

Memorandum 2007-10

**Revision of No Contest Clause Statute
(Draft of Proposed Law)**

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.

At its March 2007 meeting, the Commission directed the staff to prepare a draft of a proposed law to make the following changes to existing law:

- (1) Limit enforcement of a no contest clause to a "direct contest."
- (2) Eliminate the existing declaratory relief procedure for determining the scope of application of a no contest clause.
- (3) Expand the existing "probable cause" exception, which is currently limited to specified types of direct contests, to apply to all direct contests.
- (4) Make technical and minor substantive simplifications.

A draft of the proposed law is attached for review.

We have received a letter from the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM") commenting on the Commission's proposed approach. It is attached as an Exhibit and is discussed below.

There are a number of issues that need to be considered and decided in connection with the proposed law. Those issues are discussed below. If, after addressing those issues, the Commission is ready to circulate the proposed law for public comment, with or without changes, the staff will add a narrative preliminary part and circulate it as a tentative recommendation.

Unless otherwise indicated, statutory references in this memorandum are to the Probate Code.

ENFORCEMENT LIMITED TO “DIRECT CONTEST”

If the enforcement of a no contest clause is to be limited to a direct contest, there are a number of substantive issues that must be addressed:

- (1) What is the meaning of the term “direct contest?”
- (2) Are there any other types of contests that should also be governed by a no contest clause?
- (3) Should a no contest clause only cover a contest that is aimed at invalidating the instrument that contains the no contest clause, or should a no contest clause govern challenges to other related instruments as well?

Those questions are discussed below.

Meaning of “Direct Contest”

Under existing Section 21300(b), a “direct contest” is a court pleading alleging the invalidity of an instrument or one or more of its terms based on one of the following grounds: revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. The common thread seems to be an assertion that an instrument is invalid because it is not a reliable expression of the transferor’s freely formed intentions.

Note that this definition of “direct contest” is similar in substance to the meaning of “will contest” in effect prior to the Commission’s recommendation on *No Contest Clauses*, 20 Cal. L. Revision Comm’n 7 (1990). Former Section 371 described a will contest as follows:

Any issue of fact involving the competency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will....

1931 Cal. Stat. ch 281.

The letter from TEXCOM suggests that three of the current grounds for a direct contest may be too indeterminate, undermining the certainty we hope to achieve by limiting enforcement of a no contest clause to direct contests. The grounds that TEXCOM finds problematic are revocation, misrepresentation, and mistake. TEXCOM suggests that those grounds should perhaps be excluded from the definition of “direct contest.” That suggestion is discussed below.

Revocation

An instrument that is revoked by the transferor no longer reflects the transferor's intentions. It should not be given effect. For that reason, a claim that an instrument has been revoked would seem to fall squarely within the concept of a direct contest.

TEXCOM has no argument with that general proposition, but is concerned that there may be problems properly circumscribing the meaning of "revocation."

"De Facto Revocation"

The concern is that the term "revocation," standing alone in the statute, could be interpreted to include any sort of action that would result in a disposition of property that is contrary to the terms of an instrument. The inconsistency between the action and the instrument could be characterized as a de facto revocation of the instrument.

For example, a revocable trust is created that includes a list of trust assets and instructions for the disposition of those assets on the transferor's death. Later, the transferor executes a grant deed conveying one of the listed assets to her nephew. She does not amend the trust to indicate that the property is no longer governed by the trust. On her death, a beneficiary petitions the court to return the transferred property to the trust, on the grounds that the transferor lacked capacity when she executed the grant deed. The nephew opposes the petition, unsuccessfully, and the property is returned to the trust.

Could the nephew's opposition be described as a direct contest of the trust, on the theory that it relies on a de facto revocation of the trust terms governing the disputed property? TEXCOM believes that could at least be argued, leading to uncertainty as to whether the nephew's actions might trigger a no contest clause.

That would be a problem. The term "revocation" should not include actions that are merely inconsistent with the terms of an instrument.

Revocation by Prescribed Methods Only

One way to avoid that result would be to limit the concept of revocation to include only revocation pursuant to the procedures that are prescribed by law. See Sections 6120 (revocation of will), 15401 (revocation of trust). A person who

revokes an instrument under those procedures acts unambiguously. It is clearly intended as a revocation.

That should provide a clear way to differentiate between actual revocation and other types of actions that only indirectly affect an estate planning instrument. **That is the approach taken in proposed Section 21330(b).**

The only wrinkle in this approach is that there are other types of nonprobate instruments that transfer property on death. Most of those do not have revocation methods that are prescribed by law. (An exception would be the revocable TOD deed, which is currently being considered by the Legislature in AB 250 (DeVore)). The method of revocation of most of those types of instruments is governed by the instrument itself. So, for example, a life insurance policy will have terms that specify how the policy can be cancelled or a beneficiary changed.

Proposed Section 21300(b) includes a catch-all for those instruments, which references the revocation “of an instrument other than a will or trust, pursuant to the procedure that is provided by statute or by the instrument.”

The staff believes that this approach will address TEXCOM’s concern.

Modification

Although it is currently not included in the statutory grounds for a direct contest, the TEXCOM liaison has asked whether “*modification*” of an instrument should be included in the definition of “direct contest.”

Partial Revocation v. Modification

Existing Section 21300 defines “direct contest” as an action alleging the invalidity of an instrument *or one or more of its terms*. That would seem to encompass an amendment that negates part, but not all, of an instrument.

To complicate matters, existing law recognizes “partial revocation” of an instrument. For example, a transferor may revoke less than all of a will by crossing out terms in the instrument, or by a codicil that expressly deletes certain terms, or by a later executed will that reiterates most, but not all, of the provisions of the earlier will. See California Will Drafting, § 9.6 at 204 (Cal. Cont. Ed. Bar 2006) (“Methods of Partial Revocation”).

It may therefore be difficult to distinguish between partial revocation and modification. Both actions can have the same substantive result — the invalidation of some, but not all, of the terms of an instrument.

At a minimum, that could cause uncertainty. The proponent of a codicil could not be sure whether an action to assert the validity of the codicil would be considered modification of the original will (and therefore not a direct contest) or a “partial revocation” (and therefore a direct contest). That uncertainty alone may be reason to add modification as one of the grounds for a direct contest. Doing so would eliminate the line drawing problem.

What’s more, a modification that changes or invalidates the terms of an instrument could reasonably be described as grounds for a direct contest. The claim of modification is offered to attack the validity of the instrument.

