

First Supplement to Memorandum 2006-42

Revision of No Contest Clause Statute

We received two letters commenting on Memorandum 2006-42. The letters are attached in the Exhibit as follows:

- Exhibit p.*
- Robert E. Temmerman, Jr., San Jose (10/12/06)1
- Thomas W. Latham, Dominic J. Campisi, Andrew Zabronsky, San Francisco (10/18/06)2

This supplement discusses the comments we received and provides some additional information about the attempt to quantify contest litigation rates in different jurisdictions.

NEED FOR CHANGE

The commentators disagree on whether there is a serious enough problem with existing law to justify making a significant change to the law. Their views are summarized below:

Need for Significant Change

Robert Temmerman is an attorney and a former chair of the Executive Committee of the Trusts and Estates Section of the State Bar (“ExComm”). He believes that existing law has caused a significant increase in litigation costs and that the complexity of the law is causing a “substantial malpractice exposure to attorneys who are not intimately familiar with the no contest clause statutes and the declaratory relief procedures.” See Exhibit p. 1.

Mr. Temmerman indicates that he had previously supported the ExComm proposal of full repeal of the no contest clause but is now interested in the possibility of simply repealing the declaratory relief provisions. *Id.* He believes that the public wants to be able to use a no contest clause to “force a beneficiary to choose their gift under the client’s testamentary instrument or take their chances with a challenge to the estate plan.” *Id.*

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.

No Need for Significant Change

Thomas Latham, Dominic Campisi, and Andrew Zabronsky are probate litigation attorneys. Mr. Zabronsky is a member of ExComm. They write collectively, on their own behalf. See Exhibit p. 5.

They dispute ExComm's claim that increasing use of pre-contest declaratory relief procedures means that the enforcement of no contest clauses under California law is increasing litigation rather than deterring it. While pre-contest proceedings may be increasing, contests themselves are still being deterred. They emphasize that a contest is many times more costly and time consuming than a pre-contest proceeding. Therefore, even with an increase in pre-contest costs, the net effect is still significant savings in litigation costs. See Exhibit pp. 3-7.

They also dispute the claim that uncertainty as to the application of a no contest clause is a serious problem. Many contests involve "garden-variety" attacks on the validity of a donative instrument that clearly fall within the scope of a no contest clause. For the most part, it is indirect contests that present the difficult cases. That problem is minimized by recent statutory changes that limit the application of a no contest clause to various types of indirect contests, and by the availability of the declaratory relief safe harbor. See Exhibit pp. 7-8.

Mr. Latham, Mr. Campisi, and Mr. Zabronsky oppose the ExComm proposal. However, they do suggest one relatively minor change in the law that would reduce the delay that can result from declaratory relief:

Under current rules, the decision on a pre-contest petition is immediately appealable, which means that a party with even a marginal argument can delay the filing of the proposed action by a year or more. We see nothing that justifies this delay, and believe a pre-contest petition is more properly viewed not as a separate proceeding, but as the first step in bringing the proposed action. We therefore believe a decision the proposed action is *not* a contest ought to be treated as an interim ruling, appealable only upon final judgment of the proposed action (with protection for the petitioner in the event of a reversal). Such reform could easily be accomplished statutorily.

See Exhibit p. 7 (emphasis in original).

The proposed reform would seem to favor contestants. A contestant who receives an unfavorable ruling in a declaratory relief proceeding could immediately appeal. A contestant who receives a favorable decision could proceed with the contest and would be protected from forfeiture, even if the declaratory decision is later reversed. Still, the general concept of limiting

appeals as a way of reducing cost and delay is an interesting one that should be considered.

EMPIRICAL DATA

The main memorandum discusses the data provided by ExComm on the number of contest-related appeals in different states. See Memorandum 2006-42, pp 26-27.

In analyzing that data, the staff overlooked an important distinction. The California numbers include **both will and trust contests**, while the New York numbers includes **only will contests**. That difference invalidates the staff's comparison of California and Nevada cases.

