

Memorandum 2007-7

Revision of No Contest Clause Statute: Practitioner Survey

The Commission has been directed by legislative resolution to study the advantages and disadvantages of California's existing no contest clause statute and to weigh the merits of alternative approaches to the enforcement of a no contest clause. See 2005 Cal. Stat. res. ch. 122.

Prior memoranda have considered the policies served by the enforcement of a no contest clause, problems that can arise under a no contest clause, the approach to enforcement followed in other jurisdictions, and possible changes to the California statute. See CLRC Memoranda 2005-47, 2006-42, 2006-45, and their supplements.

Before deciding on what reform to propose in a tentative recommendation, if any, the Commission decided to conduct a survey of trust and estate attorneys, probate judges, and elder law practitioners, in order to judge whether there is a perceived problem with existing law that is serious enough to justify a significant change in the law.

The staff conducted a narrowly focused survey, aimed at determining the extent to which lawyers and judges who work with no contest clauses see existing law as problematic. The results are discussed below. The attached Exhibit includes the full survey results, survey results for selected subgroups of respondents, and unsolicited comments from those who submitted survey responses in writing:

	<i>Exhibit p.</i>
• Complete Survey Response	1
• Survey Response from "Transactional Attorneys"	3
• Survey Response from "Estate Litigators"	5
• Survey Response from "Elder Law Practitioners"	7
• Michael G. Desmarais, Los Gatos (1/19/07)	9
• James R. Birnberg, Encino (2/6/07)	11
• James A. Willett, Sacramento (2/9/07)	12
• Anonymous Comments Submitted with Surveys	14

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.

The survey results indicate the distribution of responses to each question, with the most common response (the “mode”) in bold.

With the survey results in mind, the Commission should decide what reform, if any, to develop as a tentative recommendation. A section at the end of the memorandum recaps the main reform proposals that have been considered to date.

SURVEY DESIGN

The survey was designed to learn whether existing law is causing problems serious enough to justify a significant change in the law. If existing law is widely viewed as satisfactory, then more modest changes in the law might be justified, or none at all.

The introduction to the survey makes that purpose clear: “The California Law Revision Commission is studying the enforcement of no contest clauses in California, to determine whether there are problems that would justify a significant change in the law.”

The survey did not discuss proposed reforms. That narrow focus was intentional. It helped to keep the survey short (increasing the likelihood of a good response rate) and it also reduced the risk that a respondent’s answers about problems with the law would be colored by the respondent’s reaction to any proposed solutions.

Types of Problems

The survey identifies four potential problems with existing law:

(1) *Uncertainty whether a proposed petition would trigger a no contest clause.* Because each no contest clause is individually drafted, the scope of its application to unique circumstances may be unclear. Judicial willingness to consider facts extrinsic to the document that contains the no contest clause can also make the application of a clause unpredictable.

(2) *Expense and delay of declaratory relief proceedings under Probate Code Section 21320.* Section 21320 provides a pre-contest process for determining whether a proposed action would be a contest for the purposes of a particular clause. In deciding the matter, the court may not decide the merits of the contest. A decision that an action would not constitute a contest serves as a safe harbor

against forfeiture under the clause. Use of Section 21320 has reportedly become a routine precaution.

(3) *Deterrence of a reasonable claim of ownership of estate assets.* In some cases, a person may be an heir under a decedent's estate plan *and* may claim an interest in estate assets that is independent of the estate plan (e.g., a creditor's claim, or community property interest). A no contest clause can deter such a person from making a reasonable claim against estate assets for fear of forfeiting the gift made by the estate plan. That sort of "forced election" may be a fair and sensible way of simplifying complex ownership issues, or it may put the heir in an unfair dilemma.

(4) *Deterrence of a reasonable contest based on fraud or undue influence.* A person may trick or coerce a transferor into naming the person as an heir. In such a case, a no contest clause may deter the other heirs from challenging the fraudulently procured instrument.

Those are the main problems that have been discussed in prior staff memoranda.

Frequency and Severity of Problems

In determining the significance of a problem, it is useful to separately consider the severity and frequency of the problem. For example, a problem might be severe but rare, or common but insignificant.

The survey asks respondents to separately rank each of the problems for the frequency with which it occurs (very common, common, uncommon, rare, don't know) and the severity of the problem when it does occur (serious problem, moderate problem, minor problem, insignificant problem, don't know).

Overall Assessment

Respondents were also asked: "Overall, do you agree that problems with existing law justify a significant change in the law?" (strongly agree, agree, not sure, disagree, strongly disagree). That allowed the respondent to provide a general assessment that is not tied to any of the specified problems.

Self-Identification

Respondents were asked to identify themselves (trusts and estates attorney, probate judge, appellate justice, elder law practitioner, other). They were also

asked “Have you participated in the filing or defense of a Section 21320 petition?”

The purpose of those questions was to allow for separate analysis of the responses from different types of respondents. See Exhibit pp. 1-6.

Criticism of Survey Design

James R. Birnberg and James A. Willett believe that the survey design is flawed and reflects a bias toward weakening the enforcement of a no contest clause. See Exhibit pp. 11-13.

