in the case law that

the Law Revision Commission and the Legislature sought to put to rest with Probate Code section 21304.

Id. at 283-84 (Kennard, J., dissenting).

A rule allowing consideration of extrinsic evidence would undermine the certainty that strict construction was intended to promote. If extrinsic evidence can be considered in construing a no contest clause, an heir cannot simply read the donative instrument in order to determine the meaning of the no contest clause.

On the other hand, a rule of strict construction could operate to frustrate a transferor's actual intentions, even where extrinsic evidence makes those intentions clear. Arguably, that would have been the result if the *Burch* court had refused to consider the fact that the disputed assets had been transferred to the trust.

Note that criticism of the approach used in *Burch v. George* is not universal. "*Burch v. George* was decided correctly. The court was able to determine Mr. Burch's objectives as expressed in his testamentary instruments clause and applied the no contest clause properly under the circumstances." MacDonald & Godshall, *California's No Contest Statute Should be Reformed Rather Than Repealed*, Cal. Tr. & Est. Q., Fall 2004, at 21.

Fraud and Undue Influence Shielded From Review

As noted above, a no contest clause may be used by an unscrupulous person to deter inquiry into whether a donative instrument is the result of duress, menace, fraud, or undue influence. "Experienced practitioners are well aware that the no contest clause is a favorite device of undue influencers and those who use duress to become the (unnatural) object of a decedent's bounty." See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 11.

The only way to contest a suspect instrument without forfeiture is to successfully invalidate the instrument. Even in a case where there is strong reason to suspect foul play, an heir may still fall well short of certainty that a contest would be successful. In such a case, the abuse may stand unchallenged.

Statutory Complexity

The existing statute provides a fairly complex system of exceptions to the enforcement of a no contest clause, based on the following general rules:

(1) Some contests are exempt unless specifically identified as a violation of a no contest clause. Prob. Code § 21305(a).

(2) Some contests are exempt as a matter of public policy. Prob. Code § 21305(b).

(3) Some contests are exempt if brought with reasonable cause. Prob. Code § 21306.

(4) One type of contest is exempt if brought with probable cause. Prob. Code § 21307.

Prospectivity Provisions

That scheme is further complicated by a handful of prospectivity provisions:

- Section 21305(a) does not apply to an instrument created before the operative date of the bill adding that subdivision (January 1, 2001).
- Section 21305(a) does not apply to a codicil or other amendment that is executed **on or after** January 1, 2001, unless the amendment adds a no contest clause or amends a no contest clause in an instrument that was created **before** January 1, 2001. See Section 21305(c).
- As originally enacted, Section 21305(b) would apply to any instrument, whenever created.
- In 2002, Section 21305 was amended to provide that the provisions of subdivision (b) do not apply if an instrument becomes irrevocable or the transferor dies before January 1, 2001 — a retroactively applied prospectivity rule. See Section 21305(d).
- Three of the four exceptions added in 2002 do not apply if an instrument becomes irrevocable or the transferor dies before January 1, 2003. See Section 21305(d).

The staff has three questions about these prospectivity provisions:

(1) If the purpose of the prospectivity rules governing subdivision (a) is to avoid applying a new rule of construction to a previously executed instrument, couldn't the same result be achieved by providing a grace period during which older instruments could be updated? Permanent retention of the old law for older instruments adds to the complexity of the law and preserves rules that have been deemed problematic.

(2) Under a literal reading of Section 21305(c), it appears that Section 21305(a) does not apply to an amendment that revises a no contest clause, if the instrument containing the no contest clause was executed on or after January 1,

2001. The staff does not understand the purpose of such a limitation and suspects that it was not intended.

(3) Why were three of the four new exceptions added in 2002 subject to a January 1, 2003 application date, while the fourth was subject to a January 1, 2001 application date?

The complexity of these transitional provisions could be avoided by deleting them. In that case, the application of Section 21305 would be governed by the general rule provided in Probate Code Section 3 (added on Commission recommendation). Section 3 provides that, unless some other specific rule controls, a new law applies retroactively, with three exceptions. It does not apply to (1) a paper filed before the operative date of the new law, (2) an order made before the operative date of the new law, and (3) any action of a fiduciary taken before the date of a new law. There is also a general catch-all exception that gives the court discretion to apply the old law if it is shown that application of the new law would substantially interfere with the effective conduct of proceedings or the rights of the parties or other interested persons. That approach provides the broadest possible application for a new law, while protecting the finality of acts completed under the old law.

Disguised "Direct Contest"

Three of the public policy exceptions are subject to an additional limitation: the exceptions for a challenge to the exercise of a fiduciary power, the interpretation of an instrument, and the reformation of an instrument do not apply if the court finds that the action is a "direct contest" of an instrument. Section 21305(e). A "direct contest" is a contest based on revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. Prob. Code § 21300(b) ("direct contest" defined).

Presumably, there is a perceived risk that a "direct contest" will be improperly disguised as one of the three specified exempt actions. The staff does not see why those exemptions in particular pose a risk of disguising a direct contest. How, for example, could a claim that an instrument is a forgery be disguised as an action challenging the exercise of a fiduciary power, seeking judicial interpretation of an instrument, or seeking the reformation of an instrument to reflect changed circumstances? Why don't other exemptions pose

that risk? For example, why does an action to reform a will pose the risk, if an action to modify a trust does not?

The concern that a direct contest might be disguised, through creative pleading, as an action that is exempt from the application of a no contest clause would seem to be a general concern. It is not clear why it has been framed so narrowly. **The narrow rule should perhaps be generalized (or even deleted because it is unnecessary and creates an implication that only certain exemptions are subject to that sort of abuse).**

Overlapping Provisions

There appears to be some overlap between Sections 21306(a)(3) (reasonable cause exception) and 21307 (probable cause exception). Both of those provisions apply to a contest of an instrument benefiting the person who drafted the instrument or the person who transcribed the instrument. It is not clear that this overlap is causing any practical problem, **but it is confusing and should be addressed.**

POSSIBLE REFORMS

ExComm proposes that the law be changed to make all no contest clauses unenforceable. As a disincentive to contest litigation, a provision would be added to authorize an award of fees and costs to the prevailing party in specified circumstances.

Other possible reforms include: (1) eliminate the declaratory relief procedure, (2) add a general probable case exception, (3) reinforce the strict construction requirement, (4) add an exemption for “indirect contests,” and (5) preserve existing law unchanged. In addition, there may be minor substantive and technical improvements that can be made, especially changes that would reduce the complexity of the existing statute.

The merits of each of these possible reforms is discussed below. The discussion is organized to address the likely effect of each reform on the following matters: the volume of contest-related litigation, pressure to settle an unmeritorious contest, uncertainty as to the scope of a no contest clause, fraud prevention, the ability to create an enforceable forced election, and the transitional cost to those whose existing instruments would need to be updated to reflect the change in the law.

No Enforcement, Attorney Fee Shifting

ExComm's proposal would delete the existing no contest clause statute and replace it with the following provisions:

21300. A provision in an instrument rescinding a donative transfer or otherwise penalizing a person for initiating, responding to, or otherwise participating in any legal proceeding, including filing a creditor's claim, whether in a court of law, a mediation, an arbitration, an administrative hearing, or otherwise, is unenforceable. Nothing contained in this section is intended to prohibit conditional gifts under an instrument except as this section specifically sets forth.

21301. Whether or not the instrument contains a provision described in section 21300, a court may award reasonable attorney's fees and costs against the unsuccessful party and in favor of the prevailing party if (a) the proceeding in question involves the alleged invalidity of an instrument or one or more of its terms based on one or more of the following grounds: revocation; lack of capacity; fraud; misrepresentation; menace; duress; undue influence; mistake; lack of due execution; forgery; and (b) the court determines that the unsuccessful party asserted or opposed one or more of such grounds without reasonable cause.

21302. "Reasonable cause" for purposes of section 21301 means that the unsuccessful party has knowledge of facts that would cause a reasonable person to believe that the factual allegations and other contentions made by that party and 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.

21303. This part applies to all instruments, whenever executed, of persons dying on or after the effective date and to instruments that become irrevocable on or after the effective date.

See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004, at 7-8. The effect of those provisions would be (1) to make all no contest clauses unenforceable, (2) to preserve the validity of a conditional gift, and (3) to provide for an award of costs and fees to a prevailing party in a "direct contest" if the other party lacked "reasonable cause."

The probable effect of the proposal is discussed below.

Volume of Litigation

If a no contest clause is unenforceable as a matter of law, there would be no need for the Section 21320 declaratory relief procedure. All litigation under that section would cease. That would result in significant savings of time and money.

However, if no contest clauses are rendered unenforceable, the existing deterrent to contest litigation would be removed. This would undoubtedly cause some increase in the amount of contest litigation. The staff intends to work with ExComm to see whether we can obtain reliable data on the level of contest-related litigation in the two states that do not enforce a no contest clause (Florida and Indiana). That might help us to predict what effect the proposed reform would have in California.

The proposed attorney fee shifting provision would deter some contest litigation, but not all of it. The proposed provision would be limited in two significant ways:

- (1) It would only apply to a “direct contest” (i.e., a contest based on revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery). All other contests could proceed without the deterrent of attorney fee shifting.
- (2) It would not apply if the losing party lacks “reasonable cause” to bring or oppose the contest. For that reason, there would be little deterrent to bringing a contest if it is reasonable to believe that the contest “may” be proven, or is likely to be proven after discovery. That is a fairly forgiving standard, which may not deter much.

In summary, the proposed change would eliminate declaratory relief litigation, but would lead to an increase in the amount of contest litigation. It is unclear what the net effect would be on the total volume of contest-related litigation.

Settlement Pressure

As discussed above, declaratory relief proceedings can add to the cost and delay of administering an estate. That potential cost and delay improves the bargaining position of a disappointed heir who seeks to negotiate a more generous gift from the transferor’s estate. The proposed reform would eliminate that source of settlement pressure.

However, as noted above, the proposed reform would allow a contest to be brought without fear of forfeiture. A facially reasonable or “indirect” contest could be brought without any risk of fee shifting.

That would provide a wide range of actions that could be threatened in order to create settlement pressure. What’s more, contest litigation appears to be many times more costly than declaratory relief litigation. See Exhibit p. 7. So a threatened contest would create greater settlement pressure than a threatened declaratory relief proceeding.

The net effect of the proposed reform would probably be to strengthen the hand of those seeking to coerce a settlement through threats of litigation.

Certainty

The proposed reform would eliminate any need to construe a no contest clause, thereby eliminating any problems that would result from uncertainty as to the meaning of the clause.

