

Memorandum 2007-29

**Revision of No Contest Clause Statute
(Comments on Tentative Recommendation)**

The Commission circulated a tentative recommendation on *Revision of the No Contest Clause Statute* (April 2007). We received a number of comments on the tentative recommendation, which are included in the Exhibit as follows:

| | <i>Exhibit p.</i> |
|--|-------------------|
| • Margaret V. Barnes & Steven F. Barnes, Palo Alto (7/3/07) | 17 |
| • Robert L. Bletcher (7/3/07) | 16 |
| • James R. Birnberg, Encino (7/31/07) | 46 |
| • Thomas M. Carpenter (6/6/07) | 4 |
| • Charles A. Collier, Jr., Los Angeles (6/1/07) | 1 |
| • Robert Denham, Oakland (6/7/07, 6/28/07) | 7, 15 |
| • Jeffrey Dennis-Strathmeyer, Lafayette (7/14/07) | 37 |
| • Margaret Draper, Bayside (6/5/07) | 3 |
| • H. Douglas Duncan, Lodi (6/6/07) | 4 |
| • James Graham, San Diego (7/14/07) | 32 |
| • Rick Llewellyn (6/5/07) | 3 |
| • David C. Nelson, Los Angeles (7/12/07) | 21 |
| • Peter R. Palermo, Pasadena (7/9/07) | 19 |
| • Linda Roodhouse, Oakland (7/11/07) | 20 |
| • Gary M. Ruttenberg, Bloom and Ruttenberg (7/3/07) | 18 |
| • Paul Smith (6/7/07) | 5 |
| • State Bar, Trusts and Estates Section, Executive Committee (6/9/07, 6/22/07, 7/17/07) | 8, 12, 40 |
| • Theodore I. Wallace, Jr., Costa Mesa (7/18/07) | 9 |

The letter from Theodore I. Wallace, Jr., had two cases attached (*McKenzie v. Vanderpoel*, 151 Cal. App. 4th 1442 (2007); *Zwirn v. Schweitzer*, 134 Cal. App. 4th 1153 (2005)). In the interest of conserving resources, those cases are not reproduced in the Exhibit.

This memorandum discusses the comments that we received and recommends some changes to the proposed law in response to those comments.

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.

After the Commission has had a chance to consider the comments and decides whether to make any changes, the staff will prepare a draft recommendation for consideration at a future meeting.

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

OVERVIEW OF PROPOSED LAW

The proposed law is intended to address three problems with the existing no contest clause statute: (1) the statute is overly complex and is therefore unclear in its operation, (2) widespread use of declaratory relief is undermining the litigation avoidance value of a no contest clause, and (3) a no contest clause can be used to shield fraud and undue influence from court review.

The proposed law would address those problems by making the following changes from existing law:

- (1) The application of a no contest clause would be limited to a specified list of traditional “direct contests” (incapacity, forgery, menace, duress, fraud, undue influence, revocation, lack of proper execution, and disqualification of a beneficiary under Section 21350). That would preclude application of a no contest clause to an “indirect contest.”

Most indirect contests are already statutorily exempt from a no contest clause. Consequently, the most significant *substantive* effect of this element of the proposed law would be to prevent the application of a no contest clause to a creditor claim or property ownership claim. Such use of a no contest clause may be described as a “forced election,” as it forces a beneficiary to choose between taking the gift offered under the instrument or pursuing an independent right to purported estate assets.

- (2) The term “protected instrument” would be defined to more precisely describe which instruments are governed by a no contest clause.
- (3) The declaratory relief procedure would be eliminated.
- (4) The existing probable cause exception (for a contest involving forgery, revocation, or a disqualified beneficiary), would be expanded to apply to all types of direct contests.
- (5) The standard for establishing probable cause would be made stricter, based on the standard provided in the Restatement (Third) of Property.

GENERAL RESPONSE

Qualified Support

For the most part, the comments express support for the proposed law (although that support is usually qualified by specific concerns or suggestions):

- “The proposed new Sections 21330-21335 are a significant improvement over existing law. I would support their enactment.” Charles A. Collier, Jr., Exhibit p. 1.
- “I agree with the conclusion of your report.” Rick Llewellyn, Exhibit p. 3.
- “I would like to register my support for the Tentative Recommendation by the California Law Revision Commission on its no contest clause study. From what I have understood the problems to be, the approach outlined in the summary seems appropriate: simplify and sustain the general availability of the no-contest principle in wills.” Margaret Draper, Exhibit p. 3.
- “Congratulations on a job well done. ... Your proposed amendments are a needed simplification.” Thomas M. Carpenter, Exhibit p. 4.
- “I appreciate the effort and time that has been put in and wish to thank those who have been involved. I like the main statute and the concept.” Paul Smith, Exhibit p. 5. (Note that Mr. Smith’s concern about the shortness of the public comment period was based on a misunderstanding.)
- “We agree that the current statutory scheme is confusing and in need of repair.” Margaret V. and Steven F. Barnes, Exhibit p. 17.
- “[The] present statutory scheme pertaining to no contest clauses leads to time-consuming and expensive litigation relating to the clauses, which disrupts administration of Estates and Trusts and delays resolution of the real issues sometimes for years. The proposed revisions generally eliminating the effectiveness of no contest clauses in most of the areas where the litigation has arisen is in my mind absolutely, positively a good thing.” Gary M. Ruttenberg, Exhibit p. 18.
- “Commission members, I am the chair of the Alameda County Trusts and Estates Section’s Estate Planning subcommittee. Today at lunch a group of trusts and estates practitioners discussed the proposed changes to the new statute at our monthly meeting. I have not been authorized to speak for this subcommittee or the section as a whole, to be clear. The opinions which follow are my own, but I can say that there were no objections voiced at the meeting about the Commission’s proposed revisions. ... I have read your report (well-written) and am glad the Commission understands the importance of a person’s being free to attach conditions to gifts of that person’s property and that the basic

principal of no-contest clauses will be retained. I favor clarity in statutes, and your proposal of a clear list of actions that constitute a 'direct contest' certainly is an improvement over the current situation." Linda C. Roodhouse, Exhibit p. 20.

- "The Commission and its staff are to be commended for the reforms proposed in their Tentative Recommendation. Prior attempts to address the difficulties presented in this area of the law have largely failed to provide the simplicity and consistency which will result from the adoption of the reforms that have been proposed. My sincere thanks go to everyone who has contributed to the making of the current recommendation." James Graham, Exhibit p. 32.

General Opposition

Two of the comments express general opposition to the proposed law:

- "After 43 years of practice in the field of estate planning, I strongly object to the proposed legislation to revise the law on no contest clauses. Particularly offensive is the elimination of the application of a no contest clause to a creditor claim or property ownership dispute." Robert L. Bletcher, Exhibit p. 16.
- "[No contest clauses] are extremely important to the vast majority of our estate planning clients. Almost without exception, these clients specifically authorize us to include a detailed no contest clause in their testamentary instruments in order to discourage litigation and deter interference with their wishes. They then review and approve such clauses before executing their testamentary instruments. ... For this reason, we are troubled by certain aspects of the Tentative Recommendation and the Proposed Legislation. In our view, very little change to the current no contest clause statutes is either necessary or warranted. We reluctantly recognize, however, that some change may be inevitable." David C. Nelson, for Loeb & Loeb, LLP, Exhibit p. 21.

Both of those commenters seem to be primarily concerned about the proposed changes to the law relating to forced elections. See "Forced Elections," below.

Overall Impression

For the most part, the comments support some, but not all, of the changes in the proposed law. In particular, there was considerable concern about doing away with the use of a no contest clause to create a forced election.

The specific concerns raised by commenters are discussed in detail below.

ENFORCEMENT LIMITED TO DIRECT CONTESTS

Much of the complexity of existing law derives from the fact that the definition of “contest” is open-ended. It encompasses any court action identified by a no contest clause as a violation of the clause. See Prob. Code § 21300(a). That catch-all approach is then restrained by a lengthy list of exceptions. See Prob. Code § 21305.

The proposed law would take a much simpler approach: limit the enforcement of a no contest clause to a specified list of “direct contests.” The list of exceptions would then be eliminated as unnecessary. The complexity of the statute would be significantly reduced and there would be far fewer substantive rules to construe and apply.

The Executive Committee of the Trusts and Estates Section of the State Bar (“TEXCOM”) voted 18-2 in favor of that change (with one abstention). See Exhibit p. 40. For other expressions of support for that change, see Exhibit pp. 19-20.

Most of the objections to this element of the proposed law focus on (1) its effect on forced elections, and (2) specific drafting issues. Those matters are discussed later in the memorandum.

General Opposition

Theodore I. Wallace, Jr., believes that there are some types of indirect contests that *should* be governed by a no contest clause, because the transferor intended that the no contest clause apply to the indirect contest. Absent some countervailing policy reason, that intention should be respected. See Exhibit p. 9.

In support of his view, Mr. Wallace points to the recent case of *McKenzie v. Vanderpoel*, 151 Cal. App. 4th 1442, 60 Cal. Rptr. 3d 719 (2007), which involved a trust beneficiary who wanted to petition for an adjustment to the allocation of trust assets between principal and income (under the California Uniform Principal and Income Act (“CUPIA”), Section 16320 *et seq.*). The court held that such a petition would trigger the trust’s no contest clause, in part because the proposed reallocation might impair the transferor’s overall testamentary plan by altering the balance of benefits between two different classes of beneficiary.

Shirley Kovar of TEXCOM also finds *McKenzie* instructive. But she draws a different conclusion. She believes that *McKenzie* illustrates the need for the proposed law. See Exhibit p. 12.