Mr. Birnberg feels that the “problems” identified in the survey are not the proper way to evaluate the effectiveness of a no contest clause. The point should be whether the no contest clause effectuates the transferor’s intent.

The staff did exercise judgment in selecting which problems would be included in the survey, but there was no pre-judgment on whether those problems are in fact significant enough to warrant a change in existing law. The answer to that question is the point of the survey.

SURVEY DISTRIBUTION AND RESPONSE

The survey was distributed to trust and estate attorneys, probate judges, and elder law practitioners, through institutional channels.

The Executive Committee of the Trusts and Estates Section of the State Bar (“TEXCOM”) distributed the survey to its approximately 6,000 members. We received 326 responses from self-described trusts and estates attorneys. That represents approximately 5.4% of the section’s members (reportedly a good rate of return for a mailed survey to the section). Self-identified attorneys represent 88.6% of the total response.

Respondents were asked whether they have ever “participated in the filing or defense of a Section 21320 petition.” That question distinguishes between those who have at least some experience in estate litigation, as opposed to those whose practice is primarily transactional. As a shorthand, the two groups of attorneys are described in this memorandum as “Estate Litigators” and “Transactional Attorneys,” respectively. The staff recognizes that these labels may not properly capture the character of every respondent included within a group, but in the aggregate they help to show differences in perspective between the two types of practice.

The survey was also mailed to the members of the California chapters of the National Academy of Elder Law Attorneys, with a total membership of around 350 (many of whom are probably also members of the Trusts and Estates Section of the State Bar). We received 18 responses from persons who self-identified as elder law practitioners (4.9% of the total response). Given that small sample, the answers from elder law practitioners may not be a strong indicator of general views within the elder law community.

Finally, the staff asked the California Judges Association (“CJA”) to distribute the survey to individual probate judges statewide. Unfortunately, that proved impracticable. Instead, CJA provided the survey to the members of its probate committee. In response, we received 7 responses from self-identified probate judges (1.9% of the total response). That is a small sample, which may not be a reliable indicator of general views among judges. For that reason, the responses of judges have not been separately tabulated.

Overall, we received responses from around 5% of those who were invited to participate, most of them attorneys. A higher response rate would improve the reliability of the survey, but the staff never expected that the survey would achieve a quantifiable level of scientific accuracy. This survey is only intended to give a general impression of prevailing views. For that purpose, a sample of 368 responses should be sufficient.

The staff wishes to express its sincere appreciation for the assistance given to the Commission in conducting the survey. We probably could not have received a useful number of responses without the help.

SURVEY RESULTS

General Opinion on Need for Reform

Opinion is divided. However, there is a significant tilt towards the view that problems with existing law would justify a significant reform of the law. A majority agrees or strongly agrees with that proposition. The size of the majority varies if different cross-sections of the data are examined:

	Agree or Strongly Agree	Disagree or Strongly Disagree
Total Respondents	51%	30.7%
Estate Litigators	56.3%	32.4%
Transactional Attorneys	38.5%	31.2%
Elder Law Practitioners	70.6%	17.7%

While there is support for reform of the law, especially among estate litigators and elder law practitioners, the Commission should also recognize that there is a sizeable minority that favor the status quo.

Overall, the staff believes that the data supports the need for reform of the law, though that view is far from universal. Given the divided opinion, it might be sensible to take a somewhat conservative approach to reform.

Frequency and Severity of Problems

Having established that most respondents find existing law to be problematic, it is instructive to examine which of the problems identified in the survey are considered to be the most frequent and serious.

Data on the identified problems is presented below, with the most common and serious problems presented first.

Uncertainty

Uncertainty whether a proposed petition would trigger a no contest clause is viewed as the most common and serious of the listed problems.

A sizeable majority find the problem to be common or very common:

	Common or Very Common	Uncommon or Rare
Total Respondents	60%	35%
Estate Litigators	66%	32%
Transactional Attorneys	48%	45%
Elder Law Practitioners	53%	41%

By a similar margin, the problem is viewed to be moderate or severe in seriousness:

	Moderate or Severe	Minor or Insignificant
Total Respondents	61%	33%
Estate Litigators	67%	33%
Transactional Attorneys	53%	36%
Elder Law Practitioners	57%	38%

This data suggests that a principal objective of any reform should be to reduce the uncertainty about whether a particular action would trigger a no contest clause.

Expense and Delay of Section 21320 Proceedings

The procedural burden that results from use of the Section 21320 declaratory relief procedure is considered to be the second most common and serious of the identified problems.

With the exception of transactional attorneys (i.e., those who have no direct experience with a Section 21320 proceeding), a majority find the problem to be common or very common:

	Common or Very Common	Uncommon or Rare
Total Respondents	54%	34%
Estate Litigators	64%	33%
Transactional Attorneys	35%	41%
Elder Law Practitioners	59%	34%

A majority find the problem to be moderate or severe in its seriousness:

	Moderate or Severe	Minor or Insignificant
Total Respondents	56%	33%
Estate Litigators	63%	35%
Transactional Attorneys	41%	40%
Elder Law Practitioners	63%	31%

This data suggests that any proposed reform should also aim to reduce the need for declaratory relief under Section 21320.