However, it would create a new source of uncertainty: the distinction between an unenforceable no contest clause and an enforceable “conditional gift.” That distinction is discussed below, under “Forced Election.”

Fraud Prevention

The proposed reform would provide unrestricted access to the courts to adjudicate contests. That serves the general public interest served by resolution of such disputes. In particular, a wrongdoer would no longer be able to use a no contest clause to shield fraud or undue influence from court review.

Forced Election

If the proposed reform were implemented, a transferor would not be able to use a no contest clause to force an heir to elect between taking under a donative instrument or asserting an independent legal right in purported estate assets. As discussed above, there are circumstances in which a forced election would be a fair and efficient way to resolve difficult legal questions (e.g., the proper characterization of intermingled community and separate property).

It is possible that a forced election could still be created through an express “conditional gift.” ExComm’s proposal includes language providing that the rule prohibiting enforcement of a no contest clause would not affect the enforcement of a conditional gift. “Nothing contained in this section is intended to prohibit conditional gifts under an instrument except as this section specifically sets

forth.” See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004, at 7.

The staff is not sure that the proposed distinction would be workable. Both a no contest clause and a conditional gift can be used to reach the same substantive result (i.e., “you forfeit your gift, if you contest” v. “you will receive a gift, unless you contest”). The difference seems to be one of phrasing, rather than effect.

The attempt to draw the distinction could create two problems. First, some practitioners would attempt to use the conditional gift as a de facto no contest clause. That potential was recognized in 1987, when the Commission considered a proposal to limit the enforcement of a no contest clause, without limiting the enforcement of a conditional gift. At that time, ExComm predicted that the result would be a CEB course on “How to Prepare No-Contest Clauses By Use of Conditional Gifts.” See Second Supplement to CLRC Staff Memorandum 1987-44.

The second possibility is that a genuine attempt to create a conditional gift would be construed by a court as an unenforceable no contest clause, contrary to what the transferor intended or expected.

The difficulty in distinguishing between a no contest clause and a conditional gift creates significant uncertainty with respect to the enforceability of such clauses, negating the apparent certainty offered by a rule that a no contest clause is flatly unenforceable.

It is possible that this problem could be minimized with very careful statutory drafting, but the staff is not sure that it can be entirely eliminated.

Transitional Cost

The proposed reform would cause a very significant substantive change in the law. Every estate plan that includes a no contest clause would need to be revisited to determine how best to implement the transferor’s intentions under the new law. In particular, thought would need to be given to whether the purpose served by a no contest clause could be preserved through the creative use of a conditional gift, and conversely, whether an existing conditional gift would need to be restated to preserve its enforceability.

Repeal Declaratory Relief Provision

It appears that the main problem with existing law is the increasing volume of declaratory relief litigation. The most direct and narrow way to resolve that problem would be to repeal the declaratory relief provision. Heirs in California

would then be in much the same situation as heirs in New York (where a no contest clause is generally enforceable, subject to a number of specific public policy exceptions, but without any declaratory relief safe harbor). See New York Est. Powers & Trusts § 3-3.5 (McKinney 2006).

Volume of Litigation

Repeal of the declaratory relief provision would eliminate all declaratory relief litigation, without disturbing the existing litigation deterrent provided by enforcement of a no contest clause.

If anything, the deterrent achieved through use of a no contest clause would be increased, as some heirs would be unwilling to file a contest that **might** violate a no contest clause. There would be no safe harbor from which to explore **whether** the no contest clause would be triggered.

The net effect would be a significant reduction in the volume of contest-related litigation.

Settlement Pressure

Elimination of the declaratory relief procedure would weaken the bargaining position of a dissatisfied heir who wishes to pressure the estate into providing a more generous gift through a negotiated settlement. The dissatisfied heir could no longer threaten a declaratory relief action.

Certainty

The proposed reform would worsen problems that result from uncertainty as to the meaning of a no contest clause. The purpose of declaratory relief is to definitively determine whether a proposed action would violate a no contest clause. That source of clarity would be eliminated.

As a result, some contests that were not intended by a transferor to be a violation of a no contest clause would be deterred.

A transferor who guesses wrong about the application of a no contest clause may face an unexpected forfeiture.

Fraud Prevention

Assuming that no other change is made to the law, the repeal of the declaratory relief provision would do nothing to address concerns about access to justice generally or the specific problem posed by the use of a no contest clause to shield fraud or undue influence from judicial review.

To the extent that the reform would increase uncertainty about the intended scope of a no contest clause, thereby chilling some contests that might otherwise have proceeded, it would make matters worse.

Forced Election

Repeal of the declaratory relief remedy would have no effect on the ability to use a no contest clause to force an election.

Transitional Cost

Because the repeal of the declaratory relief provision would have no effect on when or how a no contest clause would operate, there would be no need to update estate plans in order to adjust to the new law.

General Probable Cause Exception

California could join the majority of states by providing a general probable cause exception.

Probable and reasonable cause exceptions already exist in California for contests that are based on a claim of forgery, revocation, or certain specific types of influence on a transferor. It isn't clear why those types of contests should be given precedence over other types of contests. For example: why is it more important to allow a probable case of forgery to be adjudicated than it is to allow a probable case of fraud to proceed?

Volume of Litigation

A general probable cause exception would do nothing to reduce the amount of contest-related litigation. To the contrary, it would increase the amount of contest litigation.

Many actions that would trigger a forfeiture under existing law would be exempt from forfeiture under a probable cause exception. Many of those cases would not be brought under existing law, but would be brought if a probable cause exception were enacted.

Settlement Pressure

An expanded ability to bring a contest would increase the pressure that an heir could bring to bear by threatening a contest.

Certainty

Under the proposed reform, uncertainty as to the scope of a no contest clause would be less of a problem. An heir who is confident that probable exists need not worry about whether the anticipated contest would be a violation of a no contest clause. Probable cause alone would be enough to prevent a forfeiture.

Fraud Prevention

One of the principal advantages of the probable cause exception is that it broadens access to justice, without entirely extinguishing the deterrent effect that the transferor intended to create through use of a no contest clause.

Such a rule would not eliminate the problem of a no contest clause being used to shield fraud or undue influence from review, but it would significantly reduce it.

Forced Election

A probable cause exception would effectively eliminate the use of a no contest clause to force an election. It might also undermine the existing ability to impose an express forced election, for the reasons discussed above in connection with a “conditional gift.”

This effect of the proposed reform could perhaps be drafted around, by creating a special rule for a contest that is based on an alleged independent right to purported estate assets.

Transitional Cost

Unless something is done to preserve the effect of a forced election, estate plans that include a forced election would need to be updated after enactment of a probable cause exception.

No other changes are likely to be necessary, as the proposed reform would not have any effect on the **types** of contests that would violate a no contest clause.

Reinforce Strict Construction

It would be possible to revise Probate Code Section 21304 to restate the strict construction requirement in even stronger terms (e.g., “Extrinsic evidence shall not be considered.”). The likely effects of such a change are discussed below.

Volume of Litigation

To the extent that liberal construction of a no contest clause has increased uncertainty as to the application of the clause, it has also heightened the need for clarification through declaratory relief. Arguably, stricter construction would reduce the amount of litigation by reducing the number of declaratory relief actions.

Of course, a prudent person may seek declaratory relief when the application of a no contest clause is relatively clear, in order to avoid any risk of forfeiture (or malpractice). Stricter construction would have little effect on those cases.

Settlement Pressure

The proposed change would have no effect on the potential pressure to settle an unmeritorious contest.

Certainty

Stricter construction would help to make the application of a no contest clause more certain. However, that certainty would come at a price: a transferor whose intentions are clear from extrinsic evidence but are not expressed within the four corners of an instrument may have those intentions thwarted.

Fraud Prevention

The proposed change would have no effect on the judicial review of fraud and undue influence.

Forced Election

The proposed change would not affect the use of a no contest clause to force an election.

Transitional Cost

Some estate plans would need to be updated in order to more carefully express the transferor's intentions.

Indirect Contests Exempted

Existing law provides that a no contest clause is enforceable, except as otherwise provided. It then provides over a dozen specific exceptions.

The apparent trend in the recent amendments is toward exempting indirect contests from the application of a no contest clause. The Commission might consider taking that trend to its logical end point: provide that a no contest

clause only applies to a direct contest (i.e., a contest that seeks to invalidate an instrument based on a claim of revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery).

Volume of Litigation

ExComm believes that “the great majority of 21320 proceedings involve ‘indirect contests,’ rather than ‘direct contests....’” See Exhibit p. 5. This is because it is usually clear that a direct contest would violate a no contest clause. For that reason, a rule exempting indirect contests from the application of a no contest clause should reduce the amount of declaratory relief litigation.

However, the proposed change would also remove any deterrent to an indirect contest. That would increase the amount of contest litigation.

The net effect on the volume of contest-related litigation is unclear.

Settlement Pressure

By removing any deterrent to an indirect contest, the proposed change would strengthen the hand of a dissatisfied heir who seeks to coerce a settlement.

Certainty

The proposed change should provide much greater certainty as to the application of a no contest clause. It would only apply to a direct contest.

Unexpected and unintended forfeitures should be rare.

Fraud Prevention

The proposed change would increase access to the courts to adjudicate legitimate disputes. However, it would have no effect on the prevention of fraud or undue influence, as those matters would be raised as direct contests.

Forced Election

An assertion of an independent right in estate assets is an indirect contest. Exempting those contests from the application of a no contest clause would defeat the ability to use a no contest clause to force an election.

It would be possible to draft around that constraint. The law could be drafted so that a no contest clause applies to a contest that is based on a creditor’s claim or a dispute as to the transferor’s dispositive control of purported estate assets.

Transitional Cost

The proposed change would significantly affect the application of existing no contest clauses. Most donative instruments that include a no contest clause would need to be reviewed.

Preserve Existing Law

One option would be to recommend no change to existing law. It may be that the perceived problems are not significant enough to justify any change in the law, especially one that would defeat settled expectations and require that existing estate plans be reviewed and updated.

Note that the resolution assigning this study expressly requires that the Commission consider “the potential benefits of maintaining current law.” 2005 Cal. Stat. res. ch. 122.

Volume of Litigation

Preservation of existing law would do nothing to reduce the large volume of declaratory relief litigation. The staff is convinced that such litigation is significantly undermining the value of a no contest clause as a litigation deterrent. That problem seems to be serious enough to justify some change in the law.