Gaps in Exemption List

The staff agrees with Ms. Kovar. *McKenzie* exposes a general problem with existing law, which the proposed law would eliminate. The existing statute relies on an express list of policy exceptions. See Section 21305. The staff believes that the list of exceptions will inevitably be incomplete. The universe of indirect contests is too wide to anticipate all of the possible situations in which action by a beneficiary might fall within the scope of a broadly worded no contest clause. It seems inevitable that there will be matters that would have been included in the list of exceptions had the issue been presented to the Legislature.

The staff believes that *McKenzie* provides an example of that problem. The Legislature has already decided that, as a matter of public policy, a no contest clause should not apply to modification of a trust under Section 15400 *et seq.* (which includes modification to address changed circumstances). See Section 21305(b)(1). That makes sense. Modification may be necessary to preserve the transferor's intentions. Such action should not be deterred by a no contest clause.

Action under CUPIA is very similar in purpose. It allows a trustee to impartially adjust between a trust's principal and income, to reflect changes in the trust's investment portfolio. If that power did not exist, necessary investment decisions might alter the balance of beneficial enjoyment between different groups of beneficiaries, contrary to what the transferor intended. As the note to Section 104 of the national Uniform Principal and Income Act (2000) explains:

Section 104 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration ... is the requirement ... that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion.

In the staff's opinion, action under CUPIA is a form of modification and serves the same general policy purpose: to preserve the transferor's intentions

despite a change in circumstances. If modification is exempt from a no contest clause, action under CUIPA should also be exempt.

In all likelihood, that specific issue has not been considered by the Legislature. Had the issue been presented to the Legislature, it seems likely that action under CUIPA would have been added to the list of exceptions.

That illustrates the problem with relying on a list of exceptions. There are inevitably going to be unintended gaps. An action that falls within a gap may be subject to a no contest clause in way that is contrary to public policy. There will then be pressure to amend Section 21305 to fill the gap. That will add to the complexity of the statute, especially if the Legislature continues the current practice of assigning different operative dates to different exceptions.

The proposed law would eliminate that problem.

FORCED ELECTIONS

Background

Under existing law, a no contest clause can be used to create a “forced election,” forcing an heir to choose between taking the gift offered under the instrument or asserting a creditor claim or 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 surviving spouse’s share of the disputed property. The surviving spouse can then choose to take the gift or assert the disputed ownership claim, but not both. If the surviving spouse asserts the ownership claim, the gift is forfeited by operation of the no contest clause.

If the gift is large enough, the surviving spouse will probably accept the gift, effectively waiving the community property claim. That will eliminate the cost, delay, and acrimony involved in litigating the claim. Estate assets will be preserved for the benefit of heirs, rather than spent on property tracing.

However, a forced election could be problematic in some circumstances. The Commission identified three general concerns about the use of a forced election:

- (1) *The beneficiary may settle for less than what is due.* Suppose that a surviving spouse has good reason to believe that the transferor’s estate plan would transfer \$100,000 of property that is actually

owned by the surviving spouse. If it would cost \$30,000 to adjudicate the matter, the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the inconvenience, risk, and delay of litigation are significant detriments, the surviving spouse might accept even less.

- (2) *The estate plan may be inconsistent with the beneficiary's own dispositional preferences.* For example, a surviving spouse would have liked her share of a family business to pass to her children from a former marriage. Under community property law, she should be free to make that disposition of her own interest in the business. Instead, the transferor's estate plan transfers the entire business to his children from a former marriage. A no contest clause may pressure the surviving spouse into accepting that result, even though it is contrary to her own preferences as to the disposition of property that is by law under her control.
- (3) *Unilateral disposition of community property is contrary to express public policy requiring spousal consent to a transfer of community property.* California law provides that one spouse may not make a gift of community property without the written consent of the other spouse. Fam. Code §§ 1100-1102. A forced election may have just that effect. The surviving spouse has not given advance written consent. Any acquiescence in the result may not be freely given. That may be especially true for an elderly surviving spouse.

The staff has always felt that the question of whether to preserve the use of a no contest clause to create a forced election is a difficult one. There are good arguments for and against the use of a forced election. When the staff proposed to the Commission that the tentative recommendation include language that would preclude forced elections, the staff acknowledged the difficulty of the policy choice and suggested that the change be made in part to provoke comment on the merits of the change:

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 propose law not include language preserving the forced election. That is the approach used in the proposed law.

CLRC Memorandum 2007-10, p. 16. The effort to provoke comment defending the forced election was very successful. We received a number of thoughtful and persuasive comments on that issue.

Support for Proposed Law

We received three comments expressly supporting the proposed law on the issue of forced elections:

- “I also favor eliminating ‘forced elections.’ The forced election is highly manipulative. It has historic connotations of ‘Father knows best.’ It is offensive to me for that reason. One’s community property interests are vested, and the forced election implied guts that vested, historically earned right. I realize it can be used by either spouse (or partner) and is not gender-biased. Nevertheless...” Linda C. Roodhouse, Exhibit p. 20.
- “The Tentative Recommendation requests comment regarding the proposal concerning forced elections. The proposal is excellent and should be adopted.” James Graham, Exhibit p. 35.
- TEXCOM voted 15-4 (with 3 abstentions) in favor of the proposal to preclude the use of a no contest clause to create a forced election.

General Opposition to Proposed Law

We received a number of comments expressing opposition to the proposed change in the law relating to forced elections.

Paul Smith believes that a forced election is a valuable tool for avoiding expensive litigation, and that there is no good substitute for it:

As to the comments regarding forced elections, I answer with a request. Provide a reasonable alternative — not that the parties should work it out ahead of time. If that happened we wouldn’t need laws, so get real. Sure there are abuses, but there are many situations where forcing an election discourages litigation.

See Exhibit p. 6.

Theodore I. Wallace, Jr., sees considerable value in the use of forced elections. He suggests that, under the proposed law, a creative contestant would characterize an attack on an instrument as a creditor claim, so as to escape the application of a no contest clause. He cites the case of *Zwirn v. Schweizer*, 134 Cal. App. 4th 1153, 36 Cal. Rptr. 3d 527 (2005), as an example where a disappointed heir argued that an action to enforce an alleged oral promise to include him in the transferor’s estate plan was a creditor claim rather than a contest, and therefore was not subject to the transferor’s no contest clause. See Exhibit p. 10.

Mr. Wallace also cites examples from his own practice that show the considerable benefit of using a forced election to avoid complicated community property litigation:

Persons entering marriage often have substantial separate property. This is especially true in the case of second (or even later) marriages. Where the separate property value increases substantially during the marriage, the surviving spouse may assert a community interest in that property. Disputes over the characterization of property can be avoided by carefully drawn premarital agreements. However, often people with substantial property overlook or ignore this financial aspect at the start of a marriage. Unless the transferor can put his or her spouse to an election with a no contest clause, expensive litigation can arise. The determination of the extent of the community component acquired during a lengthy marriage in the separate property can be enormously expensive and time consuming. The determination involves forensic accountants analyzing years of financial records and tax returns in order to calculate the community property amount under the *Pereira/Van Camp* cases. Other experts such as appraisers and business consultants also may be necessary.

I recently was involved in a case where the surviving spouse claimed that she had acquired a community property interest in her deceased husband's shopping center. They had been married for some 14 years. The preparation of the case involved numerous depositions, production of in excess of 12,000 documents as well as numerous computer disks, several discovery motions, and the designation of three accountants, two property managers, and two real estate appraisers as expert witnesses. The husband's trust actually left a substantial bequest to the widow and contained a general no contest clause. However, the trust did not have a clause putting the widow to an election to take the bequest in lieu of any community property claim. Not only is the separate versus community property analysis fact intensive and time consuming, the deceased transferor's successor is at a distinct disadvantage. The deceased transferor is no longer around to testify to his or her side of the case. The surviving spouse is not only liberated from the conflicting testimony of the deceased spouse but also may very well have the benefit of all of the presumptions in favor of community property. The decedent should be allowed to nip this whole process in the bud with a specific no contest clause.

The case that I just mentioned is not an isolated event in my practice. I have settled two such cases just this year with the litigation costs on *each* side in *each* case far exceeding \$100,000. And these cases were settled before trial.

See Exhibit pp. 10-11 (emphasis in original).

Margaret V. and Steven F. Barnes oppose the proposed change in the law and believe it will lead to a considerable increase in marital property litigation:

We strongly believe, however, that creditor's claim and property ownership disputes should continue to be covered by no-

contest clauses. It isn't just the typical "forced election" technique that needs protection. It is the carefully-crafted spousal property characterization agreements that we use so frequently to clean up our clients' commingling, achieve certainty regarding characterization, and create "integrated" estate plans upon which spouses can rely, particularly in second-marriage situations. Without the no-contest clause to enforce compliance with characterization agreements, there is nothing to preclude a spouse from accepting benefits under the decedent's estate plan and asserting a property ownership claim as well.

The current draft of the proposed statute will increase monumentally the occurrence of spousal post-death litigation, and deprive spouses of the peace of mind they currently enjoy with a forcefully worded no-contest clause.

See Exhibit p. 17.

David C. Nelson writes on behalf of his firm's Trusts and Estates Practice Group. He believes his group to be the largest trusts and estates practice group in the state:

To the best of my knowledge, Loeb's California Trusts and Estates Practice Group constitutes the largest such practice group in the State. Our practice spans the full spectrum of trusts and estates-related legal services, including wealth succession planning, trust and estate administration, and litigation. Collectively, we have drafted, implemented and/or litigated literally thousands of no contest clauses.

See Exhibit p. 21 (footnotes omitted). Mr. Nelson has considerable experience with no contest clause litigation:

I personally have litigated numerous no contest clause cases in the trial courts and have served as counsel of record in at least a dozen no contest clause appeals, including, most notably, *Colburn v. Northern Trust Company* (2007) ___ Cal. App. 4th ___, *Hearst v. Ganzi* (2006) 145 Cal. App. 4th 1195, and *Estate of Ferber* (1998) 66 Cal. App. 4th 244.