Changed Terms v. New Terms

On the other hand, an amendment could merely *add* new terms, without changing or invalidating any of the existing terms. The argument for treating that sort of modification as a direct contest is weaker.

It clearly could have a significant effect on the operation of the instrument. For example, a will includes a residuary clause, which leaves to a named heir all of the property that is left in the estate after the specific gifts have been made. Under the original will, the residue of the estate at the time of the transferor’s death is \$1 million. However, a codicil is produced that would add a new specific bequest — \$1 million to the proponent of the codicil. The codicil does not invalidate the residuary clause. But the residuary heir will take nothing.

The effect of the new term in the example above could be described as indirect. There is no attempt to invalidate the instrument. The residuary clause is left standing, there just isn’t any money to fund it.

A creditor’s claim could have the same effect, depleting the estate so as to abate the residuary gift. If a creditor’s claim with that effect is an indirect contest (which it historically and conceptually is), then an amendment that merely adds a new specific gift might also be described as having an indirect effect on the residuary gift.

Notwithstanding that argument, the staff recommends against trying to differentiate between modifications that change terms and modifications that merely add terms. Such a distinction could lead to unanticipated uncertainty as it is applied to different instruments and factual situations. If the Commission decides that modification should be included as grounds for a direct contest, **the staff would recommend that all modifications be treated in the same way.**

Furthermore, **the staff would treat modification in the same way that is proposed for revocation above** — “modification” would mean a modification pursuant to the methods prescribed for modification by governing law or the instrument.

Should the proposed law treat modification as grounds for a direct contest?

Misrepresentation

The existing definition of “direct contest” includes a contest brought on the grounds of “misrepresentation.” Section 21300(b)(4). When would misrepresentation be grounds for invalidation of an instrument or one or more of its terms?

The obvious answer is when the misrepresentation constitutes fraud. However, fraud is already listed as sufficient grounds for a direct contest. Section 21300(b)(3). If misrepresentation only means fraud, then it is redundant.

A non-fraudulent misrepresentation can be offered as grounds for invalidating an instrument if it can be shown that the transferor relied on the misrepresentation in drafting an instrument. For example, suppose a transferor is innocently misinformed that an heir has died and, acting on that misinformation, revises an instrument to omit the heir. In that case, the misrepresentation would not be fraud, but could be grounds for invalidating the instrument.

A contest based on those facts could also be described as a contest based on “mistake”:

In the probate setting, “mistake” encompasses an erroneous assumption of facts upon which the testator relied in formulating his or her estate plan, errors in drafting the will, or an erroneous belief about the instrument being executed.

Ross, Cal. Prac. Guide Probate § 15:157 (2006).

Mistake is already included in the grounds for a direct contest. Section 21300(b)(8). To the extent that misrepresentation means mistake, it is redundant.

In fact, the staff could find no case in which misrepresentation was offered as grounds to invalidate an instrument, independent of a claim of fraud or mistake. Thus, it appears that misrepresentation may be entirely redundant and could be deleted from the definition of “direct contest” without causing a substantive change.

Should that change be made? Probably. The goal of the proposed law is to limit enforcement of a no contest clause to a specified list of actions that is so

clearly defined that the existing declaratory relief procedure can be deleted as unnecessary. The inclusion of a term that serves no clear purpose and could perhaps be stretched in unexpected ways undermines the certainty that the proposed law is intended to achieve.

Proposed Section 21330 does not include misrepresentation as grounds for a direct contest. A note following the section requests comment on whether that change would cause any problems.

Mistake

As noted above, a claim that a transferor executed an instrument based on a mistake can be grounds to attack the instrument or one or more of its terms.

Rescission

Mistake can be grounds for rescission of a trust:

A trust may be rescinded when there was a substantial mistake of law or fact in its execution. ... When the settlor received no consideration for creating the trust, the settlor's unilateral mistake is ordinarily a ground for rescission, though the mistake must have been material, i.e., it must be relevant to the essence of the settlor's conduct.

J. Barringer & N. Lawrence, *Grounds for Setting Aside Will or Trust, in California Trust and Probate Litigation* § 6.31 at 142-43 (Cal. Cont. Ed. Bar 2006) (citations omitted).

A will may also be rescinded on the grounds of mistake, though the standards are stricter:

By contrast, a will cannot be overturned on the basis of mistake when the will as a whole was executed with testamentary intent. ... The mistake must go to execution or to the formation of testamentary intent in its entirety, as when the testator executes an apparently testamentary instrument under the misapprehension that it is something else.

Id.

Other contractually-implemented nonprobate transfer instruments could be rescinded for mistake under general contract principles. See Civ. Code § 1689.

Rescission on the grounds of mistake is an attempt to invalidate an instrument on the grounds that it does not correctly express the transferor's true intentions. That would seem to be a direct contest.

Reformation

Mistake can also be offered as grounds for reformation of a trust. “The purpose of reformation is to effectuate the common intention of the parties, when that intention was incorrectly reduced to writing.” See J. Barringer & N. Lawrence, *Trust Contests, in California Trust and Probate Litigation* § 20.26 at 717 (Cal. Cont. Ed. Bar 2006). See also Civ. Code § 3399 (revision of instrument).

Reformation does not invalidate the entire instrument, though it could have the effect of invalidating one or more terms of the instrument. So a simple reference to “mistake” in the definition of “direct contest” could be read to include reformation aimed at invalidating one or more terms of an instrument.

That reading would contradict another provision of existing law. Section 21305(b)(11) provides that a no contest clause does not apply to a “pleading regarding the reformation of an instrument to carry out the intention of the person creating the instrument.” Thus, existing law distinguishes between rescission of an instrument on the grounds of mistake (a direct contest), and reformation of instrument on the grounds of mistake (not a contest).

Distinction Problematic

Shirley Kovar, the TEXCOM liaison on this study, believes that the proposed law should not preserve that distinction.

She argues that rescission and reformation are fundamentally similar, in that each is a means of conforming a person’s estate plan to their actual intentions, in order to cure an action taken on the basis of a mistake. The fact that one remedy invalidates an entire instrument, while the other remedy invalidates only part of an instrument, is not sufficient reason to treat them differently with respect to the application of a no contest clause.

The Legislature has already decided that other actions to determine and implement a transferor’s intentions are exempt from a no contest clause. See Section 21305(b)(1) (reformation of trust), (9) (interpretation of an instrument), (11) (reformation of instrument). Ms. Kovar believes that rescission on the basis of mistake should be treated in the same way.