Settlement Pressure

This option would have no effect on the incidence of coerced settlement. To the extent coerced settlement is a problem, it would remain one.

Certainty

Preservation of existing law would do nothing to provide greater clarity as to the application of a no contest clause.

Fraud Prevention

This option would do nothing to address the problem of fraud and undue influence. The severity of the problem is not known, so it is difficult to judge whether this concern alone would justify a significant change in the law.

Forced Election

This option would preserve the existing ability to use a no contest clause to force an election.

Transitional Cost

There would be no transitional cost.

CONCLUSION

Based on the information that we now have, it appears that there is a problem with overuse of the declaratory relief procedure. The prevalence of such litigation is undermining the principal purpose of a no contest clause: to prevent litigation.

The ExComm proposal would cure that problem. But would it throw the baby out with the bathwater, eliminating an estate planning tool that is recognized as valuable (if also problematic) in 48 states?

It may be possible to address the problem with a more narrowly tailored solution. The Commission should consider the different proposals that are discussed above and see whether one of those proposals, or a combination of them, would reduce or eliminate the overuse of the declaratory relief process while preserving the benefits of the no contest clause as a deterrent to litigation.

In addition, some revisions could be made to simplify the existing exemption provisions and make the law easier to understand.

If the Commission has a tentative preference for one or more of the proposed reforms, the next step would be to develop a draft tentative recommendation to implement that approach. It would be presented for review and approval at a future meeting and then circulated for comment.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
650-494-1335



January 17, 2006

To:

Hon. Joseph L. Dunn
Chair, Senate Judiciary Committee

Hon. Dave Jones
Chair, Assembly Judiciary Committee

Hon. Bill Morrow
Vice Chair, Senate Judiciary
Committee

Hon. Tom Harman
Vice Chair, Assembly Judiciary
Committee

Re: Law Revision Commission study of no contest clauses

Dear Senators and Assembly Members:

SCR 42 (Campbell), enacted as Resolution Chapter 122 of the Statutes of 2005, directs the California Law Revision Commission to conduct a comprehensive study of the advantages and disadvantages of California law governing no contest clauses. The study is to include a comparison of the law of other jurisdictions and an evaluation of a range of options, including possible modification or repeal of existing statutes, shifting of attorneys fees, and other reform proposals, as well as the potential benefits of maintaining current law.

The commission cannot devote substantial resources to this project during 2006 without unduly impacting high priority topics currently on our calendar. We plan to assemble background information for this project during 2006, including investigation of the State Bar's change of position on no contest clause issues. We do not expect to complete work on the project before the end of 2007.

SCR 42 requires that the commission make this study in consultation with the Senate and Assembly Judiciary Committees. We have consulted with lead staff for both committees. Public policy considerations, factual inquiries, and legal questions we plan to review in this study are listed below.

Public Policy Considerations

Public policy considerations include:

- The goal of effectuating the decedent's intent
- The goal of enabling a legitimate contest of an instrument that has been affected by fraud, coercion, or undue influence.
- The concern that the process of distinguishing between a legitimate and an illegitimate contest ought not to involve extensive litigation.
- The concern that the economics of litigation may create undue pressure to settle a meritless will or trust contest.

Factual Inquiries

Factual inquiries include:

- Is the volume of will and trust litigation affected by the increasing complexity of family and social relationships (including multiple layer extended families involving several marriages and many step and in law relationships)?
- Is the volume of will and trust litigation affected by the increasing complexity of estate planning devices that may generate unintended results?
- How does will and trust litigation impact the probate bar? Is there a division between estate planners and litigators concerning no contest clauses?
- Would making a no contest clause ineffective increase will and trust litigation?
- How do the costs of will or trust litigation affect settlement decisions? Factors to consider include (1) the cost of will or trust litigation and (2) whether litigation costs are a deterrent in the context of the emotions that may be involved in will and trust litigation.
- What is the impact of in propria persona trust and estate litigation?
- What is the experience in other jurisdictions that have made changes to their law governing no contest clauses?

Role of Declaratory Relief

Issues involving declaratory relief include:

- Would elimination of declaratory relief in a no contest clause dispute reduce litigation?
- Should use of extrinsic evidence be limited in a declaratory relief proceeding?
- Should the issues that may be tried in a declaratory relief proceeding be limited?
- Is the definition of a “challenge” under the no contest clause statute unduly circumscribed, effectively neutralizing a no contest clause?

Other Issues

Other issues to be considered include:

- Should a higher standard of proof be required to invalidate an instrument? Would that be appropriate where the ultimate question is the decedent’s subjective intent?
- Would an award of litigation expenses be an effective deterrent to unmeritorious litigation in the context of the emotions that may be involved?
- Should a no contest clause be made ineffective if the court determines the contestant had probable cause to challenge the instrument? This is the majority rule in other jurisdictions; experience there may be instructive.

Sincerely,

Nathaniel Sterling
Executive Secretary

File: L-637
cc: Gene Wong
Drew Liebert
Mike Petersen
Mark Redmond
Brian Hebert



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

October 2, 2006

Law Revision Commission
RECEIVED

OCT 4 2006

Mr. Brian Hebert
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

File: _____

Re: Law Revision Commission Study of No Contest Clause

Dear Brian:

Enclosed are the following for the use of the Law Revision Commission with respect to your no contest clause study:

1. Letter to you in response to your letter dated June 19, 2006;
2. My Memorandum concerning the no contest clause; and
3. Study conducted by the Fiduciary Litigation Committee of the American College of Trusts and Estates Counsel (ACTEC), which surveyed and assessed the laws of twelve states regarding the no contest clause. This study was generated independently by ACTEC and is completely unrelated to the separate study of this issue by the California Trusts and Estates Executive Committee.

On behalf of the Executive Committee, we hope the enclosed information will be helpful to the Commission in your study of the no contest clause. Please feel free to contact me with any further questions the Commission may have, either regarding the enclosures or otherwise.

It would be helpful to know if the Commission will produce a further memorandum regarding your no contest study, either specifically in response to the enclosures or otherwise. Also, please advise whether the no contest clause study will be on the agenda of your October 27, 2006, meeting in Burbank.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Shirley L. Kowar".

Shirley L. Kowar, Esq.

SLK:rs

Encl.

cc: Tracy Potts, Chair, Trusts and Estates Executive Committee
John A. Hartog, Vice-Chair and Chair-Elect, Trusts and Estates Executive Committee



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

Law Revision Commission
RECEIVED

OCT 4 2006

October 2, 2006

File: _____

Mr. Brian Hebert
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Law Revision Commission Study of No Contest Clause Statute

Dear Mr. Hebert:

This is in response to your letter dated June 19, 2006, requesting information from the Executive Committee of the State Bar of California Trusts and Estates Section. I am responding on behalf of the Executive Committee as Liaison of the Executive Committee to the Law Revision Commission ("CLRC"). For your convenience, I have restated the questions in your June 19 letter.

1. *Why did the Section change its position on the enforcement of no contest clauses? In 1990, the Section supported enforcement without any exception for probable cause. It now proposes that a no contest clause be unenforceable. What led to that shift in position?*

The shift in position is due to the volume of 21320 petitions, the inefficiency of the process and the corresponding additional cost and delay of trial court proceedings and appeals of 21320 orders. We believe the increased cost and delay do not serve a sufficient purpose to justify that cost and delay. To the contrary, the belief is that 21320 proceedings, more often than not, simply double the litigation necessary to resolve a single set of facts and closely-related issues, and it would be more efficient to resolve contest disputes in one court proceeding on the merits of the underlying or "proposed petition."

The Committee believes that the great majority of 21320 proceedings involve "indirect contests," rather than "direct contests" such as a challenge based on undue influence or lack of capacity where it is usually clear a proposed action would be a "contest." For this reason, the proposed statute includes a provision for award of attorneys' fees for a "direct contest" not based on reasonable cause.

Brian Hebert

Re: Law Revision Commission Study of No Contest Clause Statute

October 2, 2006

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It is also the sense of the Executive Committee that the no contest clause is being used by those who unduly influence declining elders to protect improper and substantial bequests for the benefit of the undue influencers.

In other words, at the same time the perceived burden of 21320 proceedings has increased, the perceived benefit of the no contest clause has decreased.

The Committee has also concluded that it is not feasible to either reduce the number of 21320 petitions or streamline the 21320 process. The volume of 21320 proceedings is due to a number of factors, including increasingly complex tax and estate planning with multiple documents, ambiguity, other mistakes of estate plan drafters, and recent developments in the case law.

Further, case law developments, notably *Burch v. George*, 7 Cal. 4th 246 (1994) (which introduced the concept of an “integrated estate plan”) and *Genger v. Delsol*, 56 Cal. App. 4th 1410 (1997) (following the ground broken in *Burch*) reinforced the belief that a 21320 petition is required to precede virtually all pleadings filed by a beneficiary if the estate plan anywhere includes a no contest clause, notwithstanding the general policy of strict construction set forth in Probate Code section 21304.

Finally, the Committee believes it is time to revisit the public policies that underpin the use of the no contest clause and for California to join the majority of states that have exceptions for reasonable cause to the enforcement of a no contest clause. This analysis is set forth in the enclosed Memorandum to the Law Revision Commission.

2. *How common is it for a person contesting an estate plan to be self-represented?*

We believe self-representation in a will or trust contest is rare.

3. *How common is it for a party requesting declaratory relief under Probate Code Section 21320 to be self-represented?*

We believe self-representation in a 21320 proceeding is rare.

4. *What is the average cost for a person who is represented by counsel to contest an estate plan?*

Our answers to questions 4 and 5 are based on a survey of members of the Trust and Estates Executive Committee who handle estate and trust administration and contested trust and estate matters. The dollar amounts represent estimated attorney’s fees for

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handling or defending a will or trust contest; the percentage represents the relative number of contests handled for the dollar amount specified. The percentages listed are an average for the survey. This information was not a scientific survey, but a good faith attempt to obtain relevant data from Executive Committee members who deal with trust and estate contest issues.

\$20,000 – \$50,000	10%
\$50,000 – \$100,000	36%
\$100,000 – \$300,000	42%
\$300,000 – \$500,000	<u>12%</u>
	100%

5. *What is the average cost for a person who is represented by counsel to obtain declaratory relief under Section 21320?*

\$1,500 – \$5,000	20%
\$5,000 – \$20,000	40%
\$20,000 – \$50,000	30%
\$50,000 – \$100,000	<u>10%</u>
	100%

In addition, one response indicated some proceedings in the \$100,000-\$200,000 range and one matter in the \$300,000 plus range.