Deterrence of Reasonable Contest Based on Fraud or Undue Influence

A majority of respondents find this problem to be uncommon, but somewhat serious. Not surprisingly, elder law practitioners find the problem to be more common and serious than respondents as a whole. That makes sense given their greater experience with problems involving elder financial abuse.

Most find the problem to be uncommon or rare (with the exception of elder law practitioners):

	Common or Very Common	Uncommon or Rare
Total Respondents	37%	51%
Estate Litigators	43%	52%
Transactional Attorneys	25%	55%
Elder Law Practitioners	59%	36%

With the exception of transactional attorneys, who are evenly divided, a majority find the significance of the problem to be moderate or serious:

	Moderate or Severe	Minor or Insignificant
Total Respondents	51%	41%
Estate Litigators	56%	41%
Transactional Attorneys	42%	42%
Elder Law Practitioners	63%	31%

Deterrence of Reasonable Claim of Ownership of Estate Assets

Deterrence of an heir's reasonable claim to estate assets was viewed as the least common and serious of the identified problems.

With the exception of elder law practitioners, who are evenly divided, most find the problem to be uncommon or rare:

	Common or Very Common	Uncommon or Rare
Total Respondents	35%	55%
Estate Litigators	40%	55%
Transactional Attorneys	22%	62%
Elder Law Practitioners	42%	42%

With the exception of transactional attorneys, a slight majority find the significance of the problem to be moderate or serious:

	Moderate or Severe	Minor or Insignificant
Total Respondents	46%	44%
Estate Litigators	52%	45%
Transactional Attorneys	39%	46%
Elder Law Practitioners	50%	37%

Discussion

The problems that are perceived to be most common and serious are (1) uncertainty as to the scope of a no contest clause, and (2) the procedural burden that results from use of the declaratory relief procedure. Those two problems are connected. It is uncertainty as to the scope of application of a no contest clause that fuels the need for clarification through the declaratory relief procedure. Any reform that increases certainty would also reduce the need for declaratory relief.

In deciding on an approach to reform of the no contest clause statute, the Commission should aim to address those two problems.

Respondents were less concerned about problems that involve overreach of a no contest clause: the deterrence of a reasonable claim to estate assets or the deterrence of a reasonable contest based on fraud or undue influence. The Commission should bear those problems in mind when choosing an approach to reform, but should probably view them as a lower priority concern.

POSSIBLE REFORMS

The purpose of the survey was to determine whether existing law is perceived to be causing problems that are serious enough to justify significant reform of the no contest clause statute. As discussed above, the survey data shows support for some reform.

If the Commission agrees that change is needed, it will need to decide on a reform to develop as a tentative recommendation. The staff will then prepare a draft tentative recommendation, for review at a later meeting. The memorandum presenting the draft will include analysis of the most significant policy questions that need to be answered in implementing the chosen reform. Those questions are noted below.

This section of the memorandum briefly summarizes the main reform options that have been considered to date, in increasing order of significance (and disruptiveness):

- No Change
- Simplification Only
- Exempt All Indirect Contests, Eliminate Declaratory Relief
- Expand Probable Cause Exception
- Replace Elective Forfeiture with Statutory Fee Shifting

Note that the last three of the listed options, combined, constitute the TEXCOM proposal.

No Change

One option is to recommend that there be no change to existing law. **The staff recommends against that option**, for two reasons:

(1) The survey shows significant dissatisfaction with existing law, especially with respect to uncertainty as to how a no contest clause will operate and the burden of the declaratory relief procedure, which is used to address the uncertainty.

(2) At a minimum, there are changes that can be made to simplify the law without significant substantive disruption of established law and expectations. See “Simplification Only,” below. If nothing else, those changes should be made.

Simplification Only

Existing law could be simplified, without making any major substantive changes to the law.

The overly complex prospectivity provisions that exist in Section 21305 could be replaced with the Probate Code's general rules on the application of a new law. Other provisions of that section could be clarified.

The overlapping application of Section 21306 and 21307 could be eliminated.

Those changes are clearly warranted. They would help to address uncertainty as to the application of a no contest clause, on a modest scale.

Even if the Commission decides to do nothing else, it should simplify Sections 21305-21307.

Exempt All Indirect Contests, Eliminate Declaratory Relief

Uncertainty

A large part of the uncertainty of existing law derives from the fact that the definition of "contest" is open-ended. It encompasses any type of court challenge to an estate plan. See Section 21300(a) ("'Contest' means any action identified in a 'no contest clause' as a violation of the clause."). That catch-all approach is then restrained by a lengthy list of exceptions. See Section 21305. It seems likely that new exceptions will be added over time, as new problems crop up in practice and in the courts.

The "catch-all, with exceptions" approach is complex and creates many points of potential ambiguity and dispute.

A much simpler approach would be to provide an exclusive list of the types of contests that are subject to a no contest clause. A list of exceptions would then be unnecessary. The complexity of the statute would be significantly reduced and there would be far fewer substantive rules to construe and apply.