In the interest of provoking further comment on the issue, the proposed law does not include mistake as grounds for a direct contest. A note following proposed Section 21330 asks for comment on whether that change would cause any problem.

Presumptively Disqualified Beneficiary

With certain exceptions, Section 21350 invalidates a provision of an instrument that makes a donative transfer to any of the following persons:

- (1) The person who drafted the instrument.
- (2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.
- (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.
- (4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
- (5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).
- (6) A care custodian of a dependent adult who is the transferor.
- (7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

There are exceptions for: (1) a gift to a relative, cohabitant, or domestic partner of the transferor; (2) an instrument reviewed by an independent attorney, who certifies in writing that the transfer is “not the product of fraud, menace, duress, or undue influence;” (3) an instrument created by a conservator after a court proceeding approving the action; and (4) an instrument reviewed by a court, which finds by clear and convincing evidence, that the transfer is “not the product of fraud, menace, duress, or undue influence.” Section 21351.

Section 21350 operates as a statutory presumption of fraud or undue influence where the beneficiary is in one of the specified types of relationship to the transferor. It would therefore seem to be grounds for a direct contest.

The staff recommends that the definition of direct contest include a contest brought on the grounds of Section 21350. That is the approach taken in the proposed law. See proposed Section 21330(b)(5).

Protected Instruments

It is clear that a no contest clause should govern a direct contest of the instrument that contains the no contest clause. It is not clear whether other related instruments should also be protected. For example, should a no contest clause in a trust apply to a contest of an instrument amending the trust?

Revoking the trust? Listing the assets of the trust? Transferring an asset to the trust?

Existing law provides that a no contest clause applies to any instrument that the clause itself “expressly identifies” as being governed by the clause. This is a flexible approach, that allows the transferor to incorporate instruments by reference, rather than by drafting a separate clause in every instrument (which would be impossible for some contractual instruments, such as a life insurance policy).

The proposed law preserves the existing approach, with one exception. The term “expressly identified” is replaced with “expressly described.” See proposed Section 21330(c) and Comment.

That change would make clearer that a transferor may describe protected instruments by type (e.g., “any instrument that amends or revokes this instrument”). There should be no need to separately identify each instrument.

FORCED ELECTION

A no contest clause can be used to create a “forced election,” which requires an heir to choose between taking the gift offered under the instrument or asserting a claim of ownership of purported estate assets.

A forced election is useful where property ownership issues are complicated or uncertain (e.g., where determining the exact community property or separate property character of purported estate assets would require extensive tracing and litigation). In such a case, the transferor may combine a no contest clause with a gift that clearly exceeds the heir’s share of the disputed property. The heir can then choose to take the gift or assert the disputed ownership claim, but not both. If the heir asserts the ownership claim, the gift is forfeited by operation of the no contest clause.

If the gift is large enough, the heir will accept the gift, effectively waiving the disputed property claim. That will eliminate the cost, delay, and acrimony involved in litigating the claim.

However, a forced election may be problematic in some circumstances. The California Judges Association has described the spousal election as a “widow’s election.” Second Supplement to CLRC Memorandum 2006-42, p. 2. A surviving spouse may be faced with a difficult and unwanted choice — either acquiesce in

her deceased husband's unilateral disposition of her community property or face the stress and cost of litigating to secure her property rights.

Forced Election Incompatible with the Proposed Law

A claim to ownership of estate assets is an *indirect* contest. It is an attempt to reach estate assets before distribution, and *is not an attempt to invalidate an instrument*.

Consequently, if the application of no contest clauses is limited to direct contests, a no contest clause could not be enforced against a property ownership claim. *That would preclude the use of a no contest clause to create a forced election.*

In fact, it might preclude any use of forced elections. Logically there seems to be no difference between a conditional gift (if you don't contest, you will receive a gift) and the conditional forfeiture of a gift (you will receive a gift, unless you contest). In either case the result is the same. An heir who takes the proscribed action gets no gift.

Possible Preservation of Forced Election

It would be possible to preserve the forced election option, by providing that a no contest clause applies to both a direct contest *and a property ownership claim*.

That presents a significant policy choice, as well as a difficult technical issue: (1) Should the forced election be preserved? (2) How would a probable cause exception apply to a forced election?

There are two common situations in which a forced election might arise: a creditor claim or a marital property dispute. They are discussed separately below.

Arguments for Preservation of Marital Elections

A marital election has obvious utility. It allows the transferor to head off litigation over difficult property characterization issues by making a gift that is roughly equivalent to what the surviving spouse would receive as a result of litigating. The surviving spouse is then free to accept or reject that compromise. Used in that way, the forced election can be benign and beneficial.

The California Supreme Court upheld the public policy of enforcing a forced election in *Burch v. George*, 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d (1994):

The reasoning underlying the validity and enforceability of a forced election is persuasive in putting into proper perspective the

claim that the use of a no contest clause represents an attempt by a trustor or testator to dispose of another's property. "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. The act of the testator attempting to dispose of the property of another, and the act of the owner of such property in accepting the benefit provided for him by the testator, united, complete the disposition, which, without the act of confirmation, would be of no effect." ... In other words, "the effectiveness of a testamentary disposition of the surviving spouse's community property interest to third persons depends upon the survivor's voluntary and affirmative acceptance of the will's provisions and cannot stem from the decedent's testamentary act alone. ... This logic applies with equal force to dispel any notion that a no contest clause allows or encourages a testator or trustor to "unlawfully" dispose of another's property.

Arguments Against Preservation of Marital Elections

Legality aside, there can be situations in which a spousal forced election is coercive and unfair. A deceased spouse's estate plan may claim ownership of assets that clearly belong to the surviving spouse and purport to dispose of those assets in a way that the surviving spouse would never voluntarily accept. The only recourse would be costly litigation, which triggers forfeiture of the gift provided in the estate plan. Faced with such a choice, a surviving spouse may surrender significant rights simply to avoid the cost, stress, and uncertainty of litigation.

The dissent in *Burch v. George* would not enforce a no contest clause against a marital property claim:

The underlying assumption of these cases is that a no contest clause is valid insofar as it assures that a testator or trustor may, without challenge, dispose of property that belongs to him or her. But the converse of that proposition should also be true: under California law, a no contest clause should not be valid insofar as it allows a testator or trustor to dispose of property that does not belong to him or her.