6. *How frequent are **contest proceedings in California**? How has the frequency of those proceedings changed over time? How does the frequency compare to the frequency of similar proceedings in other jurisdictions?*

CALIFORNIA (population 36,000,000 – Enforces no contest clause)

Will and trust contests

Appellate level (1990-2006)

<u>Year</u>	<u>Reported</u>	<u>Unreported</u>
2006	2	15
2005	7	33
2004	4	25
2003	4	34
2002	7	37

Brian Hebert

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2001	5	14
2000	3	0
1999	5	1
1998	7	0
1997	4	0
1996	5	0
1995	8	0
1994	4	0
1993	6	0
1992	5	0
1991	6	0
1990	<u>4</u>	<u>0</u>
	86	168

NEW YORK (population 19,000,00)– (Enforces no contest clause)

New York Supreme Court, Appellate Division – Will Contests

<u>Year</u>	<u>Reported</u>
2006	2
2005	1
2004	4
2003	1
2002	2
2001	2
2000	2
1999	3
1998	2
1997	3
1996	3
1995	1
1994	4
1993	1
1992	0
1991	3
1990	1

Brian Hebert

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TEXAS (population 23,000,000.00 – Enforces no contest clause)

Will and Trust Contests

Appellate level (from 1990 to 2005)

Reported: 150 cases total; approximately 9-10 per year

Unreported: 63 unreported cases (unreliable figure)

FLORIDA (population 18,000,000.00 – Does NOT enforce no contest clause)

Will and Trust Contests

Appellate level (from 1990 to 2006)

Reported: 44 cases total; approximately 2-3 per year

7. How frequent are Section 21320 proceedings?

In its July 5 analysis of SCR 42, the Assembly Judiciary Committee asked for empirical information on the frequency of contest litigation in California and in other jurisdictions. I don't know whether any empirical studies have been conducted to answer those questions. If so, please provide me with references to the studies.

CALIFORNIA – 21320 proceedings (Trial level and appellate level)

Trial Level:

a. Alameda County

2005 – approximately 50 petitions per year

b. Los Angeles County

Roughly 212 petitions in a one-year period

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c. Orange County

Approximately 100 to 150 per year

d. San Diego County (downtown branch only)

2005 – 19 petitions going to decision

2004 – 12 petitions going to decision

Unknown – petitions filed, then settled or taken off calendar

e. San Francisco County

Approximately 25 filings per year

Approximately 16 of 25 are contested

Appellate Level:

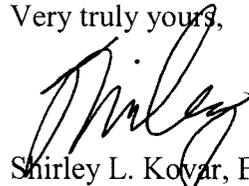
Reported – 18 cases

Unreported – 21 cases

<u>Year</u>	<u>Reported</u>	<u>Unreported</u>
2006	1	1
2005	3	4
2004	0	3
2003	2	5

<u>Year</u>	<u>Reported</u>	<u>Unreported</u>
2002	1	5
2001	1	3
1999	0	0
1998	2	0
1997	1	0
1996	0	0
1995	2	0
1994	2	0
1993	1	0
1992	2	0

Very truly yours,



Shirley L. Kovar, Esq.

To: CA Law Revision Commission
From: Shirley L. Kovar, Liaison to CLRC from Trust/Estate Executive Committee
Re: Public Policy and the No Contest Clause
Date: October 4, 2006

On July 24, 2004, the Executive Committee of the State Bar Trust and Estate Section ("Executive Committee") voted to propose legislation to repeal the enforceability of the no contest clause and to replace it with an attorneys' fee-shifting provision for bringing a direct contest (Prob. Code section 21300(b)) without reasonable cause. The Committee has taken this step after determining that a no contest clause has, over time, become incapable of fulfilling the public policies that previously justified the enforceability of a no contest clause.

The policies favoring enforceability are to deter litigation (meaning specifically will and trust contests) and to carry out the testator's or trustor's intent. *Burch v. George*, 7 Cal. 4th 246, 255 (1994).

After decades of experience with the no contest clause the Executive Committee has come to the conclusion that the benefits of deterring contests with a no contest clause are offset by:

- a. the failures of 21320 and 21305 to provide certainty whether the filing of a pleading would be a "contest;"
- b. the chill placed on a beneficiary's access to the court to cure problems in will and trust administration;
- c. the additional cost and delay of section 21320 proceedings, including the inefficient use of court time; and
- d. the increase in abuse of no contest clauses by opportunists who take advantage of a declining elder.

The Executive Committee submits that the solution is to repeal the enforceability of the no contest clause and to shift the attorneys' fees to the losing party if a direct contest is brought without reasonable cause.

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This approach is designed to accomplish the following:

- a. deter unfounded direct contests by requiring the losing party to bear the prevailing party's attorneys' fees ("fee-shifting");
- b. provide advance certainty that the filing of a pleading by a beneficiary would or would not be a "contest" by limiting fee-shifting to direct contests;
- c. eliminate the cost, delay, double litigation and continued ineffectiveness and inefficiency of 21320, 21304, 21305(a) and (b) and recent abuse of section 21320 by making no contest clauses unenforceable;
- d. eliminate the chill placed on a beneficiary's access to the court for legitimate reasons (such as curing problem wills and trusts and challenging improper fiduciary conduct) by limiting fee-shifting to direct contests; and
- e. in light of increasing elder abuse and the high bar for proving undue influence or lack of capacity, allow beneficiaries with reasonable grounds to file a direct contest without penalty.

Part II -VIII are a discussion of the above conclusions.

II. 21305(b) is a trap for the unwary, not a "safe harbor" for 21320 petitions.

Section 21305(b) specifies 12 proceedings that are nominally protected from being a "contest" because of public policy considerations. Section 21305(b) is intended to avoid the need for a beneficiary to file a 21320 petition when the beneficiary's proposed action is included under that section. Notwithstanding the apparent simplicity of 21305 (b), it does not, in fact, provide certainty. There are three reasons for this incongruous result.

First, section 21305(b) is subject to effective date limitations.

Second, a court may determine that the caption of a proposed petition with a proceeding described in 21305(b) does not genuinely reflect the content of the petition. For example, the Court could determine that a proposed petition for construction alleging unclear language is not ambiguous, and the proposed construction is therefore a contest because the language is not

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"reasonably susceptible" of the proposed construction. Section 21305(b) purports to provide certainty on its face, but the reality is that even a proposed petition using a caption listed in 21305(b) does not, in fact, eliminate or even simplify the 21320 proceeding.

Third, a petition under 21320, even if based on 21305(b), will not be resolved by a court order if the court determines an order would require hearing the case on the merits of the proposed petition. Prob. Code § 21305 (c).

III. The policy of "strict construction" of the no contest clause imposed by section 21304 has been eclipsed by case law that gives a broad interpretation to the trustor's intent as expressed in a no contest clause.

The enforceability of the no contest clause in California is a compromise between two conflicting public policies. The compromise was implemented by Section 21304, which provides as follows: "In determining the intent of the transferor, a no contest clause shall be strictly construed." Notwithstanding the admonition of Section 21304, courts in California, notably the California Supreme Court, have given a broad interpretation of the coverage of no contest clauses, rendering ineffective the "compromise" of strict construction contained in Section 21304. Two examples are found in *Burch v. George, supra*, and *Genger v. Delsol*, 56 Cal. App. 4th 1410 (1997). Both cases are based on the concept of an "integrated estate plan," which results in the violation of the no contest clause in one instrument (a trust agreement) as a result of a challenge to a completely different instrument (in *Burch*, a beneficiary designation in a pension plan, and in *Genger*, a buy-sell agreement.)

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IV. Recent case law casts doubt on the attempt in 21305(a) to bolster the policy of "strict construction" and certainty.

The goal of 21305(a) is to require further evidence than a generic no contest clause that a testator did, indeed, intend to trigger the no contest clause by the proposed action by a beneficiary. The requirement of §21305(a)(1) regarding a creditor's claim has been ignored by the courts. In *Zwirn v. Schweizer*, 134 Cal. App. 4th 1153 (2005), the Court determined that even though the filing of a creditor's claim was not mentioned in the no contest clause, the proposed action would trigger the no contest clause, notwithstanding the apparent applicability of section 21305(a)(1). At least in the Second Appellate District, the Court is continuing to give a broad interpretation to the no contest clause.

V. A petition under Section 21320 causes additional cost, delay, and inefficiency and, frequently, the kind of litigation the trustor intended to prevent.

A. The procedural nightmare of multiple 21320 petitions.

In any case with multiple issues (which is frequently the case), there are likely to be multiple 21320 petitions. For example, if the petitioner wants to add, correct, or otherwise change the proposed pleading before it is filed, then the petitioner faces the dilemma of whether to file a new 21320 petition to add the additional facts or cause of action to the proposed pleading before it is filed. An order under 21320 is specific as to the protection afforded by the order. The 21320 order protects the proposed petition, as filed in the 21320 proceeding, not as revised prior to the filing of the proposed petition.

In any complex proceeding with discovery that brings evidence of new potential claims, a second or third filing is likely. In *Ferber*, for example, the appellate court noted three petitions for declaratory relief under 21320. *Id.*, at 249.

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Additionally, when a section 21320 petition is contested, the objector faces the decision whether to file a 21320 petition to protect the allegations in the objections from being a contest. Further, all of the above problems regarding multiple petitions for the initial petitioner are also faced by the objector. And the situation becomes almost surreal when, after the filing of the objections to the initial 21320, whether the initial petitioner should file still another 21320 in responding to objections that may raise new issues.

B. Abuse of the 21320 procedure.

A recent development is abuse of the 21320 procedure to avoid the impact of the no contest clause on a beneficiary. The misuse of the 21320 procedure arises in the following situation. A beneficiary under a trust is also the trustee. The beneficiary purports to retain one attorney to represent her "as a beneficiary" and the other attorney to represent her "as a trustee." There develops a dispute among the beneficiaries, and the beneficiary wants to file a petition that may trigger the no contest clause and uses the following technique in an attempt to avoid the no contest clause.

The attorney for the beneficiary "qua" beneficiary files a section 21320 petition, attaching to it a "proposed petition" to be filed for the beneficiary "qua" trustee, prepared and filed by the beneficiary's attorney representing her "as trustee." The section 21320 petition states that the "proposed pleading" is not a contest because it would be filed by the beneficiary "qua" trustee, and thus as a matter of law, the petition filed by the beneficiary under the label of trustee has not filed a "contest." Although *Genger v. Delsol, supra*, criticized this tactic, it still takes time and client resources to oppose it.