See Exhibit p. 21, n. 2.

Mr. Nelson states his group's general opposition to the proposed law's effect on forced elections:

Our most serious concern regarding the Tentative Recommendation and the Proposed Legislation is that they would severely limit the permissible scope of no contest clauses exclusively to "direct contests" of an instrument based on such things as forgery, lack of due execution, lack of capacity, undue

influence, fraud, etc. Doing so would preclude enforcement of no contest clauses with respect to numerous types of “independent rights claims” that case law and statute have long recognized as permissible subjects of no contest clauses, including such things as creditor’s claims, claims concerning the characterization of property (e.g., community property or separate property characterizations), and claims to title to or ownership of property. In our experience, inclusion of such independent rights claims as contests within a no contest clause has been extremely important, if not critical, to many of our clients to ensure that their wishes are carried out.

For nearly 100 years, California law has consistently held that:

- Giving effect to a transferor’s intent is the paramount rule in administering estates and trusts;
- Because they are purely gratuitous, a transferor has the right to impose any conditions he wants on his gifts as long as those conditions are not illegal or contrary to public policy; and
- No contest clauses are a valid means for imposing conditions and, while they must be interpreted narrowly, nevertheless are favored by the public policies of avoiding litigation and giving effect to a transferor’s wishes.

With this in mind, we emphasize again that, in our experience, transferors often specifically include independent rights claims as contests in their no contest clauses precisely because they wish to discourage litigation and claims that would interfere with their wishes. Until now, this has been permissible. By eliminating independent rights claims – which are neither illegal nor contrary to any recognized public policy – from no contest clauses, the Tentative Recommendation and the Proposed Legislation would effect a fundamental and far-reaching change to a century of settled law and policy that would seriously interfere with, if not often defeat, the intentions of countless transferors. We believe that such an extreme change should not be made absent exceptionally compelling reasons for doing so.

See Exhibit pp. 22-23 (footnotes omitted).

Mr. Nelson provides a recent example from his practice, in which a forced election served an important function in the transferor’s estate plan:

The recent *Colburn* case is just one example of this. In that case, the settlor left the residue of his substantial trust to a charitable foundation. However, at the time of his death, the settlor was subject to certain open-ended financial obligations to his former wife and their minor children under a marital dissolution

judgment. Because those obligations would survive the settlor's death and were open-ended, the amount of the residue passing to the foundation therefore might not have been ascertainable, and it might have been impossible to make distributions to the charitable foundation for many years after the settlor's death. Moreover, the open-ended nature of the obligations to the settlor's former wife and the children raised estate tax issues regarding the extent to which a charitable deduction would be allowed for the residual gift to the charitable foundation. To avoid these potential problems, the settlor attempted to quantify his financial obligations to his former wife and the children and included in his trust generous provisions to satisfy those obligations as so quantified, as well as substantial additional gifts beyond those obligations. The settlor also included a no contest clause that, among other things, would disinherit the former wife or the children if they claimed entitlement to open-ended amounts under the marital dissolution judgment. In effect, the settlor's former wife and the children could take under the marital dissolution judgment, or under the settlor's trust, but not both. The former wife and the children wished to bring precisely such claims while at the same time retaining their conditional rights under the trust. The Court of Appeal upheld the applicability of the no contest clause to their proposed claims. As a result, the former wife and the children were discouraged from asserting their claims and the settlor's intent was preserved.

See Exhibit p. 22, n. 3.

In addition to his general statements opposing the change in the proposed law, Mr. Nelson offers specific responses to the concerns about the use of forced elections that are stated in the tentative recommendation. Those responses are discussed in the next section of the memorandum.

Finally, Mr. Jeffrey A. Dennis-Strathmeyer comments that there is broad support for the use of forced elections and that any attempt to preclude the use of a no contest clause to create a forced election would be so unpopular that it would be politically untenable:

It will be virtually impossible to enact any bill whatever if the bill ... attempts to outlaw forced elections. In connection with my 23+ years working on the CEB Estate Planning and California Probate Reporter, I have had many opportunities to debate the relevant issues with a significant number of highly experienced estate planning attorneys. The overwhelming majority of those attorneys believe that forced elections are legitimate and often necessary devices for accomplishing estate planning objectives. They are particularly concerned with situations in which a surviving spouse might claim an interest in a family farm, inherited newspaper, or you-name-it, that is primarily separate property of a

deceased spouse and is devised to the descendants of the deceased spouse who are the current operators of the business. Claims of such community property interests are typically based on allegations that the deceased owner of the separate property business improved the business during lifetime by working in the business during the marriage. Forcing the surviving spouse to choose between asserting the claim or accepting a generous gift can avoid litigation (and family strife) while accomplishing the objective of keeping the farm in the family that has owned it for multiple generations.

See Exhibit pp. 37-38.

Response to Concerns About Use of No Contest Clauses

David Nelson and Jeffrey Dennis-Strathmeyer are not persuaded by the concerns that the Commission raised about the use of a no contest clause to create a forced election.

The general thrust of their response is that a beneficiary cannot be made worse off by being offered a choice. If the gift offered is not to the beneficiary's liking, the beneficiary can choose to assert the creditor claim or property ownership claim rather than accept the gift. The beneficiary is then in the same position as if no gift had been offered.

Specific responses to the Commission's concerns are discussed below.

Beneficiary May Settle for Less Than the Beneficiary is Due

Suppose that a transferor's estate plan would transfer \$100,000 of property that is actually owned by his surviving spouse. If it would cost \$30,000 to litigate the matter, the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the inconvenience, risk, and delay of litigation are significant detriments, the surviving spouse might accept even less.

David Nelson does not see any problem with that scenario:

Perhaps we are missing something, but we do not see the problem with this example. As an alternative to giving the surviving spouse \$80,000 and including a no contest clause, the transferor instead could give the surviving spouse nothing and still purport to dispose of the \$100,000 claimed by the surviving spouse. In that event, the surviving spouse would still have to litigate the claim at a cost of \$30,000, and therefore (if successful) would only receive a net amount of \$70,000 instead of \$80,000. The transferor's estate plan thus is actually more advantageous to the surviving spouse than the alternative.

See Exhibit p. 23.

That response presupposes that there are only two alternatives, each of which involves the transferor claiming ownership of the surviving spouse's community property. A third alternative would be for the transferor to acknowledge the scope of his spouse's property rights and decline to include that property within the estate plan. Under that approach, the surviving spouse would retain full ownership of his or her community property, without the need for any litigation.

However, the staff concedes that reality will rarely be so tidy. Some spouses will disagree. Some transferors will act unreasonably. Even where both spouses act rationally and in harmony, it may be very difficult to determine the exact boundaries of each spouse's community property rights. In all of these circumstances, the forced election provides a useful tool for reducing a complicated problem to a simple one.

Gift May Be Inconsistent With Beneficiary's Own Dispositional Preferences

Although a forced election does involve a choice, it is a "Hobson's choice." Because of the "take it or leave it" quality of the forced election, the beneficiary may be forced to choose between two undesirable results.

For example, a surviving spouse would have liked her share of a family business to pass to her children from a former marriage. Under community property law, she should be free to make that disposition of her own interest in the business. Instead, the transferor's estate plan transfers the entire business to his children from a former marriage. A no contest clause may pressure her to accept that result, even though it is contrary to her own preferences as to the disposition of property that is by law under her control.

Mr. Nelson again responds by emphasizing the freedom of choice involved in a forced election:

The short answer to this example is that the surviving spouse is free to claim his or her community property interest. A no contest clause does not and cannot prevent this. A no contest clause might cause a forfeiture of gifts the transferor makes to the surviving spouse. But the clause would be meaningful only if the transferor's gifts to the surviving spouse that would be forfeited are of equal or greater value than the surviving spouse's community property interest. By structuring an estate plan in this way, the transferor essentially is doing nothing more than offering to buy the surviving spouse's interest, with the consideration being gifts to the surviving spouse that the transferor has no obligation to make. As with any purchase offer, the surviving spouse can choose to accept it, forego

his or her community property interest, and receive the gifts given as consideration. Or, the surviving spouse instead can choose to reject the offer, assert and retain his or her community property interest, and forego the gifts offered as consideration. In either event, the choice is entirely up to the surviving spouse. We see no problem with affording a surviving spouse such a choice.

See Exhibit p. 24.

That is all correct, as far as it goes. However, the staff is still somewhat concerned about the nature of the choice being offered. By the time the choice is presented, the transferor is deceased. Bargaining and compromise are no longer possible. The transferor may have framed the choice in a way that presents the beneficiary with a choice between the lesser of two evils.

However, there is nothing in the law that requires that an estate plan be kind. A transferor is free to give or withhold gifts, or put lawful conditions on them. The transferor is allowed to present a beneficiary with a difficult choice. Such a choice may seem mean-spirited, but that does not make it unlawful or against public policy.

Gift May Constitute Unilateral Disposition of Community Property

The Commission has also noted that California law does not allow one spouse to transfer community property on death without the written consent of the other spouse. See, e.g. Section 5020 (nonprobate transfer of community property). A forced election could be seen as having that effect, contrary to express public policy.

On the other hand, the surviving spouse's choice to accept the gift offered under a forced election can be seen as acceptance of the estate plan's disposition of community property. Seen that way, the disposition is not unilateral. The surviving spouse's freely given assent completes the transfer.