More fundamentally, the staff has come to doubt the feasibility and value of counting appellate decisions as a way of gauging the effectiveness of a no contest clause as a litigation deterrent.

The staff spent a considerable amount of time exploring different ways of searching for contest-related appellate cases and concluded that the concept of a will or trust contest is too complex to be reduced to search terms that will yield consistent results in different jurisdictions. If the terms used are too narrow, relevant cases will be excluded, in unpredictable ways. If the terms used are broad enough to ensure that all relevant cases are found, the results will include an unmanageably large number of irrelevant cases.

Even if we could reliably count "contest" appeals in various states, the ratio between the number of appeals and the number of cases at the trial level may vary between states in unpredictable ways. For example, the ratio could be affected by differences in the cost of appeal, time required for appeal, the standard of review, etc. This makes the number of appeals an unreliable way of comparing the total volume of contest litigation in different states.

Most importantly, the staff now believes that any attempt to count contest cases as a way of determining the effectiveness of a no contest clause as a litigation deterrent is inherently flawed. The relevant empirical question is: How many contest cases could have been filed, **but were not**, because of the use of a no contest clause? That question cannot be answered by counting the number of contests that **were** filed.

One could perhaps speculate that the number of filed cases is proportional to the number of deterred cases, but again the ratio could well vary between states in unpredictable ways.

A further complication is the fact that most contest appeals **do not involve a no contest clause**. Such cases have no value in estimating the number of contests deterred by no contest clauses.

The only way the staff can see to empirically judge the effectiveness of a no contest clause would be to survey beneficiaries of instruments that contain no contest clauses (or their attorneys) to determine how those clauses affect the decision on whether to contest. We do not have the resources for that sort of research. Perhaps ExComm could survey the members of its section?

It may also be useful to examine historical appeal rates in California and Florida to see whether there are intra-state trends over time that bear on this study. The staff will investigate that question.

QUESTIONS FOR EXCOMM

ExComm will be meeting on November 11, 2006. Its liaison to the Commission for this study, Shirley Kovar, has invited the Commission to ask ExComm specific questions regarding the policy or practice of no contest clause use and enforcement. ExComm will consider those questions at its November meeting and should be able to provide answers before the Commission's December meeting. The staff appreciates that offer and suggests that the Commission consider what additional information from ExComm might be helpful in its deliberations.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

**EMAIL FROM ROBERT E. TEMMERMAN, JR.
(OCTOBER 12, 2006)**

To: "Brian Hebert" <bhebert@clrc.ca.gov>
Subject: Study on Revision of California's No Contest Clause Statutes

Brian,

Great job on your analysis and report. Although I previously supported full repeal of the no contest clause and fee shifting as a viable solution to California's problems with the current statutory framework of no contest clauses, I am intrigued by the possible solution of repealing only the declaratory relief provisions of our statutes.

Clients want no contest clauses and the ability to force a beneficiary to choose their gift under the clients' testamentary instrument or take their chances with a challenge to the estate plan. Attorneys who litigate in the trust and estate arena are well aware of the increase in cost involving no contest clauses and the two-fold (or more) approach to litigating no contest clauses by first filing declaratory relief actions. Moreover, because of the statutory complexity in California there is a substantial malpractice exposure to attorneys who are not intimately familiar with the no contest clause statutes and the declaratory relief procedures. Simplifying the statutes would indeed be welcome.

I look forward to your continuing good work on this important topic to estate planners, trust and estate litigators and our respective clients.

