

Second Supplement to Memorandum 2006-45

Revision of No Contest Clause Statute (Discussion of Issues)

The Commission received an email from attorney David C. Nelson of Los Angeles. He requested information about the opportunity to comment on this study. He also stated his opposition to replacing enforcement of a no contest clause with a fee shifting provision. See Exhibit p. 1.

The staff provided the requested information and asked Mr. Nelson for his thoughts on the other reforms that are under consideration. His response is attached at Exhibit p. 2.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

**EMAIL FROM DAVID C. NELSON
(DECEMBER 5, 2006)**

Brian:

Thank you for the update on the CLRC study of whether to revise No Contest Clause law.

As a firm and long-time proponent of no contest clauses, I am very interested in this issue and am strongly opposed to any proposal that would eliminate or significantly limit -- especially on the proffered ground of procedural expediency -- the right of a transferor to impose on gifts a condition long held to be supported by and consistent with public policy. In my humble view (and that of the California Supreme Court for over 100 years), if a transferor wants to disinherit a contestant, he should be permitted to do so. That right should not be taken away or limited simply because, in a relatively small handful of cases, it sometimes requires judicial proceedings to ascertain what the transferor intended or to carry out that intent.

Fee shifting, and only in cases where there is no reasonable cause, is not a reasonable substitute for no contest clauses for at least two reasons. First, it does not even come close to carrying out a transferor's intent. A transferor who includes a no contest clause wants to discourage all contests and to disinherit all contestants, not just to force an unsuccessful contestant to pay attorneys' fees if the contestant's case is so weak that it lacks reasonable cause. And, second, fee shifting already exists and has little impact except in the most egregious of cases. Fee shifting is really no different than malicious prosecution, which also is governed by a reasonable cause standard and already is available against unsuccessful contestants who lack reasonable cause. The threat of malicious prosecution provides little deterrent except with the most frivolous cases, and there is no reason to believe that fee shifting -- subject to the same reasonable cause standard -- will provide any more of a deterrent. What we will see if fee shifting replaces no contest clauses is the filing of far more unmeritorious but non-frivolous contests -- which would have been deterred by a no contest clause but won't be by fee shifting -- in an effort either to get lucky or to coerce a settlement. I strongly suspect the amount of judicial resources that will be expended dealing with these added contests will far exceed those now spent on no contest clause litigation.

Sorry to launch into this speech. I really only intended to ask a couple of questions. What is the public comment period? And how does one go about submitting formal comments?

Thanks.
David

**EMAIL FROM DAVID C. NELSON
(DECEMBER 7, 2006)**

Brian:

Thanks for the information.

In response to your questions:

My personal preference would be to put real terror back into in terrorem clauses by eliminating altogether Sections 21305-21307 and 21320. But I seriously doubt that will happen.

My second choice probably would be a modified form of the "direct contest" idea, limiting the applicability of no contest clauses to certain types of conduct. However, I would not limit it to the current statutory definition of "direct contest." At a minimum, I also would add creditor's claims, attempts to characterize property other than as characterized in the instrument, a claim of right to or ownership of assets other than as specified in the instrument, and, to the extent not included in these things, forced elections -- essentially those things listed in Section 21305(a)(1) and (2). As under Section 21305(a)(3), application of the clause to contests (as defined) of other instruments also would be permissible as long as the other instruments are identified. Like the things currently included in the statutory definition of "direct contest" and Section 21305(a), these things both are fairly common subjects of no contest clauses and are reasonably easy to identify.

I might even support taking this approach a step further with something I have not seen anyone recommend -- a "statutory no contest clause." The statute would dictate required or permissible language of a clause, with the option to include or exclude any of the list of types of permissible "contest." This would go a long way toward eliminating ambiguities and absurd extensions of no contest clauses by making their interpretation and application uniform. It also would make Section 21305 unnecessary, and probably Section 21320, as well. At the same time, it would largely preserve a transferor's right to impose a forfeiture in at least most circumstances where no contest clauses commonly are used. I would be opposed to a general application probable cause exception because it would dilute the effectiveness of no contest clauses in much the same way as fee shifting -- it is a low threshold and in effect would limit application of no contest clauses only to frivolous cases. However, I would retain Sections 21306 and 21307 (but make them consistent -- either reasonable cause or probable cause -- and perhaps better define what the standard is and when the relevant time is for determining whether the standard is met (i.e., when the contest is filed, at anytime during the course of the contest, etc.).

David