That was the view of the majority in *Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr 2d 165 (1994)). Mr. Nelson quotes the majority opinion in that case:

"Both Marlene and the dissent misapprehend the purpose and effect of a no contest clause. Such a clause essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument. Thus, while the enforcement of a no contest clause might work a forfeiture of a surviving spouse's conditional right to take under the trust

instrument, it does not, as Marlene and the dissent urge, work any forfeiture or conversion of the spouse's community property. We have no doubt that no contest clauses discourage some spouses from litigating over perceived community property rights in estate property. However, the fact that a no contest clause might discourage a surviving spouse in this way does not mean that a 'theft' of community property has occurred. Such a clause does not deprive the spouse of his or her community interests in property, nor does it hinder the ability of the spouse to assert such interests. To the extent the spouse believes valid community claims may be made against the estate property, the spouse remains free to pursue them at his or her option. In doing so, however, the spouse may not retain the distribution conditionally provided under the estate plan." *Id.* at 265.

...

"[W]e hold that a no contest clause is properly enforceable against a surviving spouse who, under the terms of a will or trust instrument, brings a contest against that instrument based on the assertion of community property rights to estate property. When a spouse decides to pursue such a challenge, we see no legal or policy reason that would justify the spouse to also take under the instrument in clear violation of the decedent's wishes." *Id.* at 267-68.

See Exhibit pp. 24-25.

Loophole

Policy issues aside, Robert Denham points out a loophole in the proposed law:

I agree with the general thrust of the tentative recommendation, but I think Prob C § 21333 should be amended to clarify the status of forced election provisions that do not meet the statutory definition of a no contest clause, which requires that the provision would penalize a beneficiary who files a contest as defined in the statute.

While a "contest" is defined in Prob C § 21330(a) to mean a pleading alleging the invalidity of a protected instrument, the discussion indicates that the proposed revision would effectively prevent the use of a no contest clause to create a "marital forced election" yet it is easy to imagine clauses that would require a spouse to waive community property interests as a condition of a gift but would not involve a potential contest as defined. For example, a clause might simply provide that the spouse shall receive a gift of specified separate property if the spouse waives her interest in other specified property without stating whether the latter property is in fact the separate property of the testator.

In this case, it is far from clear that the clause would constitute an unenforceable no contest clause because a claim by the spouse to a community property interest in the property does not appear to allege the invalidity of the provision. In other words, it seems that the statute by its literal terms would allow the testator to condition a separate property gift on an agreement by the spouse to give up her interest in other property so long as the clause tacitly assumes that the spouse has an interest in the property. Nor is this necessarily inappropriate. But the language of the discussion implies that a more sweeping ban on forced elections is intended.

See Exhibit p. 7.

David Nelson raises the same issue:

[The] elimination of independent rights claims from no contest clauses also is puzzling because the same result could still be achieved in other ways. For example, a transferor could provide for a gift of \$1 million to his or her surviving spouse, but only on condition that the surviving spouse release any community property claim he or she may have to Blackacre. This condition is not a no contest clause, and so would not be precluded by the Tentative Recommendation and the Proposed Legislation. Yet, it would have exactly the same effect as a \$1 million gift to the surviving spouse accompanied by a no contest clause causing a forfeiture of that gift if the surviving spouse asserts a community property claim to Blackacre. In either case, the surviving spouse can either have her interest in Blackacre or the \$1 million gift, but cannot have both. It therefore makes no sense and would serve no purpose to eliminate such independent rights claims from permissible no contest clauses.

See Exhibit p. 25.

That is a significant gap in the coverage of the proposed law. The staff agrees that there is little point in preventing the use of a no contest clause to create a forced election if a forced election can be created by other methods.

If the Commission decides to preserve the proposed prohibition on the use of a no contest clause to create a forced election, the staff will prepare language to close the loophole discussed above. That could be done by expanding the definition of no contest clause to include a gift that is conditioned on the beneficiary waiving an interest in a debt or purported estate property.

Analysis

A forced election can provide significant advantages in estate planning. It allows a transferor to preempt potentially expensive and disruptive litigation by

offering a gift in exchange for not pursuing a creditor claim or property ownership dispute.

Mr. Wallace cites examples from his practice where an effective forced election would have saved hundreds of thousands of dollars in litigation costs. Mr. Nelson describes a case in which a forced election was used to resolve an open ended support obligation, allowing the transferor to dispose of the remainder of his estate without worrying that his former spouse would attempt to “double dip,” taking both the testamentary gift and asserting the ongoing support obligation.

The staff has never doubted the significant utility of the forced election. Used intelligently, it can be beneficial to all involved.

On the other hand, a transferor may use the device to pressure the beneficiary into accepting an undesirable result. That risk is probably less acute when the forced election involves a business debt. The creditor can make an economically rational choice about whether or not to accept the gift offered under the estate plan. The risk is probably most acute when the transferor and beneficiary are married. If the transferor was dominant in the relationship, the surviving spouse may be more likely to acquiesce in the transferor’s plan, no matter how little regard the transferor showed for the surviving spouse’s right to control the disposition of community property.

That concern is real, but the commenters make a very persuasive point in response: the transferor is not obliged to make *any* gift to the beneficiary. The transferor could entirely disinherit the beneficiary. The beneficiary would then be required to pursue a creditor or property ownership claim, just to be made whole. If the transferor offers a gift that will make the beneficiary better than whole, without any need for litigation, that offer does the beneficiary no harm. If the offer is insufficient, the beneficiary can choose to reject it, and is no worse off than if the offer had not been made at all.

There is no clear consensus for a significant change to the law governing forced elections. To the contrary, the commenters have presented persuasive arguments for the continued use of the forced election. It is also suggested that support for the use of forced elections is widespread within the bar and that any attempt to prohibit forced elections would be strongly resisted. The Commission should be cautious about recommending a significant substantive change in the law without clear evidence that it is needed and would be welcomed.

The staff recommends that the proposed law be revised to preserve existing law with respect to forced elections. As under existing law, a no contest clause would be enforceable against a creditor claim or marital property claim if the clause itself expressly states that application. See Section 21305(a) (no contest clause inapplicable to creditor claim or property claim unless clause expressly states such application).

If the Commission adopts the staff's recommendation, the staff will prepare implementing language as part of a draft recommendation, for consideration at a future meeting.

PROTECTED INSTRUMENT

Proposed Section 21330(d) would define the term "protected instrument" as follows:

- "Protected instrument" means all of the following instruments:
- (1) The instrument that contains the no contest clause.
 - (2) An instrument that is expressly identified in the no contest clause as being governed by the no contest clause.

That term is then used to limit the application of a no contest clause. See proposed Section 21330(a) ("Contest" means a pleading in a proceeding in any court alleging the invalidity of a *protected instrument* or one or more of its terms.") (emphasis added).

Charles A. Collier, Jr., wrote in support of that approach: "The protected instrument definition should eliminate uncertainty as to whether the no contest clause applies to other estate planning documents." See Exhibit p. 1.

Other commenters raised questions about the adequacy of the definition:

- Shirley Kovar asks whether "the instrument that contains the no contest clause" includes an amendment of that instrument. See Exhibit p. 8. David C. Nelson raises the same issue. See Exhibit p. 27.
- David C. Nelson also notes a potential ambiguity where a no contest clause purports to apply to any amendment of the instrument that contains the clause. If the amendment is successfully invalidated, was it ever an "amendment" within the meaning of the clause? See Exhibit p. 27.
- Peter R. Palermo questions whether a no contest clause in a trust would apply to "subtrusts." See Exhibit p. 19.
- Finally, TEXCOM (by a vote of 16-4, with one abstention) would settle all of these issues by providing that a no contest clause

cannot apply to an instrument that was not “in existence” at the time that the clause was executed. See Exhibit p. 42. That would preclude application to any later executed amendment.

Those issues are discussed below.

Future Instruments

The proposed law requires that an instrument be “expressly identified” in a no contest clause in order to be governed by the clause. The Commission intended that language to be construed strictly. A general reference to “any future instrument that amends this instrument” would not satisfy the standard.

That intention is probably not sufficiently clear. It could be clarified by adopting the suggestion made by TEXCOM (at Exhibit p. 42) and David C. Nelson (at Exhibit p. 30). Proposed Section 21330(d) would be revised as follows:

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

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

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause as being governed by the no contest clause.

That would place a burden on a transferor to draft a new no contest clause for any subsequent amendment, but it would eliminate any ambiguity that might otherwise produce uncertainty and litigation.

The staff recommends that the revision be made.

Application of No Contest Clause to a “Subtrust”

Peter R. Palermo directs the Commission’s attention to two cases that involved intervivos family trusts. See *McIndoe v. Olivos*, 132 Cal. App 4th 483, 33 Cal. Rptr. 3d 689 (2005); *Scharlin v. Superior Court*, 9 Cal. App. 4th 162, 11 Cal. Rptr. 2d 448 (1992).

Both of those cases involved similar facts. A husband and wife executed a joint intervivos family trust. The trust provided that, on the death of the first of the spouses, the joint trust would be divided into two new trusts — a revocable survivor’s subtrust, and an irrevocable decedent’s subtrust. This arrangement provides tax benefits.

In each of the cited cases, the trust instrument contained a no contest clause. After the husband’s death, the surviving spouse amended the survivor’s subtrust. A beneficiary then petitioned the court for a declaration of whether a

contest of that amendment would also be a contest of the irrevocable decedent's subtrust, under the terms of the no contest clause. In other words, does a contest of one subtrust also constitute a contest of the other?

In both cases, the court held that a contest to the revocable survivor's subtrust did not trigger forfeiture of benefits provided under the irrevocable decedent's subtrust. However, those holdings were based on analysis of the terms of the no contest clause, in order to effectuate the transferor's intent. A different result could have been reached if it had been desired: "Had the trustors intended a contest to a particular subtrust result in a contest to all subtrusts, they could have so stated." *McIndoe*, 132 Cal. App. 4th at 489.