The existing distinction between a "direct" and "indirect" contest could be used as the dividing line, with all indirect contests exempted from the application of a no contest clause. Section 21300(b)-(c) defines the terms as follows:

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

(1) Revocation.

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

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

A direct contest is an attack on the validity of an instrument, in an attempt to defeat it. Those are the sorts of contests that have traditionally been the main target of a no contest clause. The question of whether a no contest clause applies to a direct contest should be relatively easy to determine.

By contrast, an indirect contest could be any type of judicial action relating to a person’s estate plan. That can create significant uncertainty about whether a generally or carelessly phrased clause would apply to an action that is arguably not really an attack on the estate plan (e.g., a request for an accounting from a trustee). The Legislature has already exempted a long list of indirect contests from the operation of a no contest clause. See Section 21305. It seems likely that other exceptions will be added over time, as novel situations arise in court.

In fact, Section 21305 is already most of the way toward exempting indirect contests. It would not be a huge leap to continue that trend and simply provide that only a direct contest can trigger a no contest clause. That would greatly simplify the law and avoid most of the difficult problems involving the interpretation of a no contest clause.

There are three questions that would need to be addressed in developing this reform:

- (1) Should a no contest clause be enforceable against an “indirect contest” that involves an heir making a claim against purported estate assets? That is, should the law continue to allow the use of a no contest clause to create a “forced election”?
- (2) Are there other types of contests, besides those listed in the existing definition of “direct contest” that should be subject to enforcement of a no contest clause? For example, an action to invalidate an heir under Section 21350 (prohibited transferees) is

essentially a contest based on undue influence and should perhaps be treated in the same way with respect to a no contest clause.

- (3) Should the law specify whether a direct contest can be brought with respect to an instrument other than the instrument that includes the no contest clause? Under existing Section 21305(a)(3), a no contest clause would not apply to such a contest unless it is “expressly identified in the no contest clause as a violation of the clause.”

Assuming that those questions can be worked out satisfactorily, **the staff recommends that the law be revised to exempt an indirect contest from the operation of a no contest clause.** That would be a natural extension of the existing policy trend reflected in Section 21305, and it would largely eliminate uncertainty as to the operation of a no contest clause.

Declaratory Relief

If indirect contests are exempted from the application of a no contest clause as discussed above, it is likely that the operation of a no contest clause would be so straightforward that the declaratory relief provision could be eliminated entirely.

As TEXCOM has noted:

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.”

CLRC Memorandum 2006-42, Exhibit p. 5.

The staff agrees. Provided that the questions discussed above can be resolved, it should usually be clear whether a no contest clause would apply to a traditional contest that attempts to invalidate an instrument based on a claim of incapacity, revocation, execution problems, fraud, undue influence, or forgery.

If that is the case, and the declaratory relief procedure can be dispensed with, the reform described in this part of the memorandum would be sufficient to address the two main problems described in the survey.

The staff recommends that the Commission propose the repeal of the declaratory relief provisions.

Note that both of the changes proposed here are proposed by TEXCOM, though they would also add the reforms described below.

Expand Probable Cause Exception

Existing Sections 21306 and 21307 provide exceptions to the enforcement of a no contest clause for certain types of contest brought with “reasonable” or “probable cause,” respectively. Section 21306 governs contests based on forgery, revocation, or an action to invalidate a transfer under Section 21350 (prohibited transferees). Section 21307 governs any contest challenging a transfer to a person who drafted or transcribed the instrument, a person who gave certain directions to the drafter of the instrument, or a person who served as a witness to the instrument.

The probable cause exception could be expanded to include any type of contest.

The principle benefit of doing so would be to provide some slack for those who have good reason to contest an instrument and would otherwise be deterred by a no contest clause. This would be most beneficial in cases of suspected fraud or undue influence.

This reform would not reduce uncertainty as to the application of a no contest clause, nor would it reduce the need for declaratory relief.

In order to implement a general probable cause exception, it would be necessary to address two issues:

- (1) What standard should be used to establish probable cause?
- (2) Should the determination be made before trial, or after judgment on the merits?

As a general matter, the staff believes that an expanded probable cause exception would be good policy. There is a policy tension between (1) effectuating a transferor’s intention that litigation be deterred, and (2) an heir’s access to justice. Where probable cause exists to bring a contest, the balance arguably tips toward letting the heir have a day in court, without fear of sanction.

Replace Elective Forfeiture with Statutory Fee Shifting

The TEXCOM proposal would make all no contest clauses unenforceable as a matter of law. However, a statute would be added providing that a person who brings an unreasonable direct contest would be liable for attorneys fees and costs. That provision would provide a substitute way to deter an unreasonable direct contest.

Advantages of Proposed Reform

There are two main advantages to the TEXCOM proposal:

- (1) It would no longer be necessary to construe individual no contest clauses. The fee shifting rule would be statutory and therefore more predictable.
- (2) The deterrent would apply to non-heirs. Under existing law, a transferor must make a gift to a person, in order for that person to be deterred by a no contest clause (i.e., there must be something to forfeit, for the threat of forfeiture to affect behavior). That would not be true under a statutory fee shifting rule. A transferor could entirely disinherit someone, and that person might still be deterred from contesting the estate plan.