This point needs little elaboration. Nothing in the policy favoring no contest clauses was designed to encourage theft. Yet if a testator or trustor lays claim to property that does not belong to him or her, and successfully insulates the disposition of such property from challenge by use of a no contest clause, theft is the result.

... For the courts to enforce no contest clauses that are used to deprive individuals of their own property would allow the estates and trusts of testators and trustors who have acted wrongly to take advantage of the wrongs of those testators and trustors.

A second, related rationale also supports my conclusion. As this court recognized ..., judicial enforcement of no contest clauses is also limited to situations in which the no contest condition is “not prohibited by some law or opposed to public policy” But in this case, and in similar situations, law and public policy do stand in opposition to the trustor’s employment of the no contest clause.

Allowing enforcement of a no contest clause to effectively prohibit assertion of statutorily guaranteed community property rights is contrary to the public policy embodied in Family Code sections 1100 and 1101. Those sections provide that a spouse may not convey or dispose of community personal property without the written consent of the other spouse, and grant the nonconsenting spouse a right of action against the other spouse for breach of that duty to obtain written consent.

Burch v. George, 7 Cal. 4th at 284-85 (Kennard dissenting) (citations omitted).

What’s more, it should be possible to achieve the benefits of a marital election without the threat of forfeiture. The spouses could simply discuss the disposition of their property on death and agree to a plan that will not infringe on either spouse’s property rights. *Id.* at 287.

Of course, it will not always be possible to reach agreement, but cases in which agreement cannot be reached are arguably the most problematic. The deceased spouse could use a forced election to impose a unilateral disposition of the property, over the known wishes of the survivor, with the threat of forfeiture to secure acquiescence.

On a final point, it is worth noting that existing law disfavors the application of a no contest clause to a property ownership claim. Section 21305(a) provides that a no contest clause does not apply to such claims unless the no contest clause expressly identifies such claims as a violation of the clause.

Merits of Creditor Election

The staff believes that the case for application of a no contest clause to a generic creditor claim is much weaker. Most debtors probably expect to pay a debt during life. The possibility of dying before paying a debt exists, but is probably not taken into account in drafting an estate plan. In some cases, a debt will arise *after* the estate plan is created, in which case it is clear that the

transferor does not intend the estate plan to serve as a substitute for payment of the debt.

For example, transferor creates a trust with a no contest clause. The trust makes a gift of \$50,000 to the transferor's nephew. Five years later, transferor agrees to pay nephew \$25,000 to construct an addition to the transferor's house. Nephew performs, but the transferor dies before paying the debt. If the no contest clause operates, the nephew must waive either the \$50,000 gift, or the \$25,000 owed on the contract. It seems very unlikely that the transferor intended that result.

Forced Election and Probable Cause

The Commission is considering creating a probable cause exception to the enforcement of a no contest clause.

A probable cause exception would be incompatible with the use of a no contest clause to create a forced election. That is because the forced election is most useful when the transferor *knows* that an heir has a property interest in estate assets, but wants to avoid the cost of determining the exact magnitude of the interest. The forced election provides a way of sidestepping the need for precise property characterization.

In that situation, the heir could easily establish probable cause for an action to dispute the ownership of purported estate assets.

For example, transferor and her spouse own many assets as community property, but the history of contributions to, and possible transmutation of, those assets makes it difficult to know exactly what portion belongs to each spouse. Transferor's trust purports to dispose of all of those assets, but makes a generous gift to her surviving spouse (coupled with a no contest clause) to deter him from making any claim of ownership of the trust assets. After the transferor's death, the surviving spouse brings an action claiming his full community property share of the purported estate assets. After lengthy litigation, he succeeds in claiming a large part of the trust corpus as his own property. Because he had probable cause for his claim, the no contest clause would not operate, and he also takes the large gift provided by the trust — clearly not what the transferor intended.

If a forced election is to be effective in such cases, it cannot be subject to a probable cause exception. The probable cause exception would need to be limited to direct contests.

That disparate treatment would complicate the law and would be difficult to justify. The law already sets a higher bar for the use of a no contest clause to create a forced election, which would make it odd if the law then provided for stricter enforcement of those contests.

Staff Recommendation

This is a difficult issue. There are good reasons for the use of a forced election, but it can also be abused.

The proposed law aims to reduce the complexity of the no contest clause statute, but preservation of the forced election would add a significant measure of new complexity.

Existing Section 21305(a) already sets a higher bar for the use of forced elections, providing that a property claim is not governed by a no contest clause unless the clause expressly describes such claims as contests. **If the Commission chooses to preserve the forced election, that existing limitation should also be preserved** — only a no contest clause that expressly states its application to a property claim would apply to a property claim.

There may also be issues relating to the use of a forced election of which the staff is unaware. For example, there may be some obscure tax-related reason why it would be important to be able to use a forced election. The best way to flush out arguments that favor the preservation of the forced election would be to propose its elimination. For that reason, **the staff recommends that the proposed law not include language preserving the forced election.** That is the approach used in the proposed law. A note following proposed Section 21333 invites comment on that issue.

PROBABLE CAUSE EXCEPTION

The Commission expressed interest in providing a probable cause exception to the enforcement of a no contest clause. That would allow a person who has good reason to believe that there is a problem with an instrument (e.g., undue influence) to bring a contest with little or no fear of forfeiture.

Existing Sections 21306 and 21307 already provide a probable cause or reasonable cause exception for a contest based on the following grounds:

- Forgery
- Revocation

- Disqualification under Section 21350.
- A provision benefits the person who drafted or transcribed the instrument, a person who directed the drafter of the instrument, or a witness to the instrument.

There is considerable overlap between the last two grounds, but both are aimed at the same concern, a provision that is likely to have been the product of menace, duress, fraud, or undue influence.

In other words, existing law already provides a probable cause defense for most of the grounds for a direct contest. The proposed law would simply expand the probable cause defense to include a contest brought on the grounds of incapacity, lack of due execution, and a case of menace, duress, fraud, or undue influence that does not involve one of the persons described in Section 21307 or 21350.

The “Probable Cause” Standard

The first issue to be decided in implementing a probable cause exception is the standard to use. *What constitutes probable cause?*

Existing Section 21306 provides a statutory standard, but as will be explained below, the staff finds it to be seriously flawed.

However, the statutory standard has been judicially interpreted in a way that conforms it to other similar standards in existing law. That interpretation offers a possible alternative to a strict reading of the existing standard.

The Restatement (Third) of Property offers another alternative, which is also discussed below.