Under the proposed definition of "protected instrument" a no contest clause in a joint trust *could* apply to that trust as well as any subtrusts that are created on the death of one of the settlors. All of those trusts are created by a single instrument, and the no contest clause governs that instrument. The question of how the clause applies to a subtrust would be determined by the terms of the clause. The definition of "protected instrument" would not be a limiting factor.

ELIMINATION OF DECLARATORY RELIEF PROCEDURE

One of the principal problems with existing law is uncertainty as to whether a particular no contest clause will govern a particular action by a beneficiary. The combination of individually drafted clauses and the open-ended nature of what might constitute an indirect contest, can make it very difficult to know in advance whether a contemplated action might trigger a forfeiture.

Existing law provides a declaratory relief procedure that can be used to resolve that uncertainty. Use of the declaratory relief procedure does not itself trigger a no contest clause. Because the risk of forfeiture (and attorney malpractice) are so significant, the use of declaratory relief has become very common. If there is any doubt as to whether a no contest clause will govern a beneficiary's action, the prudent course is to seek declaratory relief.

One of the goals of the proposed law is to reduce the uncertainty as to the scope of operation of a no contest clause to a level where the declaratory relief procedure is not needed. That would be achieved by limiting the operation of a no contest clause to a fixed list of fairly straightforward direct contests and by defining the term "protected instrument" so as to limit the instruments that are

governed by a no contest clause to an easily determined set. With those changes, the proposed law would also repeal the declaratory relief procedure.

Charles A. Collier, Jr., writes in support of that change: “Limiting a no contest clause to a ‘direct contest’ eliminates most uncertainty. Elimination of the declaratory relief provision is long overdue.” See Exhibit p. 1.

We received two comments in general opposition to the change. Theodore I. Wallace, Jr., maintains that the number of declaratory relief petitions is manageable and that the cost of declaratory relief serves as an adequate limit on its overuse:

The Number of Safe Harbor Petitions Is Manageable. In my experience the Recommendation exaggerates the “excessive litigation” issue. The Recommendation states that Orange County considers some 100 to 150 safe harbor petitions per year. I often sit through a morning calendar in the Orange County probate court which has as many as 40 diverse petitions on calendar. If the probate court on average hears only two or three safe harbor petitions a week, the number seems quite manageable. This is especially true because many of the safe harbor petitions are unopposed and granted routinely.

The Expense of a Safe Harbor Petition Acts as a Control. I suspect that in general, safe harbor petitions are filed only where serious money is involved. The expense of the preparation and presentation of a weak safe harbor petition in a case where the assumed amount in controversy would be small, should be a deterrent in and of itself to filing the petition.

See Exhibit p. 9 (emphasis in original).

Peter R. Palermo agrees that the proposed law would eliminate the need for most declaratory relief petitions, but that there would still be cases in which the operation of a no contest clause would be uncertain. In those few cases, the declaratory relief procedure would be useful. He is against deleting the procedure. See Exhibit p. 19.

Finally, Richard R. Birnberg points out that case law may allow for declaratory relief to construe the scope of a no contest clause, *even if the statutory procedure were to be eliminated*. See Exhibit p. 46. He cites *Estate of Friedman*, 100 Cal. App. 3d 810, 161 Cal. Rptr. 311 (1979), as an illustration. In that case, a potential contestant petitioned the court for interpretation of a will. More specifically, the petitioner requested a determination of whether a contemplated complaint would violate the will’s no contest clause. The request for an interpretation did not itself violate the no contest clause. Thus, there does appear

to be a common law basis for declaratory relief to construe the scope of application of a no contest clause.

Given that fact, it isn't clear that a simple repeal of the statutory procedure would serve much purpose.

Another option would be to go beyond repeal of the statutory procedure, and create a general prohibition on the use of declaratory relief to construe a no contest clause. Given the comments suggesting that there might still be some continued need for judicial interpretation, even after enactment of the proposed law, the staff is uncomfortable with that approach. It is one thing to remove a special statutory remedy that may be unnecessary; it is another to eliminate an established common law remedy.

In light of the comments that we have received, **the staff believes that the declaratory relief procedure should be preserved for now.** If the proposed law has the expected effect (simplification of the law and greater certainty as to the scope of application of a no contest clause), then the use of declaratory relief should drop significantly as a result. That could solve the reported problem of overuse, without risking the elimination of a remedy that might still be useful in some cases.

PROBABLE CAUSE EXCEPTION GENERALLY

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

- Forgery
- Revocation
- Disqualification of a beneficiary under Section 21350.
- The provision benefits the person who drafted or transcribed the instrument.
- The provision benefits a person who directed the drafter of the instrument (unless the transferor affirmatively instructed the drafter regarding the same provision).
- The provision benefits a witness to the instrument.

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

The existing probable cause exception does not apply to a direct contest brought on the following grounds: lack of due execution, incapacity, menace,

duress, or a case of fraud or undue influence that does not involve one of the beneficiaries listed above. The staff sees no policy reason for that distinction.

The proposed law would extend the existing probable cause exception to *all* types of direct contests.

That extension of the existing probable cause exception would provide greater latitude to contest an instrument that is believed to have been procured through fraud or undue influence.

Support for Expanded Probable Cause Exception

Jeffrey Dennis-Strathmeyer writes that “Prevention of Elder Abuse requires a ‘probable cause’ exception for contests alleging lack of capacity and/or undue influence.” See Exhibit p. 37. He cites an example from his own practice to illustrate the need for the probable cause exception:

I once won a will contest by proving that the decedent was impersonated at a mental exam on the day the will was signed. Most cases involving wills signed by incapacitated persons and/or persons who have been subjected to undue influence are not nearly so entertaining, but they appear to be common and will likely become more so as the population ages. I’m not surprised that Florida, with its large senior citizen population, is one of the states that does not enforce no-contest clauses.

Id.

TEXCOM voted 17-2 in favor of the expanded probable cause exception (with one abstention). See Exhibit p. 40. However, TEXCOM’s support was conditioned on using a different standard to determine probable cause. (TEXCOM was not the only commenter who suggested changing the standard for probable cause. That issue is discussed below. See “Probable Cause Standard.”)

Opposition to Probable Cause Exception

Theodore I. Wallace, Jr. is opposed to the expansion of the probable cause exception:

The Probable Cause Safeguard May Just Create Another Layer of Litigation. In my view, limiting enforcement of a no contest clause to direct contests that are not brought with probable cause could proliferate, not reduce, contest litigation. First, the contestant calculates the potential benefit of a successful contest. The contestant then weighs that benefit against (1) possibility of forfeiting the bequest in the instrument, (2) the litigation costs of a

contest and (3) the chances, if the contest fails, of persuading the court that probable cause existed. If the contestant goes forward with the contest, then all of the expense and delay of the litigation ensues. If the contestant loses the contest, then litigation starts all over again over the issue of probable cause. So, even if the new statute allows a no contest clause to bar only direct contests, I would eliminate the probable cause exception.

See Exhibit p. 10 (emphasis in original).

The staff agrees that expansion of the probable cause exception will lead to an increase in contest litigation. In a sense, that is the point of the proposed change. There are certain contests that would proceed if there were a probable cause exception, but that would otherwise be deterred (i.e., cases where there is probable cause to challenge the instrument). The expanded probable cause exception was not intended as a way of reducing litigation.

Recommendation

Assuming that concerns about the probable cause standard can be resolved, **the staff recommends that the Commission include the expanded probable cause exception in its final recommendation.** It should help to reduce fraud and undue influence that would otherwise be shielded by a no contest clause. Furthermore, it is merely an expansion of existing policy, which already provides a probable cause exception for most types of direct contests (including some that are grounded in fraud and undue influence).

Exception for Forced Elections

If the Commission decides that a no contest clause should apply to a creditor claim or property ownership claim, **the probable cause exception should not apply to those claims.**

A probable cause exception would be largely 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 a beneficiary has a property interest in estate assets, but wants to avoid the cost of determining exactly how large that interest is. The gift offered 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 transferor's ownership of estate assets. For that reason, a probable cause exception would defeat many, if not most forced elections.

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.

PROBABLE CAUSE STANDARD

The proposed standard for determining probable cause is similar to the standard stated in the Restatement (Third) of Property. Proposed Section 21333(c) provides, in relevant part:

Probable cause exists if, at the time of instituting the contest, the evidence available to the person who instituted the contest would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that the contest will be successful.

The “more likely than not” standard is stricter than the existing standard of probable cause provided in Section 21306. That standard has been construed by one court, which held that the standard is essentially the same as the standard for malicious prosecution: the question is “whether any reasonable attorney would have thought the claim tenable.” *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002).

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. v. Albert & Oliker, 47 Cal. 3d 863, 886, 765 P.2d 498, 254 Cal. Rptr. 336 (1989) (construing “probable cause” standard in malicious prosecution).

The staff sees three reasons for preferring the proposed law over the “legally tenable” standard:

- (1) The “legally tenable” standard would gut the deterrent effect of a no contest clause. A contestant would only need to show that a contest isn’t completely without merit in order to avoid the clause. That is a very low standard. If the no contest clause is to have any significant effect, it should apply when a contest is “extremely unlikely” to succeed.
- (2) There are already sanctions for bringing a frivolous claim (including the sanctions authorized under Code of Civil Procedure Sections 128.5-128.7 and the possibility of a malicious prosecution action). A no contest clause that merely adds an additional penalty for such actions would not accomplish very much.
- (3) A strict standard is significantly better than nothing. Existing law provides no exception for many fraud and undue influence contests. The proposed law would make it easier to bring such contests.