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VI. The enforcement of no contest clauses fails to recognize its increasing abuse by those who exert undue influence and otherwise take advantage of a declining elder.

Seniors are living longer but are frequently affected by failing mental health, whether dementia, Alzheimer's or increasing dependence on others. That combination has produced a vulnerability that can be exploited by family, friends, care providers, and even "professionals" who have gained the trust of the elderly. The result is increasing claims under elder abuse statutes. Another consequence is the use of the no contest clause to protect the wrongdoer who has unduly influenced a testator or trustor to benefit the wrongdoer.

It is extremely difficult to prove up a case of undue influence (*See, O'Bryan v. Superior Court*, 18 Cal. 2d 490 (1941). *Dissent by J. Carter*, "It is a matter of common knowledge that charges of fraud and undue influence are easy to make and difficult to prove . . ." *Minnesota Law Review*, "Unmasking Undue Influence," 81 *Minn. L. Rev.* 571 (1997): "the existence of undue influence is a question about the state of mind of a person who is dead at the time of inquiry. Thus, it is not surprising that it can be proved only by circumstantial evidence"). A beneficiary who faces a no contest clause in a last will or trust amendment, even under egregious circumstances, may be deterred from filing a contest, when one *should* be filed.

VII. Deterring litigation without a no contest clause (fee-shifting)

Direct contests would still be deterred under the proposed legislation. The proposed statute for repeal includes a fee-shifting provision for attorneys' fees for direct contests brought without reasonable cause.

The fee-shifting section of the proposed statute would require potential litigants and their attorneys to consider the danger that, if they proceed with a direct contest, having to pay attorneys' fees for the other side, in addition to the client's attorneys' fees. This fee-shifting section is simply a *different* penalty for bringing a direct contest. Instead of a no contest clause

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that threatens loss of a bequest, the statute threatens what could be even worse: uncontrollable dollars run up by the attorneys for the other side.

A two-fold answer exists to those who contend that fee-shifting doesn't provide the same certainty as a no contest clause. Most litigation settles before trial, and the loss of a bequest is *far from certain* when a plaintiff files a contest when the no contest clause is enforceable.

The Executive Committee believes that the fee-shifting provision acts as a better deterrent. Loss of a bequest is far from certain and is an economic injury of deprivation, rather than reduction. The attorneys' fee provision creates a greater risk for a prospective plaintiff: there is no ceiling on the amount to be paid, and it would be an actual reduction of resources suffered by the plaintiff. Finally, since most litigation settles before trial, the fee-shifting provision would be major leverage in a settlement conference or mediation when the beneficiary's attorney can describe in painful terms what will happen if the plaintiff pursues the contest through trial and loses.

The proposed legislation limits the fee-shifting provision to direct contests for good reason. Direct contests are more readily identifiable than indirect contests. Fee-shifting should not apply to indirect contests because the same uncertainty that now resides in the application of no contest clauses to indirect contests would then give rise to litigation over whether fee-shifting might apply.

A no contest clause not only seeks to deter attempts to thwart the testator's genuine intent, it also deters *valid* efforts to set aside instruments that do NOT reflect the testator's genuine intent. The latter has become a serious problem in today's conditions of extended longevity, opportunistic care providers, and greedy heirs. *See, Cal. Wel. and Inst. Code, supra.*

VIII. Conclusion: repeal the enforceability of the no contest clause and substitute fee-shifting for direct contests.

The system of statutory and case law developed around the concept of the no contest

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clause is broken. A new system is necessary.

1. Section 21320 does not and cannot provide the certainty that was intended by its enactment;
2. Reform has not worked; section 21305(b) is ineffective and false security, even when the limiting effective dates do not apply;
3. 21305(a) provides more issues to litigate, rather than a new technique for enforcing strict construction;
4. Litigation under 21320 frequently results in multiple petitions, inordinate delay and additional cost;
5. The system fails to recognize the abuse of the no contest clause by those using undue influence against declining elders.

The proposed statute for fee-shifting for direct contests is the solution. Certainty is assured by limiting "contests" to "direct contests", which are readily identifiable on the face of a pleading. Litigation of what might be a "indirect contest" is more efficiently handled in a single proceeding, rather than a 21320 petition followed potentially years later, and significant dollars spent, by one action on the merits. The "balance of power" between protection of a testator's intent and defense against no contest clause abusers is struck by fee-shifting, rather than a no contest clause.

Respectfully submitted,

Shirley L. Kovar, Esq.,
**Liaison of the Executive Committee of the
State Bar Trusts and Estates Section
to the California Law Revision Commission
Regarding Study of the No Contest Clause**

NO CONTEST CLAUSES IN WILLS AND TRUSTS

INTRODUCTION

Litigation can be a difficult experience for families, ranging from the merely unpleasant to the downright poisonous. Families are often torn asunder as a by-product of the ordeal. Assets that could be used for education, support or health care for family members are “wasted” on attorneys’ fees and court costs. Matters may drag on for years. We all know of Charles Dickens’ classic example of litigation, *Jarndyce v. Jarndyce*, from his popular novel, *Bleak House*, which drew in various family members, destroying their otherwise productive lives, until the entire estate was consumed by costs. Many testators or scriveners of wills and trusts, in an effort to avoid such protracted family litigation and its attendant negative consequences, make use of a no contest clauses in their instruments to penalize any beneficiaries who bring a legal challenge to that instrument’s validity by forfeiting their rights under the document.

The use of no-contest clauses varies significantly from state to state. In some jurisdictions these clauses have become part of the boilerplate in recent years, perhaps as a response to the increased litigiousness in our society, while in other states no contest clauses are void against public policy and simply ineffective. Since the clauses may discourage resort to the courts in uncovering undue influence, construing the terms of a document or determining the suitability of a fiduciary that has not acted in the best interests of the estate, some states construe their effectiveness narrowly, or impose a “probable cause” or other good faith standard before seeking to enforce them. This paper seeks to review the use of no contest clauses in a sampling of states, and to consider possible strategies or alternatives.

I. California¹

(Gary Mitchell Ruttenberg)

By statute and case law no contest clauses are valid and enforceable in the State of California. Probate Code Section 21303 provides that, with certain exceptions, "a no contest clause is enforceable against a beneficiary who brings a contest within the terms of a no contest clause." [Exceptions discussed hereinafter]. Also in accordance with Probate Code Section 21304 "a no contest clause shall be strictly construed."

The term "contest" is defined by statute, Probate Code Section 21300 (a), to "mean an attack in a proceeding on an instrument or on a provision in an instrument." The term "no contest clause" is defined in Probate Code Section 21320 (b) to "mean a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest." The term "instrument" is defined in Probate Code Section 45 to "mean a will, trust, deed or other writing that designates a beneficiary or makes a donative transfer of property."

The codification as set forth in Probate Code Section 21300 et seq. is, in accordance with Probate Code Section 21301, "not intended as a complete codification of the law governing enforcement of a no contest clause." It further provides that the "common law governs enforcement of a no contest clause to the extent [the statutes do] not apply."

Various exceptions to the enforcement of a no contest clause are provided by statute:

1. Probate Code Section 21305 (enacted May 5, 2000 and effective for instruments executed after the effective date of the section January 1, 2001) creates two (2) classes of actions/proceedings eliminating or limiting the effectiveness of no contest clauses:

2. Probate Code Section 21305 (a) has four (4) identified actions which "shall not constitute a contest unless expressly identified in the no contest clause as a violation of the clause." There are (i) the filing of a creditor's claim or prosecution of an action based on it; (ii) an action or proceeding to determine the character of property; (iii) a challenge to the validity of an instrument, contract, agreement, beneficiary

¹ See also "Now You See It; Now You Don't - Triggering the No Contest Clause in California," by Shirley L. Kovar, Proceedings of the 26th Annual USC Probate and Trust Conference (2000)

designation, or other document, other than the instrument containing the no contest clause; and (iv) a petition for settlement or compromise affecting the terms of the instrument.

3. Probate Code Section 21305 (b) provides that certain proceedings "shall not violate a no contest clause as a matter of policy." These are (i) a petition for modification or termination of a trust under Probate Code Section 15400 et seq.; (ii) a petition for the establishment of a conservatorship; (iii) a petition under certain statutory sections, (Probate Code Section 4100 et seq.) pertaining to powers of attorney; (iv) a petition seeking an order annulling a marriage of the person who executed the instrument containing the no contest clause; (v) a petition for instructions to or confirmation for the acts of a guardian or conservator; (vi) a petition challenging the exercise of a fiduciary power; (vii) a petition objecting to the appointment of a fiduciary or seeking the removal of a fiduciary; and (viii) objections or other responsive pleading to an accounting of a fiduciary.

4. Probate Code Section 21306 (also amended May 5, 2000) provides that 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: forgery, revocation, or an action to establish the invalidity of any transfer described in Probate Code Section 21350 (California's sections pertaining to limitation on transfers to drafters and other persons). The current amendment changes the word "probable" to the word "reasonable" as the test for cause and defines "reasonable cause" 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."

5. Probate Code Section 21307 also provides that a no contest clause "is not enforceable against the beneficiary to the extent the beneficiary, with probable cause, can contest a provision that benefits any of the following persons: (i) a person who drafted or transcribed the instrument; (ii) a person who gave instructions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directs 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; and (iii) a person who acted a witness to the instrument."

Because of the potential catastrophic effects of no-contest clauses, California statutory law now provides a means of determining preliminarily if a proposed action will run afoul of a no contest clause in a particular document, before the action itself is brought and the benefits forfeited. California Probate Code Section 21320 (also amended May 5, 2000) provides that "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's claims... and [certain proceedings pertaining to contracts regarding testamentary or intestate successions-see new Probate Code Section 21700]... would be a contest within the terms of the no contest clause. By statute, the no contest clause is not enforceable against the beneficiary to the extent an application under section 21320 (a) by the beneficiary is limited to the procedure and purpose described [therein] and does not require a determination of the merits of the motion, petition, or other act of the beneficiary. Declaratory relief is not available for a determination of whether the exemption of enforcement of no contest relief clause under Probate Code Section 21306 and 21307 "would apply in a particular case." Judicial Decisions/Attitudes

The leading California case is *Burch v. George* (1994) 7 C4th 246, 27 CR2d 165. This case, decided by the California Supreme Court after the matter had been settled holds that the underlying theory for enforcement of no contest clauses in California is that a testator or settlor is free to condition a gift on the beneficiaries' acquiescence to the other terms of the instrument. The case, and its terms, established a public policy for the enforcement of no contest provisions but indicated that they should be strictly construed.