Statutory Standard

Existing Section 21306 defines “reasonable cause” as follows:

“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.

By contrast, Section 21307 uses the term “probable cause,” without defining it.

Judicial Interpretation of Existing Standard

There is one published opinion that interprets the meaning of “reasonable cause” as it is used in Section 21306: *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002).

The facts in that case did not present a close call. “Jorge actively participated in events causing his weak and disoriented near-death father to disinherit his other children in favor of Jorge.” *Id.* at 1309. His later attempt to probate what he knew to be a “sham will” was held to be without reasonable cause.

The court in *Gonzalez* stated that “reasonable cause” and “probable cause” are synonymous. *Id.* at 1305. That is helpful for our purposes, as existing law uses both terms in essentially identical contexts. See Section 21306 (“reasonable cause”), 21307 (“probable cause”). If the terms are synonymous, then there is no substantive distinction that needs to be analyzed in devising a standard for the proposed law.

The *Gonzalez* court looked to other statutes that use those terms as guidance in construing Section 21306. See, e.g., *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*, 19 Cal. 4th 851, 857-58, 80 Cal. Rptr. 2d 803 (1998) (construing “reasonable cause” standard in cost recovery provision of Code Civ. Proc. § 1038); *Sheldon Appel Co. v. Albert & Olier*, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (construing “probable cause” standard in malicious prosecution).

Based on that analysis, the court concluded that “reasonable cause” is an objective standard. The question is “whether any reasonable attorney would have thought the claim tenable.” *Gonzalez*, 102 Cal. App. 4th at 1304.

The meaning of “tenable” is not entirely clear, but it probably equates to *not frivolous*. In discussing probable cause in malicious prosecution cases, the California Supreme Court stated that the “legally tenable” standard was similar to the standard used in determining whether an appeal is frivolous:

[An] appeal could properly be found frivolous only if “any reasonable attorney would agree that the appeal is totally and completely without merit.” ... In arriving at that standard, we reasoned that “any definition [of frivolousness] must be read so as to avoid a serious chilling effect on the assertion of litigants’ rights. ... Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win.”

Sheldon Appel Co., 47 Cal. 3d at 886. The Court went on to suggest that the same concerns about chilling apply to a malicious prosecution claim and that the

frivolous appeal standard had been “modified to fit this context, i.e., whether any reasonable attorney would have thought the claim tenable....” *Id.*

The fundamental similarity between the standards for a frivolous appeal and an action brought without probable cause was reinforced in a later opinion:

[The] standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal, i.e., probable cause exists if “any reasonable attorney would have thought the claim tenable.” This rather lenient standard for bringing a civil action reflects “the important public policy of avoiding the chilling of novel or debatable legal claims.” ... Only those actions that “any reasonable attorney would agree [are] totally and completely without merit” may form the basis for a malicious prosecution suit.

Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 817, 123 Cal. Rptr. 2d 19 (2002) (citations omitted).

The staff believes that the court’s concern about chilling non-frivolous cases also applies to the proposed probable cause exception for a no contest clause. If the bar for probable cause is set too high, contestants will be afraid to bring a contest where the facts are not airtight or the legal theories are novel. That may be exactly the result that the transferor intended in drafting the no contest clause, but it does create the risk of chilling access to the courts that is at the heart of the California Supreme Court’s analysis of probable cause in malicious prosecution cases.

Restatement Standard

The *Gonzalez* court also discusses, but does not adopt, the current Restatement standard:

“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.”

Gonzalez, 102 Cal. App. 4th at 1308. See also Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003).

The Restatement standard has been applied by courts in at least three states that have probable cause exceptions for enforcement of a no contest clause. See *In re Estate of Shumway*, 198 Ariz. 323 (2000); *In re Estate of Pepler*, 971 P.2d 694 (Colo. 1998); *In re Estate of Campbell*, 19 Kan. App. 2d 795 (1998).

The Restatement standard appears to be stricter than the standard adopted by *Gonzalez*. It requires a “substantial likelihood” of success, which probably means that success is more likely than not. By contrast, the “legally tenable” standard discussed in *Gonzalez* requires only that “any reasonable attorney would have thought the claim tenable” (i.e., not completely without merit). See *Sheldon Appel Co.*, 47 Cal. 3d at 886.

Existing Statutory Definition Problematic

Notwithstanding the conclusions of the *Gonzalez* court, Section 21306(b) could be read as establishing a much different (and lower) standard for “reasonable cause.” That is because the statutory language speaks only of the reasonableness of the contestant’s *factual* contentions. It omits any consideration of whether the *legal* arguments made by the contestant are tenable:

“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.

The history of Section 21306(b) makes the problem clearer. As originally drafted by the Commission, Section 21306 provided an exception for “probable cause.” The section was amended in 2000 to substitute the defined term “reasonable cause.” 2000 Cal. Stat. ch. 17 (AB 1491 (Kaloogian)).

Legislative analysis of AB 1491 indicates that the definition of “reasonable cause” was drawn from Code of Civil Procedure Section 128.7(b) (which authorizes sanctions against an attorney who files papers that violate stated standards). See Senate Committee on the Judiciary Analysis of AB 1491 (March 30, 2000). However, the new definition only incorporates *one* of that section’s four criteria for proper papers (in italics below):

(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(3) *The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If the goal was to simply use language that is more familiar to practitioners, then the entire subdivision could have been incorporated. To borrow only from subdivision (b)(3), while omitting subdivision (b)(2), implies that “reasonable cause” requires only that *factual* contentions be reasonable. The legal merits of the contest would not be considered.

The staff sees no good policy reason to limit the meaning of “reasonable cause” in that way.

Proposed Standard

The malicious prosecution standard for probable cause, adopted in *Gonzalez*, would set a very low bar. In effect, it would limit the use of a no contest clause to the deterrence of frivolous contests.

The staff understands judicial concern about chilling access to the courts in a malicious prosecution action. However, a no contest clause presents a special case. The concern about chilling must be balanced against the policy of effectuating the transferor’s intentions, as expressed in the no contest clause. California courts have long held that a no contest clause is enforceable, even without a probable cause exception, despite recognition of the fact that a contestant’s access to the courts is being chilled. The right of a transferor to impose any lawful condition on a gift carries considerable weight, which must be balanced against a contestant’s right of access to the court.

Given that balancing of interests, **the staff recommends that the Restatement standard be used.** It is a relatively unambiguous rule, which requires more than just a colorable argument to avoid forfeiture. Concern about the chilling effect of a stricter standard would be offset by the overall “thawing” effect of the proposed law as a result of the narrowed enforcement of a no contest clause, and broadened probable cause exception.