Concerns About Proposed Standard

TEXCOM believes that the proposed standard is too strict. They feel that the difficulty of proving undue influence is often so great that requiring a contestant to show that it is more likely than not that the contest will prevail, based on the evidence available at the outset, is unreasonable and will seldom be of any use:

TEXCOM believes that a more liberal standard for the probable cause exception is essential to CLRC’s proposal. Filing a direct contest against a donative instrument is different from most other types of litigation, where the plaintiff knows a great deal about what happened. Most direct contests include allegations of undue influence. In those cases, the disappointed potential contestants know only that the testamentary instrument’s provisions appear “unnatural,” for example, a child whose inheritance is substantially less than that going to a sibling.

Although an “unnatural” testamentary disposition is an indication of undue influence (*Estate of Yale* (1931) 214 Cal. 115),

that factor alone does not satisfy the probable cause standard in the Tentative Recommendation (...“(I)f ... the evidence available... would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that a contest will be successful.”).

Undue influence usually takes place behind closed doors. It is difficult to prove by direct evidence; it “can only be established by proof of circumstances from which it may be deduced.” *Estate of Ferris* (1960) 185 Cal. App. 2d 731, 734. By the time the possibility of undue influence is under investigation, the decedent is no longer available to discuss the reasons for the “unnatural” gift.

See Exhibit pp. 40-41. The staff agrees that it will often be difficult to prove undue influence based on the evidence known to the contestant. However, the staff is reluctant to adopt a standard that would allow a contest to proceed without risk of forfeiture, based on evidence as thin as the fact that the transferor’s instrument is considered to be “unnatural” (e.g., one sibling receives considerably more than another under the instrument).

TEXCOM continues:

Among the factors that indicate the presence of undue influence are that the will’s dispositions differ from the intentions that the decedent expressed both before and after its execution; the chief beneficiaries had the opportunity to control the testamentary act; the decedent’s weakened mental and physical condition was such as to permit a subversion of his or her free will; and the chief beneficiary was active in procuring the instrument (*Estate of Lingenfelter* (1952) 38 Cal. 2d 571, 585; *Estate of Yale*, supra. at p. 122).

A beneficiary has only 120 days in which to file a contest. Probate Code sections 16061.8 (trust contests) and 8270(a) (will contests). During this limited period, the would-be contestant has no means to compel discovery of the information needed to determine whether the contest would be successful.

Significant sources of information that “would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that the contest will be successful” include the drafting attorney’s testimony and files, the decedent’s physician’s testimony, and the decedent’s medical records.

The drafting attorney’s testimony and files are likely to provide information as to whether dispositions under the instrument in question differ from the decedent’s intentions as expressed before and after its execution, whether the chief beneficiary had the opportunity to control the testamentary act, and the extent to which the chief beneficiary was instrumental in procuring the instrument. But most drafting attorneys will not voluntarily discuss the decedent’s estate plan or make their files available to a potential contestant.

The descendant's physician and medical records will be helpful in determining the extent to which the decedent was susceptible to undue influence. But the Health Insurance Portability and Accountability Act (HIPPA) (Pub L 104- 191, 110 Stat 1936) and California's Confidentiality of Medical Information Act (Civil Code section 56 et. Seq.), prevent a would-be contestant from reviewing the decedent's medical records or examining the decedent's physicians until after the contest is filed.

See Exhibit p. 40. These evidentiary concerns are valid. However, they could perhaps be addressed by expanding the evidence used to evaluate probable cause. That is, rather than judging probable cause based only on the evidence known to the contestant prior to discovery, the standard could allow the court to consider the totality of the evidence. That possibility is discussed further below.

TEXCOM concludes:

CLRC's strict standard of probable cause places an unrealistically high burden for would-be contestants to overcome. The result will increase the number of instruments procured by undue influence. Although TEXCOM did not vote on an alternative definition, it urges CLRC to adopt a definition of "probable cause" that is realistic in the context of contests based on undue influence.

TEXCOM overstates the problem. No matter how strict the standard is, it would not result in an *increase* in instruments procured through undue influence. At present there is no probable cause exception. Adding a probable cause exception can only make it easier to challenge undue influence.

James S. Graham is also opposed to the proposed standard:

The Restatement Third standard of probable cause should be rejected in favor of the existing standard set forth in Probate Code section 21306 as delineated in *Estate of Gonzalez* (2002) 102 Cal. App. 4th 1296. A continuation of the section 21306 standard will give greater certainty to the law. This is especially true since the section 21306 standard is based on a large body of existing California cases. The Tentative Recommendation has not identified any problems with section 21306 other than the fact that it is too narrow in scope. Adopting the Restatement Third standard will thrust probate litigators into a void that will be filled only as future decisions apply the new definition.

...

In any event, I would submit that if proposed Probate Code section 21333(c) is not revised, it will set the bar at too high a level and discourage too many otherwise meritorious direct contests from being made. I doubt that very many probate litigators will be willing to render an opinion that probable cause exists.

Always making a correct probable cause determination---which is what the new law will require since the probable cause determination is not going to be exempt from the no contest clause — is usually going to be a great challenge for probate litigators for several reasons. The 120-day statute of limitations to bring an action always imposes severe time constraints. By the time a proposed contest comes before the probate litigator, usually very little time is left. In addition, since trusts and beneficiary designations may become operative without two independent witnesses to attest to the validity of the instrument, making an assessment of the prospects of a contest is always difficult. Direct proof is often not available which means cases have to be proven circumstantially. Making an accurate capacity determination of a deceased person without access to medical records is problematic since lay witnesses are often unreliable. Likewise, making an accurate determination of where funds went without access to financial records is difficult. Since the usual elder adult abuser is in control of the decedent during his or her final days, making an accurate assessment of the prospects of a case is usually a great challenge. If you require probate litigators to make a probable cause determination to the standard required by the Restatement Third without discovery and on the basis that an incorrect determination will be a violation of the no contest clause, as a matter of business judgment, not many of us are going to be willing to recommend litigation except in the clearest of cases since the malpractice risks will be too high.

There is one other part of proposed Probate Code section 21333(c) that requires comment. The proposed revision is silent on the subject of when the probable cause determination is to be made which means that in some cases it will not be made until after the contest has been tried.

See Exhibit pp. 34-35. Mr. Graham's concerns are similar to those raised by TEXCOM. He believes that the proposed standard is unreasonably strict given the short time for filing a contest, the difficulty of proving undue influence, and the private nature of many of the facts that will be required to prove undue influence.

Intermediate Standard

One possible way to address the concerns that have been raised would be to adopt an intermediate standard that would fall somewhere between "more likely than not" and non-frivolous. Some possible alternatives are discussed below. **The staff invites comment on these alternatives, as well as suggestions of other intermediate standards that might be used.**

Substantial Likelihood

Although the standard used in the proposed law is very similar to the Restatement standard, there is one important difference. The Restatement standard provides:

Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a *substantial likelihood* that the challenge would be successful.

Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003) (emphasis added).

The meaning of “substantial likelihood” is not defined. The proposed law substituted a more easily understood measure, “more likely than not.”

It would be possible to use the exact language from the Restatement standard. The meaning of “substantial likelihood” is somewhat vague, but it probably means more than merely tenable. That interpretation could be affirmed, either in the statute or its comment: “‘Substantial likelihood’ means a claim that is more than merely tenable.”

Prima Facie Evidence

Alternatively, the proposed law could borrow from the anti-SLAPP statute. Once the defendant in the underlying action establishes that the conduct at issue is protected by the anti-SLAPP statute, the burden shifts to the plaintiff to show “that there is a probability that the plaintiff will prevail on the claim.” Code Civ. Proc. § 425.16(b)(1). Cases interpreting that requirement have held that:

In order to establish a probability of prevailing on the claim ..., a plaintiff responding to an anti-SLAPP motion must “state[] and substantiate[] a legally sufficient claim.” ... Put another way, the plaintiff must “demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” ... In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant...; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.

Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 821, 50 P.3d 733, 123 Cal. Rptr. 2d 19 (2002) (citations omitted) (emphasis in original).

The advantage of that approach is that it would require only that the contestant have prima facie evidence supporting the grounds for the contest. It would not be necessary to show that the overall weight of the evidence makes it more likely than not that the contest will succeed.

The staff is not entirely sure how that approach would work when attempting to prove undue influence (which is usually proven by a pattern of circumstantial indicia of undue influence, which taken together add up to convincing proof of undue influence). Nor is it clear how it would work if the contestant lacks key evidence (e.g., medical records necessary to show incapacity).

Expanded Evidentiary Basis

Another possible approach would be to base the determination of probable cause on the totality of the evidence, rather than just the evidence that was available to the contestant prior to commencement of the action. That would allow the court to assess the reasonableness of the contest in light of evidence that is turned up in discovery. Thus:

Probable cause exists if the totality of the evidence presented at trial would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that the contest will be successful.

That would still present a contestant with a considerable gamble. The contestant would need to decide whether to proceed without knowing for sure whether the evidence would eventually justify the reasonableness of the decision. Still, this would be more forgiving than a standard that looks back to the information available before discovery.

This approach could also be combined with the substantial likelihood language, to soften the standard further. Thus:

Probable cause exists if the totality of the evidence presented at trial would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest will be successful.

Staff Recommendation

The staff recommends against adopting the *Gonzalez* court's interpretation of probable cause, which would appear to exempt any non-frivolous claim from

the effect of a no contest clause. That would be very close to making a no contest clause unenforceable.

Of the alternatives described above, the staff sees possible merit in using a “substantial likelihood” standard, with an interpretive gloss. It might also be appropriate to expand the evidentiary basis on which probable cause is judged, to include all evidence presented at trial.

The staff invites comment from practitioners on (1) whether these alternative standards would adequately address their concerns, and (2) which of the alternatives would be best.