II. Colorado

(Stanley C. Kent)

Colorado has had a statute dealing with no contest clauses for many years. The most recent statute was enacted in 1973, effective in 1974. The current Colorado statute is taken from Section 3-905 of the Uniform Probate Code. (Colorado enacted the Uniform Probate Code in 1973, effective 1974.)

The current version of the Colorado statute is found at Section 1512905, Colorado Revised Statutes. Our statute reads as follows:

15-12-905. Penalty clause for contest. A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Generally, Colorado embraces the public policy that is opposed to clauses in wills that impose a condition that makes a devise void if the beneficiary contests the will or institutes other proceedings against the estate, unless there is an absence of probable cause for instituting the proceeding.

The most recent appellate decision construing "no contest clauses" in Colorado is *In Re Estate of Peppler*, 971 P.2d 694 (Colo. App. 1998). In that case, the Court reasoned that while no contest clauses in wills are generally held to be valid and not violative of public policy, such clauses are to be strictly construed and forfeiture is to be avoided if possible. [Emphasis added.] *Peppler*, supra, at 696.

Colorado courts have generally declined to enforce no contest clauses where the beneficiary challenging the will acted in good faith and had probable cause for the challenge. *Peppler*, supra, at 697; see also *Colorado National Bank vs. McCabe*, 353 P.2d 385 (Colo. 1960), a pre UPC decision in Colorado holding that a no contest clause did not apply to a beneficiary who had challenged a will provision as violative of the rule against perpetuities where the petition for construction of the will was made with probable cause.

"Probable cause" in the context of attacks on wills, is defined as "the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful." *Peppler*, supra, at 697; following Restatement (2d) of Property, Section 9.1, comment j. One important factor that bears on the existence of probable cause is if the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts. *Peppler*, supra, at 697.

X. Connecticut

(Deborah J. Tedford)

Connecticut takes a moderate position on in terrorem or forfeiture clauses in wills, upholding them in most cases (other than will constructions) but providing an exception if a will contest is brought in "good faith." In the state's leading case, decided in 1917, the court first considered the benefits of forfeiture clauses, ". . . as a method of preventing will contests, which so often breed family antagonisms and expose family secrets best left untold, and result in a waste of estates through expensive and long drawn-out litigation." *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 175, 101 A. 961 (1917). The court also considered the drawbacks of these clauses, and concluded that as a matter of public policy, not allowing the truth to emerge is an even more important consideration than protecting family secrets. "Courts exist to ascertain the truth and to apply the law to it in any given situation; and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law, is a mistaken public policy." *South Norwalk Trust Co.*, supra, at 176, 177. The suppression of truth, if allowed by the broad interpretation of a forfeiture clause, would assist those who stand to benefit by undue influence or lack of testamentary capacity, and the court refused to be a party to such behavior, in cases where the contest is justified.

Similarly, in a Connecticut case in which the executor or trustee raised the question of the validity of certain gifts under a will, and the beneficiary, subject to a forfeiture clause, then brought forth his own objections, the court, reasoning on the importance of its search for the truth, refused to apply a forfeiture clause:

The court is obliged to construe the will in accordance with legal principles. Those only who have an interest in the will have the disposition to assist the court in its labors. If they must be silent, for fear of forfeiture of benefits given them by the will, the court will be hindered by the command of the testator in reaching a correct result. *Griffin v. Sturges*, 131 Conn. 471, 478, 40 A.2d 758 (1944).

The decision was re-affirmed in *Bankers Trust Co. v. Pearson*, 140 Conn. 332, 99 A.2d 224 (1953). Discerning the true intent of the testator was distinguished from an outright challenge of the instrument and in those cases a forfeiture would not be applied.

III. Florida

(Robert D. W. Landon, II)

In Florida, in terrorem clauses are unenforceable. See Sections 737.207 and 732.517, Florida Statutes, pertaining to wills and trusts, respectively.

IV. Illinois

(Robert D. W. Landon, II)

Illinois has no statute, as Florida does, holding in terrorem clauses in wills or trusts unenforceable. Illinois case law upholds the validity of such clauses, but construes them strictly. See e.g. *Estate of Helen M. Mank*, 699 N.E. 2d 1103 (Ill. App. 5th Div. 1998); *Estate of Wojtalewicz v. Wojtel*, 418 N.E. 2d 418 (Ill. 1st Dist. 1981).

Cases enforcing or addressing in terrorem clauses have provided that:

"[G]enerally, conditions in a clause contesting the will or attempting to set aside are valid. Even when they are held valid, though, conditions against contests are so disfavored by the courts that they construed very strictly. This view is guided by the well established rule that equity does not favor forfeitures, and in construing conditions, both precedent and subsequent, a reasonable

construction must be given in favor of the beneficiary." *Estate of Wojtalewicz*, 418 N.E. 2d at 420.

However, the *Wojtalewicz* court went on to state, "[N]evertheless, the duty of the court in any will construction case is to ascertain from the words in the will, the intention of the testator and give effect thereto unless the same is in violation of public policy or some rule of law." *Id.* (citations omitted). In *Wojtalewicz*, the testatrix's will forbade the contest of any clause of the will. A beneficiary sought to have the personal representative named in the will removed because the personal representative had failed to begin probate proceedings more than one year after the testatrix's death. The appellate court affirmed the trial court holding that the in terrorem clause in the will violated public policy because the clause would:

"...deprive respondent of his statutory right . . . to request the court to deny the appointment of the executor for latter's very failure to initiate a proceeding to have the will admitted to probate within 30 days of acquiring knowledge of being named as executor in the will. It is undisputed that the executor took no action to admit the will to probate for nearly one year following the testator's death. Respondent's statutory right to contest the appointment of executor for his breach of duty cannot be defeated by the wishes of the testator." *Id.* at 420.

The court went on to note that this clause prohibiting any challenge to any provision of the will violated public policy because:

"[T]he petitioner, as a legatee under this will, cannot be terrorized into relinquishing his legacy by any threat of forfeiture. Otherwise, he would be forced to stand by silently while the executor jeopardizes the assets of the estate. We will not allow this result, because it permits the estate to be subject to waste and thereby diminishes the desired share of each beneficiary chosen by the testator under his will." *Id.* at 421.

In the recent case *In re Estate of Helen M. Mank*, the court appointed guardian of a disabled adult ward filed a petition to contest the will of the ward's sister "for the limited purpose of tolling the statute of limitations." The in terrorem clause in the sister's will provided

"if any beneficiary shall commence or, except as required by law, participate in any proceeding to contest the validity of this will or especially Article XI hereof, or to assert any claim based on an alleged agreement to make a will or otherwise dispose of my estate, such beneficiary shall forfeit whatever interest he would have taken under this will and my estate shall be administered and distributed as though he had predeceased me."

Based on the guardian's filing of a will contest, a number of the other beneficiaries filed an action seeking to have the ward be determined to have predeceased the testator for purposes of the will. The appellate court first asserted that the judiciary is the primary entity responsible for the protection of adult wards and that guardians are merely agents of the court and are "at all times subject to the court's direction in the manner in which the guardian provides for the care and support of the disabled person." The court went on to note that in this case, the guardian's conduct was "undertaken pursuant to fiduciary duty owed by him to protect and promote the interests of another."

It should be noted that the guardian's filing of the will contest for the purpose of tolling the statute of limitations was suggested by the guardianship court. The appellate court stated that the guardian apparently did not inform the trial court that an in terrorem clause was enforced where the filing of the will contest was at the direction of a court that lacked full disclosure of the possible consequence and the court held that it would not "permit the conduct in this case to permit a forfeiture.

Unfortunately, there are very few Illinois cases from which to glean any type of "safe harbor" with respect to what actions do and do not constitute a contest of a will or trust. However, the decision of *Clark v. Bentley*, 76 N.E. 2d 438 (IL 1948) is helpful. In that case, the Supreme Court of Illinois was faced with in terrorem clause of a will that provided:

"If any of my children, or grandchildren, or any of the cestui que trust under this will shall contest the validity of this, my will, or

attempt to vacate the same, or alter or change any of the provisions thereof, he, or she, or they shall be thereby deprived of any beneficial interest" 76 N.E. 2d. at 440.

In *Clark*, the testator's children and the testator's widow executed Quit Claim Deeds between each other, apparently in an effort to circumvent the express provisions of the interest created under the will. One of the other beneficiaries then sued, alleging that the various beneficiaries had violated the in terrorem clause thereby forfeiting their interest under the will.

The Supreme Court rejected the beneficiary's position and ruled that the in terrorem clause had not been violated.² The court stated that the "language used by the testator in this clause indicates that he had in mind and intended some form of court proceeding or contest of the will [the court focused on the use of the term contest in the in terrorem clause and then went on to state] 'Contest.' in law, as defined in Webster's New International Dictionary, 2d. Ed., is 'to make a subject of litigation; to dispute or resist by force of law; to defend, as a suit; to controvert.'" *Id.* at 440-441. Because in the instant case no legal action was filed the court concluded that an in terrorem clause which required a "contest" was not violated. The court added that "we are further guided by the well established rule that equity does not favor forfeitures, any in construing conditions, both precedent and subsequent, a reasonable construction must be given in favor of the beneficiary." *Id.* at 441.

V. Massachusetts

(Hanson S. Reynolds)

A no-contest provision, also called an in terrorem or forfeiture clause, provides that a beneficiary who contests the will loses at least some, and typically all, of the benefits given under the will. Most jurisdictions, including Massachusetts, uphold in terrorem provisions. Even though these provisions are upheld, in general, they are unpopular with the courts and are strictly construed.

Courts avoid forfeiture unless the beneficiary's conduct comes directly within the course of behavior the testator prohibited in the will. Thus, courts frequently treat the beneficiary's suit

² The court did not uphold or reject the clause on public policy grounds. It specifically declined to address this issue given its determination that the clause did not work a forfeiture under those facts.

as one to construe or interpret the will, rather than as one to contest the will, to avoid triggering the forfeiture. Additionally, many jurisdictions have cases or statutes limiting the scope of in terrorem provisions so that forfeiture does not occur if the beneficiary contests the will in good faith and with probable cause.³ In jurisdictions that follow the Uniform Probate Code, courts support the good faith/probable cause exception on several grounds. For example, one argument is that the testator would not have intended to preclude a will contest under such appropriate circumstances. In addition, enforcing the clause would be contrary to public policy if the beneficiary had a legitimate basis for bringing the contest.