Sincerely,
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MEMORANDUM

TO: Brian Hebert
Nathaniel Sterling

FROM: Thomas W. Latham
Dominic J. Campisi
Andrew Zabronsky

DATE: October 18, 2006

RE: Study L-637
Revision of No Contest Clause Statute

Introduction

We understand California Law Revision Commission Study L-637, “Revision of No Contest Clause Statute,” was prompted by a proposal made by the Trusts & Estates Section of the State Bar of California (the “Section”) for a law that would deny enforcement of no contest clauses.¹ The authors are probate litigators who do not believe that the rationale advanced by the Section justifies eliminating a favored tool of estate planners, or abandoning a century of California law, to join the only two other states in the nation that deny enforcement of no contest clauses.²

Background

For nearly a century, our Supreme Court has consistently maintained that no contest clauses are favored by the public policy of California.³ The theory underlying their enforcement is that a testator ought to be free to condition testamentary gifts upon the beneficiary’s willingness to refrain from litigation designed to thwart the estate plan.⁴ No contest clauses are powerless to prohibit a beneficiary from attempting to take against a

¹ See, Section proposal, T&E – 2005-01.

² This memorandum represents the opinion of the three authors individually. One of our partners, Charles P. Wolff, was a member of the Executive Committee of the Section when it proposed repealing no contest clauses, and supports that view. And one of the authors is a member of the Executive Committee now.

³ *Estate of Hite* (1909) 155 Cal. 436 [no contest clauses are “favored by public policy”]; *Burch v. George* (1994) 7 Cal.4th 246, 254.

⁴ *Burch v. George, supra*, 7 Cal.4th at 254-255.

document, they simply prevent the beneficiary from both accepting the gift meant for them and at the same time trying to take something meant for someone else.⁵

Well-drafted no contest clauses are undeniably effective at deterring contests. Rare is the beneficiary who will reject a sufficiently substantial gift to try his or her chances on a contest. But no contest clauses do more than merely deter litigation. They also allow testators to bring a measure of certainty to the process, especially in the increasingly common situation where second spouses (or, as in *Burch v. George*, the 5th spouse) have indeterminate community property interests or other entitlement claims. And even aside from these benefits, as our Supreme Court has noted, there is simply “considerable unfairness in allowing a [beneficiary] to accept a will or trust instrument to the extent it confers a benefit, and at the same time attack the instrument to the extent it does not.”⁶

The Section would take away a testator’s right to condition a gift upon the beneficiary’s acquiescence in the remainder of the estate plan. The Section seeks to justify this departure from a century of California law upon the claims that (1) “Enforcement of no-contest clauses has increased, rather than diminished, litigation,” and (2) “As a result of courts’ expansion of no-contest clauses and the complex legislative response, a careful attorney preparing an estate plan containing a no-contest clause cannot reasonably predict whether or how a court will enforce it.”⁷

Before we address the Section’s position, it should be noted that if thoughtful estate planners agreed with the Section that no contest clauses were likely to increase rather than deter litigation, or that they were likely to impede rather than promote the achievement of the estate plan, they could simply choose not use them; they are not, after all, mandatory. The ubiquity of no contest clauses in contemporary instruments, therefore, demonstrates that estate planners and testators almost universally *disagree* with the Section’s conclusion that no contest clauses are counterproductive.

The Allegation that No Contest Clauses Increase Litigation

In order to understand the fallacy of the Section’s argument that no contest clauses increase litigation, it is important to look at the two components of litigation in this area: pre-contest petitions and contests themselves. Pre-contest petitions are filed to find out whether a proposed action would be a contest (if it would be, then the party can decide not to pursue it, and thus avoid a forfeiture under the no contest clause). They are almost always heard as law and motion matters and, because they are often filed in an abundance of caution when there is no real doubt that the proposed action is *not* a contest, they are frequently unopposed. Contests, on the other hand, are full-fledged lawsuits that are almost always hotly contested, and can only be decided by a full-scale evidentiary trial. To put the disparity into context, the authors have rarely seen a contest that wasn’t estimated for at least

⁵ *Burch v. George, supra*, 7 Cal.4th at 252.

⁶ *Burch v. George, supra*, 7 Cal.4th at 267.