Pre-Trial Probable Cause Hearing

Another possibility, which the Commission considered and provisionally rejected earlier in the study, would be to provide for a preliminary hearing on the issue of probable cause, with limited discovery. The hearing itself would not trigger the operation of the no contest clause. This would allow a contestant to determine whether the contest would trigger the no contest clause before proceeding. (The anti-SLAPP statute provides a model for a preliminary hearing on the merits, with limited discovery.)

Jeffrey Dennis-Strathmeyer suggests something similar: allowing a contest to proceed through some period of discovery without triggering a no contest clause. Only if the contest proceeds beyond that point would the contestant risk forfeiture.

The time for determining the existence of probable cause for bringing a contest alleging lack of capacity or undue influence must be delayed. I am concerned that there are many cases in which the potential contestant will find it impossible to investigate a suspicious will without initiating legal action. It may be impossible to gather relevant information concerning the circumstances of the creation of the will or trust. The drafter may be unknown or unwilling to provide credible evidence. Witnesses are often not impartial persons who are willing to provide information. Medical records often are not available without court proceedings. Accordingly, if there is a desire to avoid protecting the guilty, the contestant must be able to initiate the contest and continue it for a reasonable period of discovery without being deemed to have *per se* acted in bad faith and without probable cause. In that case, assuming it is not shown that the contestant had actual knowledge that probable cause would not be discovered, the significant issue would be whether the contestant *continued* the contest after discovering a lack of probable cause.

See Exhibit p. 39 (emphasis in original).

James Graham seems to be suggesting something similar; a preliminary determination of probable cause, with limited discovery:

The policy reason behind the recommendation that the probable cause determination be based only on the evidence existing at the time the contest is initiated is not clear. Presumably, the policy reason is to make for a streamlined probable cause hearing that will not be too costly to the parties or too time consuming on the courts. But if this is so, it would seem to me that this policy objective could be achieved by simply specifying that the probable cause hearing would be one that would have to be determined on the basis of declarations with no testimony and no cross-examination allowed so that the proceeding does not turn into a mini-trial on the merits.

See Exhibit p. 34.

TEXCOM voted unanimously against creating a preliminary probable cause determination:

The probable cause determination should not be made before the contest is tried. A pre-trial probable cause determination will not reduce litigation. If the court finds probable cause to exist before trial, the court will hear the same testimony at trial.

Moreover, the proposal for a pretrial determination of probable cause ignores the likelihood that the beneficiary who loses the pretrial determination is likely to seek appellate review, particularly during the period that the courts of appeal determine how to apply the probable cause standard. Thus, the likelihood exists that a pre-trial probable cause determination will result in as much appellate litigation and delay as the current declaratory relief procedure.

In addition, the proposal for pre-trial determination of probable cause ignores the fact that a probable cause determination of a direct contest will be fact-intensive. It differs in this respect from the current procedure for declaratory relief, which usually involves determining a decedent's intent. Parties will want to take depositions and engage in substantial discovery before the pre-trial determination.

On the other hand, requiring the court to make the probable cause determination after trial will result in fewer determinations of probable cause because the weaker cases will settle or be dismissed before trial. It will avoid the trial court having to consider the same evidence twice. And it will result in fewer appeals as the losing contestant or the losing respondent will file one appeal, not two.

See Exhibit p. 44.

The staff remains concerned that a preliminary probable cause determination, however it is implemented, would invite litigation. Discovery could be used to explore for supporting evidence, without risk of forfeiture. That would seem to allow many of the harms that a no contest clause is intended to avoid (cost, delay, settlement pressure, family acrimony, and public exposure of private information). The staff suspects that preliminary probable cause hearings would quickly become ubiquitous. The only deterrent would be the cost of the proceeding.

Definition of “Successful”

James Graham raises an issue about the meaning of the word “successful” in the proposed probable cause standard:

Further, the proposed revision states that a no contest clause will not be enforced if there is probable cause to believe the contest will be successful. In the context of a contest of a single instrument, making the determination whether the contest will be “successful” will be far simpler than when the contest challenges multiple instruments executed on different dates. For example, assume a no contest clause applies to challenges to trusts, trust amendments, wills, codicils and beneficiary designations. Further assume a contest challenges a codicil, a trust amendment, an annuity beneficiary designation, a life insurance beneficiary designation and an IRA beneficiary designation. If two of the five contests are successful, will the contestant have to prove there was probable cause to initiate other contests? Will the result change if the contest is successful as to a majority of the challenges? What if the contest is predicated on the five instruments being challenged on lack of capacity, undue influence and fraud causes of action but at trial success is obtained only on lack of capacity grounds---will this make any difference? I would suggest in order to avoid any uncertainty, that you either provide a definition in the proposed statute of what is meant by “successful” or that you offer some guidance in the comment accompanying proposed section Probate Code section 21333(c).

See Exhibit p. 35.

If each instrument challenged has its own no contest clause, then it would make sense for forfeiture to be determined instrument-by-instrument. For example, a transferor has both a will and a trust. Each instrument has its own no contest clause, which covers the gifts made under that instrument. A beneficiary challenges both instruments. The court finds that there was probable cause to challenge the will, but there was not probable cause to challenge the trust.

Arguably, the contestant should not forfeit gifts made by the will, but should forfeit gifts made by the trust.

The more difficult scenario would arise where the estate plan is made up of several instruments, all executed at the same time. A single no contest clause in the “master” instrument governs all of the instruments (they are expressly identified in the no contest clause). Now suppose that a beneficiary challenges two of the instruments, one with probable cause and one without. What should the result be?

Arguably, if a contestant challenges multiple related instruments that are all governed by the same no contest clause, the contestant should not forfeit if there is probable cause to believe that any of the instruments is invalid. That would seem to justify the litigation. On the other hand, that would encourage a contestant who is in for a penny to go in for a pound, challenging every instrument in the hopes that at least one will fall. Still, that seems less offensive than the alternative, that a contestant who is vindicated as to one of the instruments would still forfeit.

This is a new issue. **Practitioner input is invited.**

MISCELLANEOUS ISSUES

A number of miscellaneous issues were raised. They are discussed below.

Definition of “Contest”

Robert Denham points out a significant defect in the proposed definition of “no contest clause.” See Exhibit p. 15. TEXCOM raises the same issue. See Exhibit p. 44.

The issue is technical and somewhat convoluted. Proposed Section 21330(a) provides:

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

That term is then incorporated into the definition of “no contest clause” provided in proposed Section 21330(c):

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

That terminology works well in describing matters that are governed by a no contest clause. However, the terminology breaks down when it is used to describe matters that are *not* governed by a no contest clause.

Proposed Section 21333(b) provides:

A no contest clause shall not be enforced against a *contest* that is not a direct contest, regardless of the terms of the instrument.

The problem with that language is that the use of the term “contest” limits its effect to action “alleging the invalidity of a protected instrument.” *An indirect contest does not allege the invalidity of a protected instrument.* Therefore, Section 21333(b) could be read as not applying to an indirect contest. That would defeat the point of the subdivision.

The staff believes that the defect could be cured by revising proposed Section 21330(a)-(c) as follows:

(a) “Contest” means a pleading ~~in a proceeding in any court alleging the invalidity of a protected instrument or one or more of its terms~~ that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) “Direct Contest” means a contest that alleges the invalidity of a protected instrument or one or more of its terms based on one or more of the following grounds:

- (1) Forgery.
- (2) Lack of due execution.
- (3) Lack of capacity.
- (4) Menace, duress, fraud, or undue influence.
- (5) Disqualification of a beneficiary under Section 21350.
- (6) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(c) “No contest clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary ~~that files a contest~~ for filing a pleading in a proceeding in any court.

That would make the term “contest” broad enough to include indirect contests. It could then be used properly in the provision precluding application of a no contest clause against a “contest” that is an indirect contest.

The staff recommends that those revisions be made.

Definition of “Direct Contest”

Under the proposed law, the definition of “direct contest” would exclude two grounds that are included in the existing definition of “direct contest,”

misrepresentation and mistake. James Graham supports that part of the proposed law. See Exhibit p. 35.

The proposed definition of “direct contest” also includes an action alleging disqualification of a beneficiary under Section 21350. That section operates as a statutory presumption of fraud or undue influence with respect to certain types of beneficiaries (a will drafter, will transcriber, or care custodian of a dependent adult, with certain exceptions).

TEXCOM voted 21 to 0 against including disqualification under Section 21350 as grounds for a direct contest. “TEXCOM believes that a contestant should not be required to demonstrate probable cause in order to contest a donative transfer to a disqualified person.” See Exhibit p. 43.

On the other hand, existing law provides expressly that a no contest clause is enforceable against a contest based on Section 21350, in the absence of probable cause to bring the contest. See Section 21306(a)(3). The burden imposed by that requirement is slight. In order to bring an action under Section 21350, a contestant need only show that the beneficiary falls within one of the disqualified classes (and does not fall within an exception). The burden then shifts to the beneficiary to establish (by independent attorney certification or by clear and convincing evidence) that the gift was not procured by fraud or undue influence.

Presumably, the probable cause exception merely requires that there be probable cause as to the facts that must be established by the contestant (the beneficiary falls within a disqualified group and is not exempted). It is not clear why a person who fails to meet that minimal burden should be exempt from a no contest clause. After all, a petition under Section 21305 is a direct contest; it attempts to invalidate a provision of an instrument on the grounds of fraud or undue influence.

The staff invites additional comment on this issue.

“Support” of Contest

David C. Nelson suggests that a no contest clause should also be enforceable against a person who acts to support a contest (without filing the contest):

Our version of the Proposed Legislation also includes a third category of “contest” – to the extent provided by the no contest clause, the voluntary support of or participation in a direct contest or an independent rights claim. This is necessary to preclude collusion among multiple beneficiaries whereby, if one beneficiary contests and is disinherited, the remaining beneficiaries will share their interests with that beneficiary.