TEXCOM maintains that liability for fees and costs will often be a better deterrent than forfeiture, because the amount that will be owed for fees and costs is not known in advance and is therefore more unnerving. The staff is skeptical of this argument and believes that there will be cases in which the amount at issue is so large that costs and fees will not be a deterrent (especially if an unsuccessful contestant can cover the costs of the contest with funds gifted by the contested instrument).

Disadvantage of Proposed Change

Regardless of whether fee shifting or forfeiture makes a better deterrent, there is one significant disadvantage to fee shifting. It removes transferor control. Fee shifting would be a matter of blanket policy, applicable in every case.

Such a change would disregard one of the main justifications for the enforcement of a no contest clause: effectuation of the transferor's intent. Absent that justification for imposing a sanction, the staff is not sure whether a sanction should be imposed. The default rule in California is the "American Rule" — unless there is an agreement or statute to the contrary, each party bears its own cost of representation. See Code Civ. Proc. § 1021. Certainly, the Commission could recommend a new exception to the general rule, but the staff is not sure why the contest of an estate planning instrument should be treated differently from other types of civil actions, which might also be bothersome and costly when brought without reasonable cause.

Note finally, that the existing malicious prosecution tort is available as a cause of action when a civil case is brought unsuccessfully, without probable

cause, and with malice. 5 B. Witkin, *Summary of California Law Torts*, § 469, p. 696 (10th ed. 2005). That should deter (or remedy) malicious contests.

Discussion

The replacement of forfeiture with fee shifting would eliminate uncertainty as to the effect of a no contest clause (which would no longer be at issue) and would entirely obviate the need for declaratory relief.

However, it is arguably not necessary to address those problems. Exemption of indirect contests from the effect of a no contest clause would probably achieve the same result, without nearly as much disruption of existing law and established expectations.

Fee shifting would not help with the other two problems that are identified in the survey (deterrence of reasonable claim to estate assets and deterrence of a reasonable contest based on fraud or undue influence).

STAFF RECOMMENDATION

A significant majority of respondents believe that problems with existing law would justify significant reform. That data could be cited in support of any of the reforms described above.

However, the survey data does not show a consensus. There is a sizeable minority that does not agree that problems with existing law would justify significant change in the law (with responses from those who are “not sure” omitted, the split is roughly 60-40 in favor of reform).

In addition, there is a significant division of opinion within the trusts and estates bar between those who have some experience with Section 21320 and those who do not. The staff believes that the distinction correlates with the distinction between estate litigators and transactional attorneys.

In the staff’s view, the survey results support reforming existing law, but in a moderate way. The support for change does not seem strong enough to justify a radical change in the law.

Conveniently, the two main problems identified in the survey can be largely resolved through relatively moderate reforms: minor simplification of Section 21305-21307, the exemption of all indirect contests from the effect of a no contest clause, and the elimination of the declaratory relief procedures. **The staff recommends that those reforms be developed as a tentative recommendation.**

The creation of a probable cause exception for all no contest clauses would make it easier for those who have a reasonable basis for a contest to bring the contest without forfeiture. However, such a change would weaken the deterrent effect of no contest clauses generally. **It is not clear from the survey that there is a perceived need for such a change at this time.**

The staff has reservations about the proposed fee shifting approach. It would be the most significant and disruptive of the proposed reforms, and is not strictly necessary to address any of the problems described in the survey. Its primary advantage is the fact that it would operate to deter a non-heir. However, that advantage is offset by the fact that the sanction would no longer be under transferor control. **Given the mixed opinion in the survey response, the staff is not sure that there would be practitioner support for such a significant change in the law at this time.**

Note that there is no need to do everything at once. If the Commission decides to take a moderate approach to reform at this time, the matter could always be revisited later. If serious problems persist after enactment of moderate reforms, then more far-reaching reforms could be considered.

Respectfully submitted,

Brian Hebert
Executive Secretary

Survey on Problems with No Contest Clause Statute

All Respondents

1. Please identify yourself.

	Response Percent	Response Total
Trusts and Estates Attorney	88.6%	326
Probate Judge	1.9%	7
Appellate Justice	0.3%	1
Elder Law Practitioner	4.9%	18
Other	4.3%	16
Total Respondents		368
(skipped this question)		3

2. In your experience, how common are the following problems that can result when a decedent's will or trust includes a no contest clause?



	Very Common	Common	Uncommon	Rare	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	26% (96)	34% (124)	25% (92)	10% (36)	5% (18)	2.20
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	21% (77)	33% (121)	22% (80)	12% (44)	11% (40)	2.28
Deterrence of a reasonable claim of ownership of estate assets.	9% (32)	26% (94)	29% (104)	26% (96)	10% (37)	2.81
Deterrence of a reasonable contest based on fraud or undue influence.	11% (41)	26% (94)	28% (103)	23% (84)	11% (41)	2.71
Total Respondents						366
(skipped this question)						5

3. In your experience, how significant are the following problems that can result when a decedent's will






or trust includes a no contest clause?