Timing

The second issue that must be decided in implementing the probable cause exception is *when* the probable cause determination would be made. Pre-trial or post-judgment?

Existing Sections 21306 and 21307 (which provide probable cause exceptions for specified types of contests) do not state when the question of probable cause is decided. However, it appears that existing practice in California is for the probable cause determination to be made at the end of trial, after a judgment on the merits of the contest. That makes sense as a practical matter. Until the merits of the contest have been decided, it is not known whether the no contest clause will survive the contest. The issue of probable cause is not yet ripe for adjudication.

Pre-Trial Determination of Probable Cause

Notwithstanding existing practice, the proposed law *could* be drafted to provide for a pre-trial determination of probable cause. That would provide the contestant with an opportunity to prove the reasonableness of the contest before committing to the contest itself.

That approach is used in other contexts where a pre-trial determination is necessary to avoid some harm that might result if the matter were deferred to the end of the trial. Examples include:

- (1) An injunction may be granted where “continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.” Code Civ. Proc. § 526.
- (2) The anti-SLAPP statute provides for a motion to strike a claim “brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances.” Code Civ. Proc. §425.16(a).

Clearly, a contest brought in the face of a no contest clause would fall within that general category. If the contest proceeds and fails, the contestant faces a significant penalty. Early adjudication of whether there is probable cause to bring the contest would allow the contestant to avoid the potential harm of forfeiture that might otherwise manifest at the end of the trial.

The staff has two concerns about that approach: (1) it would significantly undermine the deterrent effect of the no contest clause, and (2) it would

encourage litigation (at least at the preliminary stage). Those concerns are discussed more fully below.

Effect of Preliminary Determination of Probable Cause on Deterrence

The proposed expansion of the probable cause exception significantly undercuts the deterrent effect of a no contest clause. Under that rule there will probably be many more contests, some of which will be unmeritorious.

That decrease in the deterrent effect of a no contest clause is justified on the grounds that it will allow an apparently legitimate contest to be brought without fear of forfeiture. That is especially important as a way of policing against elder financial abuse.

Preliminary determination of probable cause would further diminish the deterrent effect of the no contest clause. A contestant would be able to have a mini-trial on the merits of any contest, without fear of forfeiture. That would open the door to many of the harms that a no contest clause is intended to avoid. The reputation of the transferor could be attacked in embarrassing ways, without the transferor having an opportunity to answer. Family skeletons could be exposed to the light. Acrimony between heirs could be worsened. Litigation costs would be imposed. The threat of all of those harms could be used to coerce a settlement.

Those harms are avoided by leaving the probable cause determination to the end of the trial. The contestant would need to make a decision about the objective merits of the contest before commencing any proceedings, without any safety valve that would allow the contestant to escape forfeiture if the contest is unreasonable. That would preserve more of the deterrent effect of a no contest clause.

Litigation Burden Imposed by Preliminary Determination of Probable Cause

The Commission's recent survey of practitioner views about problems with the no contest clause statute found that the greatest concern is the proliferation of pre-trial declaratory relief proceedings under Section 21320. See CLRC Memorandum 2007-7. Declaratory relief is used to construe the scope of a no contest clause, without deciding any of its substantive merits. Because Section 21320 provides a safe harbor, poses no risk of forfeiture, and is relatively quick and inexpensive, its use has become ubiquitous.

If prospective contestants are offered a pre-contest opportunity to test the merits of a prospective contest, it seems likely that the new procedure would also become ubiquitous. There would be no disadvantage other than procedural cost.

One of the aims of the proposed law is to eliminate the declaratory relief procedure, in order to eliminate that source of pre-trial litigation expense. If the proposed law provides for a preliminary determination of probable cause, the pre-contest litigation burden we are seeking to minimize would be reestablished in a different form. In fact, the burden might be greater than under existing law. A Section 21320 proceeding is merely an action to construe an instrument. By contrast, a preliminary determination of probable cause would require hearing and weighing disputed evidence — a much more time consuming and costly proposition.

Options

The procedural burdens of a preliminary determination of probable cause could be reduced in two ways: (1) charge all fees and costs to an unsuccessful contestant, and (2) limit discovery.

Fee shifting would help to deter casual use of the probable cause hearing as a way of testing the merits of a weak case.

Limited discovery rights would prevent a contestant from using the probable cause hearing as a fishing expedition. The contestant would need to evaluate the merits of a contemplated contest based on what is known at the outset, and could not simply file a weak contest and hope that something favorable turns up in discovery.

The “anti-SLAPP” statute provides a good model for that approach. The anti-SLAPP procedure may be used by a defendant to strike a claim that is “brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Code Civ. Proc. § 425.16(a). Once the defendant establishes that the underlying lawsuit arises from the defendant’s constitutionally protected speech in connection with a public issue, the burden shifts to the plaintiff to prove “that there is a probability that the plaintiff will prevail on the claim.” Code Civ. Proc. § 425.16(b). If the plaintiff fails to meet that burden, the underlying claim is struck *and the plaintiff must pay the defendant’s fees and costs*. Code Civ. Proc. § 425.16(c). The determination is made based on the pleadings and supporting affidavits. *Discovery is stayed during*

the anti-SLAPP process, unless the court, on a noticed motion and for good cause shown, orders specific discovery. Code Civ. Proc. § 425.16(g).

Recommendation

The staff recommends against a pretrial determination of probable cause. Most of the changes of the proposed law work to the advantage of contestants and against the enforcement of a no contest clause (i.e., narrowed enforcement and expanded probable cause exception). A preliminary determination of probable cause would tip the scales even further toward the contestant, by allowing the contestant to receive much of the benefit of bringing a contest (with much of the harm that the transferor sought to avoid) without any risk of forfeiture. That strikes the staff as too large a loophole if a no contest clause is to be given meaningful effect. What's more, it would create a major source of new pre-contest litigation, at the same time that the Commission is working to minimize pre-contest litigation costs.

FEE SHIFTING IN FLORIDA

The staff has not yet had an opportunity to investigate Florida law on fee shifting in will and trust contests. The staff will report orally at the meeting.

TRANSITIONAL PROVISION

Should the proposed law apply to instruments created before the operative date of the proposed law? Are there legal obstacles to that sort of retrospective application?