Nevertheless, some jurisdictions, including Massachusetts, hold that a general condition against contests is enforceable regardless of the contestant's good faith or the existence of probable cause. In fact, a forfeiture provision is valid in Massachusetts and the contesting beneficiary loses his or her interest under the will even though the contest was initiated with probable cause.⁴ In *Rudd*, the Supreme Judicial Court enumerated several reasons behind this rule. The Court said that the general power to make a will is not subject to a probable cause exception. First, such an exception would violate the deliberately expressed purpose of the testator. Also, to allow such an exception would deprive the donee of the gift over in case of a will contest by the first named beneficiary. Finally, such a clause would not prevent a contest by a beneficiary.

Furthermore, the Massachusetts Comments by the MBA/BBA⁵ Joint Committee on the Uniform Probate Code indicate that if and when Massachusetts does adopt the Uniform Probate Code, it will not adopt §2-507, which would make in terrorem clauses unenforceable if probable cause exists for instituting proceedings.⁶ The Committee prefers to continue present Massachusetts law which permits enforcement of in terrorem clauses.⁷ It should be noted, however, that an in terrorem clause for opposing or contesting the provisions of the will would

³ See UPC §§2-517, 3-905.

⁴ *Miller v. Stern*, 326 Mass. 296 (1950); *Rudd v. Searles*, 262 Mass. 490 (1928).

⁵ Massachusetts Bar Association and Boston Bar Association.

⁶ Proposed Massachusetts Uniform Probate Code
<http://www.lawyersweekly.com/matreas/upc.htm>.

⁷ See Newhall on Settlement of Estates and Fiduciary Law in Massachusetts (5th Ed) §33:45.

not bar a claim for rights under the will on a petition for instructions.⁸ Also, the mere filing of an appearance by a legatee when the will is offered for probate, without more, will not be considered tantamount to a will contest, because the appearance may be for a variety of reasons.⁹ Further, an in terrorem clause will not apply to a claim against the estate for services rendered.¹⁰

In conclusion, attorneys should be careful in drafting in terrorem clauses in Massachusetts, and make sure that they are furthering their clients' wishes effectively. For instance, a forfeiture clause will only deter a will contest effectively if the disgruntled beneficiary has something to lose. The in terrorem clause should clearly define the conduct that will set off the forfeiture. Additionally, the testator or testatrix should name an alternate recipient of the property that is subject to forfeiture under the clause. Finally, taking a look at current Massachusetts view on "probable cause/good faith" will contests, it appears that it is well settled that even these types of contest will lead to the forfeiture. Nevertheless, with the impending adoption of the Uniform Probate Code, one may consider adding a clause to a will that clearly states that the forfeiture clause operates despite the contestant's good faith or probable cause for bringing suit, if that is what the testator intends.

VI. Missouri

(T. Jack Challis)

Missouri courts recognize no contest clauses as enforceable in trusts and wills. However, Missouri has no current statutory authority for the specific application of no contest clauses to trust or will beneficiaries. Experience in Missouri courts (and language in cases cited below) indicate that trial court and appellate court judges do not embrace the all-or-nothing nature of such forfeiture provisions, but will nevertheless enforce them in the right circumstances.

Further, there is no statutory means for a predetermination of whether a particular challenge to a trust or will would constitute a "contest," thereby triggering the disinheritance provision. It is anticipated, however, that a judge hearing an equitable matter could make such a predetermination, if requested.

⁸ Old Colony Trust Co. v. Sullivan, 268 Mass. 318 (1929).

⁹ Maguire v. Bliss, 304 Mass. 12 (1939).

¹⁰ Maney v. Maney, 340 Mass. 350 (1960)

The prosecution of a will contest action in Missouri is strictly a creature of statute tried as an action at law, usually with a jury. Conversely, a trust contest is treated as an equitable action tried by a judge.

Missouri courts have held that a testamentary provision in a will cannot prohibit a legatee, heir or other person from contesting the will, but a provision in the will which penalizes or disinherits the contestant is valid. An unsuccessful contestant can therefore be disinherited. The court need not consider the contestant's probable cause or good faith in the enforcement of the no contest clause. *In re Chambers' Estate*, 18 S.W.2d 30, 36 (Mo. banc 1929) (forfeiture clause is not unconstitutional); *Commerce Trust Co. v. Weed*, 318 S.W.2d 289 (Mo. 1958).

In a more recent case involving a broad no contest clause and a statutory discovery of assets proceeding, the Missouri Court of Appeals held that the facts of the case are to be considered along with a careful review of the particular language of the no contest clause and that the clause is valid where the intent of the testator is clear. Even though forfeitures are not favored by the law, if such intent is that the contestant's conduct should result in disinheritance, the no contest clause must be enforced. However, an action seeking construction of the will in this case did not constitute an attack on the validity of the will. *Chaney v. Cooper*, 954 S.W.2d 510, 519 (Mo.App.W.D. 1997).

Missouri has also recognized and sustained no contest clauses with respect to trusts. *Rossi v. Davis*, 133 S.W.2d 363, 369 (Mo. 1939), citing *In re Chambers' Estate*, supra. In a case where the trustor was living but under the cloud of alleged incapacity, the court acknowledged the general enforceability of a forfeiture clause in a trust indenture but refused to enforce the clause under the particular set of facts. *Cox v. Fisher*, 322 S.W.2d 910, 914 (Mo. 1959).

Missouri case law does, therefore, support the enforcement of a no contest clause in the trust indenture or will. However, without statutory authority, the exact boundaries of enforceability are unknown. It is also unclear whether the no contest clause in a trust or will would apply to the terms of a subsequent trust amendment or codicil to a will. Because of the great potential risk of such a challenge to the contestant who is also a substantial beneficiary under the instrument, Missouri practitioners have been known to be very conservative in contesting a trust or will containing comprehensive no contest provisions.

VII. Nebraska

(Dennis W. Collins)

Nebraska adopted the Uniform Probate Code in 1977, including Section 3-905 concerning "no contest" clauses. Nebraska's version of this statute says:

"A provision in a will purporting to penalize any person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." (Section 30-24, 103, Nebraska Probate Code.).

The statute only refers to a "will," so, presumably, this rule would not apply to a "no contest" provision in a trust or other similar estate-planning document.

There are no Nebraska cases interpreting Nebraska's statute, since its enactment. The only Nebraska case on point appears to be one from 1951, in which the Nebraska Supreme Court held that a beneficiary contesting a will had not violated the "no contest" clause in the will, because the beneficiary's pleadings "imposed no burden other or different from the one imposed by the statute as a condition precedent to admission of the will to probate." *Scriven v. Scriven*, 153 Neb. 655, 45 N.W.2d 760, 767 (1951). It does not appear Section 3-905 of the UPC has been amended, nor was the reporter able to find any cases from other UPC jurisdictions specifically interpreting this section.

In actual practice in Nebraska, this reporter has seen many lower court judges appear to be willing to find "probable cause" in interpreting these clauses, if a lawyer testifies there is evidence to support the will contest. Therefore, the clauses may not be of great use in Nebraska from a practical standpoint.

XII. New Mexico

(Robert M. St. John)

In 1995, the New Mexico legislature added a section to the Uniform Probate Code as adopted in New Mexico governing no contest clauses. Section 45-2-517 of the New Mexico statutes provided that a provision in an instrument purporting to penalize an interested person for contesting or instituting other proceedings relative to that instrument or estate "...is unenforceable if probable cause exists for instituting proceedings."

This statute codified existing New Mexico law as announced in one of the very few reported opinions in recent years to address the subject. In *Estate of Seymour*, 93 N.M. 328 (1979), the probate of a will was challenged on the ground that the testator's divorce had revoked the will in its entirety. The opinion noted that the son of the decedent who brought the contest asserted, "that he did not intend to contest his mother's will as such, but only to have a court construe the meaning and effect of the will." After dealing with the primary issue raised, the effect of divorce on a will, the court stated, "We hold that no-contest provisions are valid and enforceable in New Mexico, but they are not effective to disinherit a beneficiary who has contested a will in good faith and with probable cause to believe that the will was invalid."

The *Seymour* case has been cited only a few times. In *Estate of Martin*, Court of Appeals, 97 N.M. 773 (1981), the New Mexico Court of Appeals dealt with a question of the interpretation of language in a will which both parties stipulated was validly executed. In what is probably dicta, the court referred with approval to the holding in the *Seymour* case.

XI. New York

(Gerald Carp)

In New York, in terrorem clauses in wills are enforceable by statute. New York Estates, Powers, and Trusts Law ("EPTL") Section 3-3.5(b) provides as follows:

A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest. . .

However, the statute goes on to provide:

- (1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.
- (2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.
- (3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

- (a) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.
- (b) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.
- (c) A refusal or failure to joint in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.
- (d) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding.
- (e) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

Apart from those issues covered by the above statute, the following points have been addressed by New York courts or other statute:

In general, New York courts do not favor such clauses and, therefore, apply a rule of strict construction when determining whether an in terrorem clause is enforceable and whether particular conduct violates such clause. Thus, an in terrorem clause that purports to preclude objections to an accounting is not enforceable. Further, an in terrorem clause is not violated by a petition to enforce rights under a separation agreement as a claim against decedent's estate.

Perhaps most important, SCPA Section 1404 entitles any party to the probate proceeding to examine any or all of the attesting witnesses, the person who drafted the will, and if the will contains an in terrorem clause, the nominated executors and the proponents of the will. Inquiry may be made in the examination "as to all relevant matters which may be the basis of objections to the probate of the propounded instrument." SCPA Sec. 1404 (4). In connection with such examinations, courts have permitted parties to discover documents, including decedent's prior wills and medical records, without running afoul of an in terrorem clause.

New York courts generally will not consider the issue of the trigger of the in terrorem clause prior to probate. However, one Surrogate granted a petition for construction of the in terrorem clause by a charitable beneficiary of the will.

Where an in terrorem clause bars a “contest” to the will, New York courts have held that not every filing of objections will result in forfeiture. In several cases, where objections to probate were filed but later withdrawn prior to trial, the would-be objectant did not forfeit her interest in the probate property. But, significant pretrial litigation over decedent’s testamentary plan will cause the forfeiture of benefits pursuant to an in terrorem clause.

A will beneficiary violates an in terrorem clause by procuring others to object to the will.

The commencement of proceedings to have the testatrix declared incompetent during her lifetime, in order to defeat any will testatrix would make and publish, does not constitute a violation of an in terrorem clause contained in the testatrix’s will. In terrorem provisions that provide for the forfeiture of a legacy to a beneficiary based upon the actions of another not within the control of the beneficiary are not enforceable.