	Serious Problem	Moderate Problem	Minor Problem	Insignificant Problem	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	30% (108)	31% (113)	20% (73)	13% (46)	6% (21)	2.17
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	27% (95)	29% (105)	25% (90)	10% (35)	9% (33)	2.20
Deterrence of a reasonable claim of ownership of estate assets.	20% (72)	26% (93)	23% (84)	21% (75)	9% (34)	2.50
Deterrence of a reasonable contest based on fraud or undue influence.	25% (89)	26% (92)	21% (74)	20% (70)	9% (32)	2.38
	Total Respondents					361
	(skipped this question)					10

4. Have you participated in the filing or defense of a 21320 petition?

	Response Percent	Response Total
Yes 	66.1%	238
No 	33.9%	122
	Total Respondents	360
	(skipped this question)	11

5. Overall, do you agree that problems with existing law justify a significant change in the law?

	Response Percent	Response Total
Strongly Agree 	26.6%	97
Agree 	24.7%	90
Not Sure 	17.9%	65
Disagree 	14.8%	54
Strongly Disagree 	15.9%	58
	Total Respondents	364
	(skipped this question)	7

Transactional Attorneys

1. Please identify yourself.

	Response Percent	Response Total
Trusts and Estates Attorney	100%	96
Probate Judge	0%	0
Appellate Justice	0%	0
Elder Law Practitioner	0%	0
Other	0%	0
	Total Respondents	96
	(filtered out)	272
	(skipped this question)	3

2. In your experience, how common are the following problems that can result when a decedent's will or trust includes a no contest clause?

	Very Common	Common	Uncommon	Rare	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	9% (9)	39% (37)	28% (27)	17% (16)	7% (7)	2.56
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	3% (3)	32% (30)	22% (21)	19% (18)	24% (23)	2.75
Deterrence of a reasonable claim of ownership of estate assets.	1% (1)	21% (20)	26% (25)	36% (35)	16% (15)	3.16
Deterrence of a reasonable contest based on fraud or undue influence.	2% (2)	23% (22)	23% (22)	32% (31)	20% (19)	3.06
						Total Respondents
						96
						(filtered out)
						270
						(skipped this question)
						5

3. In your experience, how significant are the following problems that can result when a decedent's will

or trust includes a no contest clause?

	Serious Problem	Moderate Problem	Minor Problem	Insignificant Problem	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	20% (19)	33% (32)	17% (16)	19% (18)	11% (11)	2.39
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	15% (14)	26% (24)	28% (26)	12% (11)	20% (19)	2.45
Deterrence of a reasonable claim of ownership of estate assets.	12% (11)	27% (26)	18% (17)	28% (27)	15% (14)	2.74
Deterrence of a reasonable contest based on fraud or undue influence.	16% (15)	26% (25)	15% (14)	27% (26)	16% (15)	2.64
					Total Respondents	96
					(filtered out)	265
					(skipped this question)	10

4. Have you participated in the filing or defense of a 21320 petition?

	Response Percent	Response Total
Yes	0%	0
No	100%	96
	Total Respondents	96
	(filtered out)	264
	(skipped this question)	11

5. Overall, do you agree that problems with existing law justify a significant change in the law?

	Response Percent	Response Total
Strongly Agree	8.3%	8
Agree	30.2%	29
Not Sure	31.3%	30
Disagree	12.5%	12
Strongly Disagree	17.7%	17
	Total Respondents	96
	(filtered out)	268
	(skipped this question)	7

Estate Litigators

1. Please identify yourself.

	Response Percent	Response Total
Trusts and Estates Attorney	100%	223
Probate Judge	0%	0
Appellate Justice	0%	0
Elder Law Practitioner	0%	0
Other	0%	0
	Total Respondents	223
	(filtered out)	145
	(skipped this question)	3

2. In your experience, how common are the following problems that can result when a decedent's will or trust includes a no contest clause?


	Very Common	Common	Uncommon	Rare	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	35% (78)	31% (68)	26% (57)	8% (17)	1% (2)	2.06
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	30% (65)	35% (77)	24% (53)	10% (22)	1% (3)	2.15
Deterrence of a reasonable claim of ownership of estate assets.	12% (26)	28% (61)	31% (69)	25% (54)	5% (10)	2.72
Deterrence of a reasonable contest based on fraud or undue influence.	14% (31)	28% (61)	31% (68)	22% (49)	5% (11)	2.65
						Total Respondents
						222
						(filtered out)
						144
						(skipped this question)
						5

3. In your experience, how significant are the following problems that can result when a decedent's will






or trust includes a no contest clause?