New Law May Be Applied to Existing Instruments

There are limits on the retroactive application of a statutory change. In general, a new law may not impair a vested property right or contractual obligation. See 58 Cal. Jur. 3d *Statutes* § 33 (2006).

Estate planning law presents a special case. The validity and effect of an estate planning instrument is determined under the law that exists at the time that it operates (on the transferor's death). A change in the law may affect a previously executed instrument so long as it does not divest anyone of a right that vested by operation of the instrument. 24 Cal. Jur. 3d *Decedent's Estates* § 1 (2006). "The testamentary disposition of property is completely subject to legislative control. The Legislature may 'withhold the right altogether, or impose

any conditions or limitations upon it which it chooses.” *Kizer v. Hanna*, 48 Cal. 3d 1, 10, 767 P.2d 679, 255 Cal. Rptr. 412 (1989).

For example, in *Estate of Moulton*, 63 Cal. App. 3d 1 (1976), a will provided for a remainder interest to pass to the “issue” of a life interest holder; if that person had no issue on death, the corpus would pass to a named remainderman. At the time that the will was drafted, a step-child could not be adopted as an adult. Later, as a result of statutory changes to the law of adoption, the scope of the term “issue” was expanded to include a step-child who is adopted as an adult. In determining the effect of the will, *the court applied the law as it existed at the time that the remainder interest vested*, not the law as it existed when the will was drafted. In other words, the changes in the law were applied to a pre-existing instrument with respect to interests that had not yet vested.

Probate Code Section 3

Section 3 provides a default transitional rule for any change to the Probate Code. It provides for very broad retrospective application of new estate planning laws. With certain exceptions, any “new law” applies to

all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action.

The exceptions are as follows:

- (1) The new law does not apply to the execution, content, and notice requirements for papers filed before the operative date of the new law. Section 3(d).
- (2) The new law does not apply to an order made before the operative date of the new law, or to an action on an order that is taken before the operative date of the new law. Section 3(e).
- (3) No person is liable for an action taken before the operative date of a new law if the action is proper under the law applicable when the action is taken, even if it would be improper under the new law. Section 3(f).
- (4) There is also a general fairness exception that allows a court to apply the “old law” if application of the new law would “substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date” of the new law.

Section 3 was added on the Commission's recommendation, as part of the complete recodification of the Probate Code. The Commission Comment explains the general approach adopted in Section 3:

Comment. Section 3 provides general transitional rules applicable to changes in the Probate Code. ...

The rules stated in Section 3 are general provisions that apply absent a special rule stated in the new law. Special rules may defer or accelerate application of the new law despite the general rules stated in Section 3. See subdivision (b).

The general rule prescribed in subdivision (c) is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by the exceptions listed in subdivision (d) (contents, execution, and notice of papers and documents are governed by the law applicable when the paper or document was filed), subdivision (e) (orders are governed by the law applicable when the order was made, subject to any applicable modification procedures), and subdivision (f) (acts are governed by the law applicable when the act was done).

...

Because it is impractical to attempt to deal with all the possible transitional problems that may arise in the application of the new law to various circumstances, subdivision (h) provides a safety-valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests.

...

The California Supreme Court has approved the rationale and result of Section 3. See *Rice v. Clark*, 28 Cal. 4th 89, 99, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002) ("The manifest purpose of Section 3 — to make legislative improvements in probate law applicable on their operative date whenever possible — would be greatly frustrated if the date of *execution* of an instrument were in all cases to fix the law applicable to the instrument's validity.") (emphasis in original). In *Rice*, the court held that changes to a statute that presumptively disqualifies certain classes of beneficiaries were properly applied to an instrument created before the operative date of the new law.

Discussion

It is clear that the proposed law *could* be immediately applied to previously existing instruments (with certain exceptions for completed acts and vested rights).

However, immediate retrospective application of the proposed law would frustrate the intentions of some transferors who relied on existing law in drafting an instrument that contains a no contest clause.

The staff believes that transferors should be given a meaningful opportunity to revise their estate plans before the new law takes effect. That could be achieved by limiting application of the new law to the instruments of persons who die one year or more after the law takes effect.

Assuming that the proposed law is enacted in 2008, it would ordinarily take effect on January 1, 2009. The proposed law would govern any instrument of a person who dies on or after January 1, 2010. See proposed Sections 21309, 21335. The estate of a person who dies prior to January 1, 2010 would be governed by existing law, rather than the new law.

CIRCULATION OF TENTATIVE RECOMMENDATION

If the Commission is satisfied with the attached draft of the proposed law, with or without changes, the staff could prepare a narrative “preliminary part” and release the proposed law for public comment as the Commission’s tentative recommendation. The comment period should be at least 60 days, which would allow for consideration of public comment at the August meeting.

Alternatively, if the Commission decides to make changes that require significantly different drafting, or if the Commission wishes to review the preliminary part before it is released, the staff could bring a draft of the tentative recommendation back for review at the June meeting. In that case, consideration of public comments would be pushed back to the October meeting. That should still provide enough time to make any necessary changes and finalize the recommendation for submission to the Legislature in 2008.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

**EMAIL FROM EXECUTIVE COMMITTEE OF THE TRUSTS AND ESTATES
SECTION OF THE CALIFORNIA BAR (“TEXCOM”)
(MARCH 28, 2007)**

Brian, this is to follow-up on our conversation after the CLRC meeting on March 1, 2007, regarding the no contest clause study. As I mentioned to you after the meeting, I believe the CLRC has made substantial progress toward a workable legislative proposal on the no contest clause study. I also mentioned to you that I would report the results of the March 1 meeting to TEXCOM at its upcoming meeting on March 17 and would advise you of the results of the TEXCOM meeting.

On March 17 I reported to TEXCOM the instructions of the CLRC to its staff to prepare a draft of a Tentative Recommendation as follows:

1. Simplify and harmonize the reasonable cause exceptions in Probate Code sections 21306 and 21307;
2. Exempt indirect contests from the enforcement of a no contest clause;
3. Repeal Probate Code section 21320, which provides for declaratory relief regarding the scope of a no contest clause; and
4. Create a probable cause exception for all direct contests.