⁷ See, Committee proposal, T&E – 2005-01.

a 5-day trial (a recently reported decision involved a *50-day* trial⁸), but have never seen a pre-contest hearing that lasted longer than an hour. Similarly, whereas they have never seen a pre-contest proceeding that involved substantial discovery, they have rarely seen a contest that did not involve extensive discovery, including especially expensive depositions of doctors, lawyers and experts, as well as of relatives and friends. In the authors' experience, the range of costs (for all parties combined) for pre-contest petitions is from the hundreds of dollars (for rote petitions that are not opposed) to the tens of thousands of dollars, whereas the usual range for contests is from the hundreds of thousands of dollars to the millions of dollars.

In sum, contests are far more burdensome than pre-contest petitions. Indeed, the average contest may involve a litigation burden that is fifty or a hundred times greater than the average pre-contest petition. Yet in arriving at its conclusion the Section inexplicably focuses only on the alleged upsurge in pre-contest petitions, and ignores entirely the far more important deterrent effect on contests themselves. In so doing the Section has reached a conclusion that, in our view, is incorrect.

Let us focus, then, on the other side of the equation—the deterrent effect of no contest clauses—beginning with the most common type of contest, the garden variety contest, that is, a direct challenge to a testamentary instrument based on competence, undue influence, fraud, etc. Undoubtedly, the potential pool of such cases is large, as it is quite common for a disfavored heir to believe the testator *must* have been either incompetent or victimized or both. On the other hand, because garden variety contests are so obviously “contests,” they rarely become the subject of a pre-contest petition; no one needs a court to tell them that a garden variety will contest is a contest. And for the same reason, well-drafted no contest clauses are particularly effective at deterring garden variety contests. Indeed, about the only public policy argument ever raised against no contest clauses is that they are *too* effective (since some of the litigation they deter would benefit society, e.g., when the testator/settlor really is incompetent or the victim of undue influence).⁹ With regard to many potential garden variety contests, therefore, the disappointed and suspicious heir simply decides that the cost of triggering the no contest clause is too great, and decides against a contest.

Because many garden variety contests are deterred without even a pre-contest petition, it is possible to overlook them. But to do so is to miss a critical fact: that with regard to the vast majority of potential contests—garden variety contests—the enforcement of no contest clauses serves as an effective deterrent with *no* substantial countervailing cost in terms of increased pre-contest petitions.

⁸ *Terry v. Conlin* (2005) 131 Cal.App.4th 1445, 1448.

⁹ Because the Section did not seek to justify its proposal on public policy grounds, the merits of this argument are beyond the scope of this memorandum. Suffice to say, however, that it would involve a dramatic reversal of a century of California law.

In addition to the large numbers of contests that are deterred without even a pre-contest petition, some fraction of pre-contest petitions result in a determination that the proposed action would be a contest. We may assume that most of these are also deterred, as there would be little reason to bring a pre-contest petition if the proposed action were to be filed no matter the result. Although these contests are deterred at some cost—the cost of the pre-contest petition—given the great disparity between the cost of pre-contest petitions and full-fledged contests, they virtually always result in a substantial reduction of litigation. This is true even when the pre-contest petition is expensive, since it is hard to imagine anyone spending more on a pre-contest petition than they expect to spend on the proposed action itself. The authors, for example, litigated a pre-contest petition that was quite expensive for a non-appealed pre-contest petition—around \$70,000—but it ended up deterring litigation in a billion dollar estate that would have cost the parties several millions of dollars.

Counterbalancing this reduction of litigation, of course, is the side of the equation that the Section focuses on—the additional litigation caused by pre-contest petitions. To be sure, pre-contest petitions do sometimes add to the litigation burden. Although, as we have seen, there is a net *reduction* in litigation whenever a potential action is deterred, the opposite is true whenever a pre-contest petition does *not* deter the proposed action, that is, whenever both the pre-contest petition *and* the proposed action are litigated (usually because the pre-contest petition succeeded in establishing that the proposed action would *not* be a contest). The question is whether the additional litigation burden caused by pre-contest petitions is outweighed by the litigation deterred.

The Section believes that, given the upsurge in litigation over pre-contest petitions, the use of no contest clauses has actually increased, rather than diminished, litigation. We disagree.