A further limit on no contest clauses concerns elections against a will. An in terrorem clause cannot disinherit a surviving spouse who elects against the will.

As the foregoing points emphasize, New York courts will read in terrorem clauses and the statute in tandem, with due regard for the testator’s intent in seeking to limit will contests. Where the beneficiary’s conduct consists solely of preliminary or pre-objection discovery, the in terrorem clause will not be implicated. However, courts will examine the beneficiary’s entire course of conduct, the testator’s intent, and the statute to determine if the conduct at issue serves to invoke the in terrorem clause.

The law on lifetime trusts was substantially revamped in New York in 1997 to establish requirements for the creation, funding, amendment and revocation of revocable lifetime trusts. Among other issues not resolved by the 1997 legislation, however, was the enforcement of in terrorem clauses in such trusts. As of this date, there are no reported New York cases ruling on this issue.

In one case, *Matter of Stralem*, supra, although the court did not rule on the enforceability of in terrorem clauses because the trust in question did not contain one, the courts stated “[a]s

with wills, in terrorem clauses in inter vivos instruments should be equally disfavored. If they exist, they must be strictly construed.” *Stralem*, 181 Misc. 2d at 721. Moreover, one author in a national article has noted that courts in states other than New York have treated in terrorem clauses in trusts the same as they do in wills.

Given that revocable lifetime trusts often serve as the primary testamentary instrument in place of or in conjunction with a will, there appears to be no reason that New York courts will not apply the same principles discussed above to in terrorem clauses contained in lifetime trusts.

IX. Pennsylvania

(Jack Meek)

Pennsylvania passed a statute in 1994 limiting the enforceability of penalty or no contest clauses in wills and trusts. The terms provide:

A provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceedings relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings.

20PaCSA Sec. 2521.

Although the statute is prospective only, the legislative history suggests that this provision is a codification of Pennsylvania common law.

VIII. Texas

(Edward V. Smith, III)

A Texas testator may provide that a devise or bequest shall be forfeited in the event that the will is contested by the devisee or legatee. No-contest laws are strictly construed and a breach will be declared only where the acts of the parties come within the strict terms of the clause. Therefore, it can be said that in Texas, no-contest clauses, though valid, are generally held not to apply where an attack on the will is based on reasonable grounds and brought in good faith. A suit to construe a will is not a contest. Some of the fairly recent cases and their holdings include:

Estate of Newbill 781 S.W.2d 727 (Tex. App. Amarillo, 1989). A beneficiary's challenge, based on Probate C. sec. 78(f), of the

named executor's suitability for appointment as executor was not a contest contrary to the in terrorem clause and did not violate such clause in decedent's will.

McLendon v. McLendon, 862 S.W.2d 662 (Tex. App. Dallas, 1993). Beneficiaries challenged executor's management of estate. Evidence that executors breached their fiduciary duty and in terrorem clause did not apply.

Sheffield v. Scott, 662 S.W.2d 674 (Tex. App. Houston, 1983) Until further action is taken to thwart intention of testator, mere filing of contest motion is insufficient to cause forfeiture under no contest clause in will.

Gunter v. Pogue, 672 S.W.2d 840 (Tex. App. Corpus Christi, 1984). Will contestants who sought to defeat no contest clause have the burden to show that contest was brought in good faith and to secure a finding to this effect. Where they failed to obtain such finding trial court erred in ordering executors to distribute bequests to them.

The reporter has not seen any indication that judges have a natural prejudice either for or against such clauses and they are enforceable. To the reporter's knowledge there is no method of making a preliminary determination as to whether or not an action constitutes a contest in Texas.

XIII. Uniform Probate Code

(Gerald Carp and Jules Haskell)

The Uniform Probate Code contains two identical provisions relating to penalties for contesting a will: (i) Section 2-517, which is part of Article II on Intestacy, Wills, and Donative Transfers, and (ii) section 3-905, relating to Probate of Wills and Administration. Each of these reads as follows:

“A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”

This section appears to place the burden of proving “probable cause” on the will contestant. Without such proof, the in terrorem clause will be enforced.

Proof of probable cause may also determine who pays for the examinations of witnesses and others. Local law may provide that in all events the estate pays for the costs of the examination of the draftsman and two of the witnesses to the will. Which party is charged with the costs of additional examinations and other discovery may be dependent upon whether the contestant establishes such probable cause.

XIV. Uniform Trust Code

(Gerald Carp and Jules Haskell)

The Uniform Trust Code contains no provision addressing the enforceability of in terrorem or no contest clauses in trusts.

As indicated in our review of New York law, revocable lifetime trusts often serve as the primary testamentary instrument in place of or in conjunction with a will. There would seem to be little reason that courts will view in terrorem clauses contained in lifetime trusts differently from those contained in wills.

XV. Strategies In the Use of No Contest Clauses

Forfeiture or no contest clauses may provide a means by which a testator can secure acceptance of his or her estate plan, provided that the incentive offered is sufficient, the state of domicile upholds forfeiture clauses, and the testator has sufficient capacity or is not subject to undue influence, at least in those states that uphold these clauses or take a “moderate” position. But even in states that uphold no contest clauses, practice suggests that they may be no panacea. A difficult beneficiary, one who is determined to be obstreperous, can still find ways to breed family antagonisms and engage in drawn-out litigation.

A. Trusts versus Outright Distributions

Perhaps the most successful use of no contest clauses involves a disposition in trust for the black (or grey) sheep of the family. In this strategy, the disposition to children or other relatives is an equal one, but some shares may be given outright and some in trust, perhaps with restrictions or incentive conditions that a beneficiary considers onerous or objectionable. With

no forfeiture clause, the burdened beneficiary may try some form of will contest, hoping by threat of protracted litigation to achieve a full or partial outright gift as part of the settlement. A no contest clause may well make the black sheep re-consider his strategy, as the loss of his entire share may not be worth the risk. In fact, his strategy may backfire by causing a forfeiture of the entire interest, thereby increasing the share of his siblings, certainly a result that may give him or his attorney pause for thought.

B. Unequal Distribution

Forfeiture clauses are also used in the case of unequal distribution among family members, or to protect a marital/credit shelter tax plan, especially with a newer spouse who is not the parent of the ultimate beneficiaries. This can be more problematic: is enough being given to each beneficiary to act as sufficient incentive? A disgruntled beneficiary who is angry or has a personal issue against a stepparent needs a sufficiently large bequest to be dissuaded from challenging the will or trust. Certainly there are those beneficiaries who will take the risk of forfeiture in order to attack the interests of a family member they dislike. The judgment of an amount adequate for the purpose can be a challenge.

C. Drafting No Contest Clauses

In practice, however, attorneys too often use in terrorem clauses indiscriminately or draft them too broadly. Some attorneys include broad no contest clauses whether or not the client's circumstances warrant them. If the client's will or trust benefits the spouse for life and then distributes the estate equally to three adult children of the client and the spouse, and if no hint exists of friction between the four objects of the client's affection, why would an attorney include an in terrorem clause? Yet far too often, we see no contest clauses in those situations. Often, the reason is that the clause is in the attorney's arsenal of clauses. And often, the attorney never discussed with the client the implications of the clause to the family members.

Instead of targeting the potentially disgruntled beneficiary, attorneys drafting such clauses too frequently apply them to "any beneficiary who" contests the instrument or asserts a collateral claim against the estate or trust. The result may be to disinherit the very beneficiaries the client sought to protect by the no contest clause. For example, if the client disfavors one child and favors another child, the instrument should couple an in terrorem clause with a pecuniary bequest

to the disfavored child sufficient to provide an incentive to that child not to contest the plan. The instrument should not be drafted in such a manner that it could apply to the favored child.

D. Collateral Attack

A beneficiary who is determined to make trouble is often not hampered by the presence of an in terrorem clause in a will or trust. If a family member is an executor or trustee, much satisfaction can be gained by questioning the fiduciary's actions, requesting accountings, filing petitions for removal, petitions for surcharge, or petitions to construe the terms of the will or trust. The determined malcontent can often find ways to be difficult and objectionable; he or she will just use a different method of accomplishing those goals.

An in terrorem clause can discourage proper questions to the court, or make them more expensive to resolve. In order to avoid a forfeiture, a reasonable party may need to request court approval that a proposed construction proceeding does not run afoul of an in terrorem clause, which can increase the costs that the clause was designed to avoid.

E. Anti-Harassment Clauses

A recent case in Maine supplied by ACTEC fellow Phil Hunt suggests another possible strategy, particularly useful in states that by public policy either do not allow no contest clauses, or uphold them only under limited conditions. In the Estate of Minnie Lewis, decided May 4 2001, #2001 ME 74, the Maine court upheld an anti-harassment clause as not void against public policy. Maine takes a position similar to Connecticut regarding no contest clauses, disallowing them if the challenge was brought in good faith. In the Minnie Lewis case, however, the clause in question was not the traditional no contest clause, but rather a clause allowing the Trustees to withhold or suspend payments to a family black sheep if in the judgment of the Trustees the child in question is harassing any beneficiary, the Trustee, or their agents. This anti-harassment clause may provide a useful strategy in conjunction with, or in place of a more traditional no contest clause.

XVI. Conclusion

In construing no contest clauses courts seem to be balancing two separate and conflicting legal principles. The first is the right of each testator or settlor to dispose of her property as she sees fit. The avoidance of family litigation, with its attendant risks of family enmity, divisiveness and airing of dirty laundry is a reasonable goal, and the majority of jurisdictions support a testator's conditioning the privilege of inheriting assets on adhering to a no contest clause. The second principle, in direct conflict with the first, is the right of interested parties to petition courts in a search for justice and truth. Was a will or trust the product of undue influence, fraud or mistake? Is there a question as to the valid interpretation of certain language in the instrument? Has the named fiduciary in fact not carried out the testator's wishes, or not acted in the best interests of the estate? Traditionally courts have been charged with resolving and answering these questions as a matter of social good. To penalize the search for "truth" or "justice" by requiring the petitioner to relinquish an inheritance is thus not favored in many jurisdictions. Courts often state that equity does not favor forfeitures. The majority of jurisdictions strive to balance these two competing principles by favoring one or the other to varying degrees.

Perhaps the most creative legal solution in resolving these conflicting principles is the attempt to move from an all or nothing no contest clause to a more measured anti-harassment clause, which may come closer to prohibiting problem behavior than the traditional no contest clauses. Creative drafting may help both the courts and the beneficiaries work their way through disagreements or disputes with a degree of reasonableness that strict no contest clauses cannot.