	Serious Problem	Moderate Problem	Minor Problem	Insignificant Problem	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	37% (81)	30% (66)	22% (49)	11% (25)	0% (0)	2.08
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	33% (72)	31% (68)	27% (59)	9% (20)	0% (1)	2.12
Deterrence of a reasonable claim of ownership of estate assets.	23% (50)	28% (62)	26% (56)	20% (43)	4% (8)	2.44
Deterrence of a reasonable contest based on fraud or undue influence.	28% (61)	27% (60)	23% (51)	18% (40)	3% (7)	2.33
					Total Respondents	221
					(filtered out)	140
					(skipped this question)	10

4. Have you participated in the filing or defense of a 21320 petition?

	Response Percent	Response Total
Yes 	100%	223
No	0%	0
	Total Respondents	223
	(filtered out)	137
	(skipped this question)	11

5. Overall, do you agree that problems with existing law justify a significant change in the law?

	Response Percent	Response Total
Strongly Agree 	35%	78
Agree 	20.2%	45
Not Sure 	11.7%	26
Disagree 	16.6%	37
Strongly Disagree 	16.6%	37
	Total Respondents	223
	(filtered out)	141
	(skipped this question)	7

Elder Law Practitioners

1. Please identify yourself.

	Response Percent	Response Total
Trusts and Estates Attorney	0%	0
Probate Judge	0%	0
Appellate Justice	0%	0
Elder Law Practitioner	100%	18
Other	0%	0
	Total Respondents	18
	(filtered out)	350
	(skipped this question)	3



2. In your experience, how common are the following problems that can result when a decedent's will or trust includes a no contest clause?

	Very Common	Common	Uncommon	Rare	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	12% (2)	41% (7)	29% (5)	12% (2)	6% (1)	2.44
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	24% (4)	35% (6)	12% (2)	12% (2)	18% (3)	2.14
Deterrence of a reasonable claim of ownership of estate assets.	18% (3)	24% (4)	24% (4)	18% (3)	18% (3)	2.50
Deterrence of a reasonable contest based on fraud or undue influence.	24% (4)	35% (6)	24% (4)	12% (2)	6% (1)	2.25
						Total Respondents
						17
						(filtered out)
						349
						(skipped this question)
						5






3. In your experience, how significant are the following problems that can result when a decedent's will or trust includes a no contest clause?

	Serious Problem	Moderate Problem	Minor Problem	Insignificant Problem	Don't know	Response Average
Uncertainty whether a proposed petition would trigger a no contest clause.	19% (3)	38% (6)	19% (3)	19% (3)	6% (1)	2.40
Expense and delay of declaratory relief proceedings under Probate Code Section 21320.	25% (4)	38% (6)	6% (1)	19% (3)	12% (2)	2.21
Deterrence of a reasonable claim of ownership of estate assets.	31% (5)	19% (3)	25% (4)	12% (2)	12% (2)	2.21
Deterrence of a reasonable contest based on fraud or undue influence.	38% (6)	25% (4)	12% (2)	19% (3)	6% (1)	2.13
					Total Respondents	16
					(filtered out)	345
					(skipped this question)	10

4. Have you participated in the filing or defense of a 21320 petition?

	Response Percent	Response Total
Yes 	58.8%	10
No 	41.2%	7
	Total Respondents	17
	(filtered out)	343
	(skipped this question)	11

5. Overall, do you agree that problems with existing law justify a significant change in the law?

	Response Percent	Response Total
Strongly Agree 	35.3%	6
Agree 	35.3%	6
Not Sure 	11.8%	2
Disagree 	5.9%	1
Strongly Disagree 	11.8%	2
	Total Respondents	17
	(filtered out)	347
	(skipped this question)	7

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January 19, 2007

Susan Orloff
Trusts and Estates Section
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Susan:

Enclosed is my response to your Probate Code section 21320 questionnaire.

My practice consists of almost exclusively of estate litigation. While no contest clauses have been a fact of life for decades, it is my deeply felt opinion that the legislature should eliminate no contest clauses.

One of the most important goals, if not the most important goal, in estate litigation is the necessity of obtaining provisional remedies to prevent the misappropriation of the estate. In my experience, once the estate has been dissipated, it is extremely difficult to recover anything significant because the person misappropriating the property is, for all practical purposes, judgment proof by the time the litigation has been concluded.

This need to obtain provisional remedies is especially important in cases of financial elder abuse. Elder adults have far too little in the way of time, and often too little in the way of resources, to be able to wait to obtain their recovery as a result of a final judgment.

Given the fact that no contest clauses uniformly apply to the initiation of any action, and given the fact that one cannot apply for a provisional remedy without initiating an action, no contest clauses, by definition, preclude resort to applications for provisional remedies. Neither Probate Code section 21320 nor section 21320's predecessor, a declaratory relief action, can remedy this problem. In addition to the fact that a party in a 21320 petition or declaratory relief action can demand an evidentiary hearing, any party can delay the entry of a final judgment in any such proceeding until after all of the appellate remedies have been exhausted.

Susan Orloff
Trusts and Estates Section
The State Bar of California
January 19, 2007
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Insofar as the supposed benefits of no contest clauses are concerned, I question how much estate litigation they have actually avoided. I do not know, but I very seriously doubt, that there has been any statistical analysis that shows how many more lawsuits would have been filed but for the presence of no contest clauses.

Moreover, the essence of a no contest clause requires the testator to bequeath a substantial enough gift to someone to whom he may not wish to bequeath anything in order to make the no contest clause effective. Given the various legal principles in favor of upholding the validity of testamentary instruments, including the imposition of the burden of proof on the contestant, and the proponent's evidentiary advantages such as the rights of attorneys to testify as to the testator's mental competency, I question the true benefit of no contest clauses in upholding the validity of instruments which should be upheld.