To start with, there is little if any empirical evidence even for the premise that there is inordinate litigation over pre-contest petitions, and it does not accord with the authors' experience. They work in a firm of 11 attorneys who do nothing but probate litigation, and find that but a very small fraction of their time is spent litigating pre-contest petitions. Consistent with this view, the San Francisco Superior Court Probate Department recently informally reported to the Section its rough estimate that it hears only approximately two pre-contest petitions in an average month (from a calendar of well over 1000 matters). It may be, therefore, that the supposed upsurge of pre-contest petitions is nowhere near as big a problem as the Section fears. And if so, the claim that the enforcement of no contest clauses actually increases litigation would be a non-starter.

But even if the number of pre-contest petitions were much larger than it appears to be, it is abundantly clear that the burden they impose would nevertheless be greatly outweighed by the litigation deterred by no contest clauses.

First, not all pre-contest petitions are particularly burdensome, as not all are hotly contested. Indeed, given the propensity of practitioners to file pre-contest petitions even when the proposed action is almost surely *not* a contest, many are not contested at all. The San Francisco Superior Court Probate Department recently informally reported to the Section its rough estimate that 30% of pre-contest petitions are unopposed. The authors believe that an additional fraction, while not conceded entirely, are not hotly contested, and are resolved at the initial hearing without substantial additional briefing. All in all, the authors estimate that something on the order of 50% of pre-contest petitions are either not opposed at all, or are not hotly contested.

For non-opposed pre-contest petitions, the authors have found that a bare-bones (and inexpensive) petition, which merely quotes the no contest clause and asserts the proposed action is not a contest, is entirely adequate. Where no opposition is expected, therefore, the authors have found that a pre-contest petition may add less than \$1000 to the litigation of the proposed action—litigation that often has an overall cost in the hundreds of thousands of dollars. (The authors believe some practitioners overestimate the cost of a pre-contest petition because they include the sometimes substantial cost of drafting the proposed pleading, which is more properly seen as a cost of the proposed action, and which would be incurred even if no contest clauses were repealed.) In sum, pre-contest petitions that are not hotly contested do not add greatly to the overall cost of litigating the proposed action

On the other hand, hotly contested pre-contest petitions *can* substantially add to the overall cost of litigating the proposed action. In the authors' experience, hotly contested pre-contest petitions usually cost each party in the range of \$10,000 to \$50,000, depending on how big a case is involved. This is an admittedly substantial sum. But notwithstanding their cost, there are several things that may be said about these petitions.

First, it must be remembered that even a hotly contested pre-contest petition *reduces* litigation if it ends up deterring a full-fledged contest. And because parties are more likely to aggressively contest a pre-contest petition that presents a close question, it may be that not too far from half of all hotly contested pre-contest petitions result in a determination the proposed action *would* be a contest, and deter that contest. But even if it were a lot less than half, considering that a full-fledged contest is likely to be 10 or 20 times more burdensome than even a hotly contested pre-contest petition, it is easy to see that even hotly contested (i.e., expensive) pre-contest petitions result in an overall reduction in litigation.

And all this is before considering the 500-pound gorilla that the Section ignores—the innumerable garden variety contests that are deterred without even the need for a pre-contest petition. When you consider the enormous disparity in litigation burdens between pre-contest petitions and contests, and that most contests are deterred without even the need for a pre-contest petition, it becomes abundantly clear that that the enforcement of no contest clauses (1) succeeds in deterring large numbers of contests, and (2) serves to substantially reduce litigation overall. The Section is wrong to suggest that the repeal of no contest

clauses will decrease litigation. It will have the opposite effect. A torrent of expensive litigation would be unleashed if no contest clauses were prohibited.