The CLRC also directed staff to prepare a memorandum discussing related legal and policy questions (including limitations on retroactive application of any reform) and report on the experience of Florida practitioners with the Florida statute on fee-shifting. TEXCOM authorized me at its March 17 meeting to advise the CLRC as follows:

While TEXCOM continues to support its own proposal to no longer enforce all no-contest clauses, it appreciates the fact that CLRC recognizes that the current method of enforcing no-contest clauses needs to be corrected. The concerns that TEXCOM expressed on March 17 about the tentative recommendation are as follows:

Direct contests

The definition of “direct contests” needs to be tightened. Currently, Probate Code Section 21300(b) defines “direct contests” to include attacking the validity of a document on grounds of revocation, misrepresentation, or mistake. These categories are so broad that they could well include indirect contests. For example, is a transfer of real property held in trust under a joint tenancy deed a revocation of the trust with respect to that property?

Although TEXCOM did not vote on how to define “direct contests,” Neil Horton and I agree that the definition should be limited to those claims that the Probate Code specifically identifies as invalidating a will: lack of capacity (Probate Code sections 6100, 6100.5); fraud, menace, duress, or undue influence (Probate Code section 6104); and lack of due execution (Probate Code section 6113).

Care Custodians

Although the Probate Code also invalidates gifts to care custodians (Probate Code section 21350), we agree with the suggestion at the March 1 CLRC meeting, that enforcing no-contest clauses against challenges to gifts to care custodians deserves special treatment.

Contests to instruments other than the instrument containing the no contest clause

TEXCOM also expressed concern about repeal of Probate Code section 21305(a)(2). In general, many members are concerned about reviving the notion of an “integrated estate plan”, which many TEXCOM members believe violates the requirement that no-contest clauses be strictly construed. Probate Code section 21303.

Effective date

TEXCOM supports the concept that any new legislation have one effective date.

Spousal elections

Many TEXCOM members are receptive to allowing no-contest clauses to be enforceable in disputes between the successors-in-interest to spouses or domestic partners over what is or is not community property, if it can be done without opening the door to litigation over other kinds of property disputes or conditional gifts.

Very truly yours, Shirley L. Kovar, Liaison from TEXCOM to CLRC on the no contest clause study.

PROPOSED LEGISLATION

1 **Prob. Code § 21309 (added). Sunset provision**

2 SECTION 1. Section 21309 is added to the Probate Code, to read:
3 21309. This part is repealed by operation of law on January 1, 2010.

4 **Comment.** Section 21309 is new. On January 1, 2010, the provisions of this part are replaced
5 by Sections 21330-21335.

6 **Prob. Code §§ 21330-21335 (added). No contest clause**

7 SEC. 2. Part 3 (commencing with Section 21330) is added to Division 11 of the
8 Probate Code, to read:

9 PART 3. NO CONTEST CLAUSE

10 **§ 21330. Definitions**

11 21330. As used in this part:

12 (a) “Contest” means a pleading in a proceeding in any court alleging the
13 invalidity of a protected instrument or one or more of its terms.

14 (b) “Direct Contest” means a contest based on one or more of the following
15 grounds:

16 (1) Forgery.

17 (2) Lack of due execution.

18 (3) Lack of capacity.

19 (4) Menace, duress, fraud, or undue influence.

20 (5) Disqualification of a beneficiary under Section 21350.

21 (6) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant
22 to Section 15401, or revocation of an instrument other than a will or trust pursuant
23 to the procedure for revocation that is provided by statute or by the instrument.

24 (b) “No contest clause” means a provision in an otherwise valid instrument that,
25 if enforced, would penalize a beneficiary that files a contest.

26 (c) “Protected instrument” means all of the following instruments:

27 (1) The instrument that contains the no contest clause.

28 (2) An instrument that is expressly described in the no contest clause as being
29 governed by the no contest clause.

30 **Comment.** Section 21330 is new. Subdivision (a) continues part of the substance of former
31 Section 21300(b), except that mistake and misrepresentation are not continued as grounds for a
32 direct contest.

33 Subdivision (b)(2) continues the substance of former Section 21305(a)(3).

34 **Note.** The Commission invites comment on whether the deletion of mistake and
35 misrepresentation as grounds for a direct contest would cause any problem. A contest based on
36 misrepresentation is largely subsumed within the ground of fraud. An action to reform an
37 instrument based on mistake is already exempt from the application of a no contest clause. See

1 Prob. Code § 21305(b)(11). Arguably, an action for rescission that is based on mistake should
2 also be exempt, as are other actions to determine the transferor’s intent. See Prob. Code §
3 21305(b)(1), (9).

4 **§ 21331. Application of common law.**

5 21331. This part is not intended as a complete codification of the law governing
6 enforcement of a no contest clause. The common law governs enforcement of a no
7 contest clause to the extent this part does not apply.

8 **Comment.** Section 21331 continues former Section 21301 without change.

9 **§ 21332. Effect of contrary instrument**

10 21332. This part applies notwithstanding a contrary provision in the instrument.

11 **Comment.** Section 21332 continues former Section 21302 without change.

12 **§ 21333. Enforcement of no contest clause**

13 21333. (a) A no contest clause may be enforced against a beneficiary who brings
14 a direct contest that is within the terms of the no contest clause.

15 (b) A no contest clause shall not be enforced against a contest that is not a direct
16 contest, regardless of the terms of the instrument.

17 (c) Notwithstanding subdivision (a), a no contest clause shall not be enforced if
18 the contest is brought with probable cause. Probable cause exists if, at the time of
19 instituting the contest, there is evidence that would lead a reasonable person,
20 properly informed and advised, to conclude that it is more likely than not that the
21 contest will be successful.

22 **Comment.** Subdivision (a) of Section 21333 continues part of the substance of former Section
23 21303. See Section 21330(a) (“direct contest” defined).

24 Subdivision (b) is new. It provides an exception to the enforcement of a no contest clause for
25 any contest other than a direct contest. That continues and expands upon the public policy
26 exceptions provided in former Section 21305.

27 The definition of “probable cause” provided in subdivision (c) is drawn from the Restatement
28 (Third) of Property (Wills & Don. Trans.) § 8.5 (2003).

29 **Note.** By limiting the enforcement of a no contest clause to a direct contest, the use of a no
30 contest clause to create a “forced election” is eliminated. The Commission invites comment on
31 the advantages and disadvantages of that change in the law.

32 **§ 21334. Strict construction**

33 21334. In determining the intent of the transferor, a no contest clause shall be
34 strictly construed.

35 **Comment.** Section 21334 continues former Section 21304 without change.

36 **§ 21335. Application of part**

37 21335. (a) This part becomes operative on January 1, 2010.

38 (b) This part applies to an instrument of a person who dies on or after January 1,
39 2010.

40 **Comment.** Section 21335 limits the application of this part.