Therefore, I strongly recommend that no contest clauses be eliminated.

Very truly yours,



MICHAEL G. DESMARAIS

MGD:mfs

Enclosure

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WALTER M. LEIGHTON
(912-2004)

February 6, 2007

Brian P. Hebert, Esq.
California Law Revision Commission
3200 5th Avenue
Sacramento, CA 95817

jbirnberg@ocslaw.com

Re: **No-Contest Clauses; Res. Ch. 122, Stats. 2005**

Dear Brian:

I am enclosing a copy of the response to the CLRC Study questionnaire. Unfortunately, this questionnaire, like many polls, is flawed because of the way the questions are posed and because it does not allow for comments. The thrust of the questionnaire is that no-contest clauses defeat "reasonable claims" or "reasonable contests." On the contrary, I believe that the focus of no-contest clauses should be whether they accomplish the wishes of the testator or trustor, regardless of whether someone else believes he or she has a reasonable claim or a reasonable contest.

My initial reaction had been that the Legislature has gone too far in placing restrictions on the use of no-contest clauses. However, upon reflection I am now convinced that overly broad no-contest provisions absolving fiduciaries from their statutory duties might encourage abuse. While some people complain about the litigation generated in this area, I do not think changes should be made for that reason. Nor should the expectations of any beneficiary, since the testator-trustor could as easily have left the person nothing.

Very truly yours,


JAMES R. BIRNBERG

JRB:jrb
Enclosure

February 9, 2007

Mr. Brian Hebert
California Law Revision Commission
3200 5th Avenue
Sacramento, CA 95817

Re: CLRC Survey Regarding No Contest Clauses

Dear Mr. Hebert:

I am responding by way of letter to Shirley Kovar's request for input regarding the No Contest Clause Survey. I was a member of the California Bar's Estate Planning, Trust and Probate Law Section for 10 years and am a past Chairman (late 1980s). I further was a member of the Board of Legal Specialization, Estate Planning, Trust Law and Probate Advisory Commission, for 4 years and was chairman of that Commission as well. During all those years, I attended a number of meetings of the Law Revision Commission.

It's clear to me that the persons who put together the survey are ones who believe that the law needs to be changed. I know some lawyers don't like the presence of no contest clauses because it makes it more difficult to challenge testamentary documents and their clients, and their property rights, may be at risk if they challenge them. That is exactly the reason that we write documents that have no contest clauses in them.

The law has tried various ways of skirting around them, but I strongly believe that a testator has the right to dictate what he/she wants and to have his/her wishes carried out without interference from disappointed heirs. The no contest provision, of course, is not valid if the person is mentally incompetent. More difficult to prove are those instances where there may be undue influence. The fact that such matters may be difficult to prove is just a fact of life and we shouldn't try to mangle the law to enable a contest, meritorious or not, to be filed easily. I've never had a testamentary document of mine successfully challenged and actual litigation had on only one in the 45 years I've been practicing in this field.

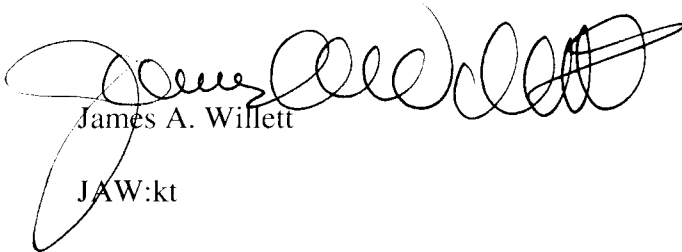
It is my belief that if no contest clauses were held to be invalid entirely, it would not eliminate contests but merely give license to the probate plaintiff bar to challenge documents that are properly executed and deal with family distribution issues in a manner that is desired by the testator. There are sufficient exceptions to the rules presently created by legislative or judicial

Mr. Brian Hebert
February 9, 2007
Page 2

interpretation and we should not continue to go down that road for more exceptions. I believe we should merely affirm that the testator has the right to make dispositions of his assets as close to being unchallengeable as possible.

Very truly yours,

DOWNEY BRAND LLP

A handwritten signature in black ink, appearing to read "James A. Willett", written over a printed name. The signature is stylized and cursive.

James A. Willett

JAW:kt

cc: Susan Orloff [Susan.Orloff@calbar.ca.gov]

Anonymous Comments Submitted with No Contest Clause Survey

The entire Chapter starting with 21300, needs to be revised to provide certainty.

Change the Law!

Also, use of clause to intimidate benes from asking reasonable questions of Trustees.

My simple reply: no contest clauses should not be enforced at all.

I believe no contest clauses should be strictly enforced particularly in A/B trust situations when there is a 2nd marriage. It is currently too easy to get through the no-contest clause.

This entire effort is due to litigation practitioners wanting no-contest/in terrorem litigation. We have over 50 probates and more trust administrations at any one time – removing the no-contest clause quite obviously would encourage more litigation.

Enforcement of no contest clauses should be abolished. Damages including attorney fees, could be proscribed for unreasonable contest or contests brought with lack of probable cause. See Florida Statues.

My clients ask for no contest clauses. They want them.