In closing this section, the authors would like to note an aspect of pre-contest petition litigation they find unwarranted. Under current rules, the decision on a pre-contest petition is immediately appealable, which means that a party with even a marginal argument can delay the filing of the proposed action by a year or more. We see nothing that justifies this delay, and believe a pre-contest petition is more properly viewed not as a separate proceeding, but as the first step in bringing the proposed action. We therefore believe a decision the proposed action is *not* a contest ought to be treated as an interim ruling, appealable only upon final judgment of the proposed action (with protection for the petitioner in the event of a reversal). Such reform could easily be accomplished statutorily.

The Allegation that the Enforcement of No Contest Clauses is Too Unpredictable

The Section is also concerned that the enforcement of no contest clauses has become too unpredictable. In our view this concern is overblown. Again, there is nothing unpredictable about the application of no contest clauses to garden-variety contests, i.e., direct, obvious contests. There is thus no unpredictability in the vast majority of potential contests. And at the other end of the spectrum, there is also (almost) nothing unpredictable about the many pre-contest petitions that are filed only in an abundance of caution; practitioners rarely get a surprising result from such petitions (indeed, they are often not even opposed). It is only in the narrow band between the two, mostly relating to what might be called indirect, non-obvious contests (i.e., actions that may be contests given the perceived expansion in the enforcement of no contest clauses after *Burch v. George*), that there is sometimes legitimate dispute as to whether or not a proposed action would be a contest. It thus seems to us that the Section greatly overestimates the fraction of cases that are truly subject to uncertainty.

It also seems to us that the Section overestimates the degree of uncertainty in these cases. To be sure, this narrow band of cases encompasses the close and difficult cases, and close and difficult cases are always somewhat unpredictable—that's what makes them close and difficult. But while a case-by-case defense of no contest cases is beyond the scope of this article, we see no reason to think courts are any better or worse at deciding no contest cases than they are at deciding any other type of case.

Furthermore, it remains to be seen to what extent the degree of uncertainty that exists today will continue into the future. For newer instruments, Probate Code § 21305 now requires strict specificity before a no contest clause is enforced in certain situations, and prohibits enforcement in others. It cannot be doubted that this statute will bring *some* additional predictability to the field. Just how much is not yet known, since instruments covered by the statute are only just starting to show up in the case law. The Legislature should not abandon its effort to enhance predictability before finding out whether it worked.

In any event, it seems to us that the Section greatly overestimates the *problem* caused by uncertainty. To be sure, uncertainty would be a big problem if parties truly risked forfeiting their inheritance. In such case parties would be too afraid even to take actions that were probably legitimate (further testament to the effectiveness of no contest clauses). But the availability of a generally expeditious procedure to resolve uncertainty—the pre-contest petition—guarantees that parties rarely if ever blunder into a contest. Thus, *whatever* the level of uncertainty (in the narrow band of cases subject to uncertainty), since it may be entirely eliminated by a pre-contest petition, it is not the problem the Section perceives.

Finally, even if uncertainty were an insurmountable problem as to *indirect* contests, it would not justify a total repeal of no contest clauses because the problem would not apply to garden-variety contests, i.e., direct, obvious contests, which do not suffer any unpredictability, which constitute the great majority of potential contests, and which could be easily carved out of legislation limiting the enforcement of no contest clauses. Unpredictability as to indirect contests provides no reason to throw the baby out with the bathwater.

In sum, the charge of uncertainty only applies to a narrow band of cases, the degree of uncertainty as to those cases is not especially remarkable, existing legislation will reduce the uncertainty, all uncertainty can be eliminated by a pre-contest petition, and uncertainty as to a narrow band of cases cannot justify a prohibition applicable to all cases. Simply put, alleged uncertainty provides no reason for doing away with no contest clauses.

Conclusion

Currently, only two states flatly prohibit the enforcement of no contest clauses.¹⁰ The Section proposes that California join them. If absolute predictability were the only consideration, total repeal would certainly achieve it. But it would be at the cost of increased litigation, particularly garden-variety contests, and of the long-held right to condition a gift upon the beneficiary's willingness not to bite the hand that feeds it.

¹⁰ See, Fla. Stat. Ann. § 732.517; Indiana Code § 29-1-6-2.