See Exhibit p. 26.

He proposes that language along the following lines be included in the definition of “contest”:

“Contest” means all of the following:

...

To the extent specifically provided in the no contest clause, the voluntary support of or voluntary participation in a direct contest or an independent rights claim.

See Exhibit p. 30.

The suggestion has obvious appeal. A beneficiary should not be able to circumvent a no contest clause by using a “front” to pursue the contest on the person’s behalf. **The staff invites public comment on this suggestion.**

Definition of “Pleading”

The proposed definition of “contest” requires that there be a “pleading in a proceeding in any court.” See proposed Section 21330(a). We received two comments suggesting that the term “pleading” needs clarification.

Paul C. Nelson writes: “[The] Proposed Legislation does not include a definition of ‘pleading.’ This creates a significant possibility of uncertainty as to what constitutes a ‘pleading,’ and thus a ‘contest’....” See Exhibit p. 26. He proposes the following definition:

“Pleading” means a document that initiates a contest, including a complaint, a cross-complaint, a demurrer, an answer, a petition, a response to a petition, objections to a petition, a will contest, a petition to revoke probate, and a creditors claim under Section 9000 *et seq.* or Section 19100 *et seq.*

See Exhibit p. 30.

TEXCOM voted 11 to 7 (with three abstentions) to add the following definition to the proposed law:

“Pleading” means a petition, complaint, objection, answer, or response.

See Exhibit p. 43.

The two drafts could be synthesized, in simplified form:

“Pleading” means a petition, complaint, cross-complaint, demurrer, objection, answer, response, or claim.

That should provide useful clarification. **The staff recommends that something along those lines be added to proposed Section 21330.** Specific language would be presented as part of the draft recommendation.

Express Recognition of Common Law

Existing Section 21301 provides:

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

Out of caution, the staff preserved that language in the proposed law, as proposed Section 21331.

We received a few comments suggesting that the section is confusing at best, and might lead to the importation of prior case law in a way that would contradict the intended effect of the proposed law:

- TEXCOM voted 19-0 to delete Section 21331 and replace it with language stating that the proposed law supersedes case law. See Exhibit p. 42.
- “I am not sure what is meant in Section 21331.... I realize this is the same language as current Section 21301, but the following questions remain: What portion of the common law is not included within the statutory scheme? Is this not just an invitation for litigation over what is or is not part of the statutory scheme and what is still left of the common law rules for enforcement of no contest clauses?” James R. Birnberg, See Exhibit p. 47.

Those arguments make sense if the proposed law occupies the entire field of no contest clause law. However, if the Commission decides to preserve significant elements of the existing statute (e.g., forced elections, declaratory relief), then the provision would have continuing relevance. Cases addressing those matters should still apply.

If the Commission decides to preserve existing law on forced elections or declaratory relief, the staff would recommend retaining Section 21331. Otherwise, the staff agrees that Section 21331 should be deleted as unnecessary and potentially problematic.

TRANSITIONAL PROVISION

Proposed Section 21335 provides for deferred operation of the proposed law, and prospective effect:

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

(b) This part does not apply to an instrument if either of the following conditions is satisfied:

(1) The person who created the instrument dies before January 1, 2010.

(2) The instrument is or becomes irrevocable before January 1, 2010.

The purpose of that provision is to provide time for any revision of estate planning documents that might be required as a result of the proposed law, and to preserve prior law with respect to instruments that have become irrevocable prior to enactment of the proposed law.

We received a number of comments on the transitional provision.

Law Should Apply Retroactively

We received some comments suggesting that the proposed law should be applicable to all instruments, regardless of whether they became irrevocable prior to the operative date of the proposed law. See comments of Shirley Kovar, Exhibit p. 12-14; Gary M. Ruttenberg, Exhibit p. 18; James Graham, Exhibit p. 33.

One concern is that there are a number of trusts in existence, which have already vested on the settlor's death, but that have continuing effect (i.e., they are still being administered and providing benefits to beneficiaries). Those trusts may not be subject to the exceptions stated in Section 21305 (depending on the date of the decedent's death), and would not be governed by the proposed law.

Should those trusts be exempt from a legislative determination of public policy, merely because the determination is made after the settlor's death or incapacity? Arguably not. For example, the Legislature has determined that an action to interpret an ambiguous instrument is exempt from a no contest clause for public policy reasons (presumably to determine the transferor's true intention, so that it can be put into effect). Why shouldn't that rule also apply to a trust that became irrevocable twenty years ago? The staff sees no substantive reason to exempt older instruments from the rule. (To the contrary, Shirley Kovar suggests that older instruments are often the ones most in need of

interpretation or modification to address changed circumstances. See Exhibit p. 14.)

The only justification for limiting such a rule to prospective application is because an instrument that has already become irrevocable cannot be revised by the transferor to adjust to the change in law.

That concern has merit if the proposed law were to prohibit forced elections. In that case, there would be a need to adjust an instrument. A transferor would probably wish to remove the gift that was offered as inducement to forgo a creditor or property claim, and might wish to draft some other language to achieve a similar result. Immediate and retroactive implementation of that change could well result in an unfair surprise.

If, however, the Commission decides to preserve existing law on forced elections, then the staff sees little need for existing instruments to be revised. The effect of the law would be to exempt all indirect contests and expand the scope of the probable cause exception to all direct contests. Neither of those changes could be circumvented through creative drafting (nor should they be).

If the Commission decides to preserve the forced election, **the staff recommends that the transitional provision be deleted.** The general transitional rules provided in Section 3 would then apply. That section provides for retroactive application, with the exception of certain completed acts.

Opposition to Retroactive Application

Paul. C. Nelson criticizes the transitional rule as creating complications and requiring expensive plan revisions:

Section 21335(b) of the Proposed Legislation provides that the new statutes do not apply either: (a) where the person who created the instrument died before January 1, 2010; or (b) where the instrument is or becomes irrevocable before January 1, 2010. We believe this double test for applicability is both unwieldy and unclear. For example, to what extent do the new statutes apply to a two-settlor trust (*e.g.*, husband and wife) where only one settlor dies, and/or only part of the trust becomes irrevocable, before January 1, 2010? The Proposed Legislation's version of Section 21335(b) does not answer these questions – it gives rise to them. In addition, application of the new statutes to existing revocable instruments could force thousands, or even hundreds of thousands, of transferors to incur the expense of modifying their current estate plans in light of the change in law. We believe a much simpler and more practical rule would be to apply the new statutes only to no contest clauses that are created or modified on or after January 1,

2010, and have stated that rule in Section 21335(b) of our version of the Proposed Legislation.

See Exhibit p. 27.

The complications cited by Mr. Nelson would be removed by deletion of the transitional provision.

The need for expensive plan revisions should not be significant if the forced election element is removed from the proposed law.

If, however, the Commission decides to retain the prohibition on forced election, the transitional issues would need to be addressed. The staff would prepare an analysis of issues in presenting the draft recommendation.

Grace Period Too Short

We received a few comments suggesting that the one-year deferred operation date (i.e., a one-year grace period) is too short. More time should be provided for revision of instruments to adjust to the new law:

- “[The] grace period is too short. Discovering what plans contain affected clauses, contacting the clients, getting a response and making revisions cannot reasonably be done in such a short time frame. I suggest a minimum of three years and would prefer five.” Paul Smith, See Exhibit p. 6.
- “The effective date in section 21335 may not allow enough time for people to make revisions of their estate plans (see, Tentative Recommendation, at page 24), particularly if court proceedings for conservatees under Probate Code section 2580 are required. Given the complete shift in approach that is proposed, I think that a longer delay for the effective date is required. (See, examples of delayed effective dates in IRC sections 2041 (a)(1)(B) and 2041 (b)(3); also see Treas. Regs. section 20.2041-2, all pertaining to pre-1942 powers of appointment.) Because a revision of an estate plan for a conservatee may be impossible because of an absence of evidence of alternate intent, another possibility would be to have the prior law continue to apply in those cases where the testator-settlor is incompetent at the time of what would otherwise be the effective date.” James R. Birnberg, See Exhibit p. 46.

The staff agrees that a “complete shift in approach” would justify providing ample time for the revision of documents. The commenters may be correct that one year would not be sufficient for that purpose.

However, if the Commission decides to preserve existing law on forced elections, then there would not be a significant shift in approach. The main substantive changes would be the exemption of some indirect contests that are

currently exempt, and the extension of the probable cause exception to all direct contests. It is unclear that most instruments would need to be redrafted as a result of those changes.

If, however, the Commission decides to recommend the prohibition of forced elections, then the adequacy of the grace period would need to be revisited.

CONCLUSION

The staff appreciates the volume and quality of the public comments that we received on the tentative recommendation. It was very helpful in exposing possible technical problems with the proposed law. The comments on the merits of retaining forced elections were especially helpful, as that was one of the most difficult and substantively important policy choices involved in the study.

The staff believes that TEXCOM's efforts to notify its section's members of the proposed law and solicit their input is in part responsible for the quality and quantity of the public response to the tentative recommendation. That is a significant contribution to the study and is greatly appreciated.

If the Commission accepts the staff recommendations to preserve the forced election and the declaratory relief procedure, the proposed law would be more modest in effect than what was proposed in the tentative recommendation. However, the staff is convinced that it would still be a significant improvement over existing law. The law would be made much simpler and easier to understand. Uncertainty would be reduced and there should be a significant reduction in declaratory relief litigation. The extension of the probable cause exception should serve as an additional check on elder financial abuse.

Once the Commission makes decisions on the issues raised in this memorandum, the staff will prepare a draft recommendation that implements those decisions. It will be presented for review and approval at a future meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

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June 1, 2007

Law Revision Commission
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JUN - 8 2007

FILE

California Law Revision Commission
4000 Littlefield Road
Room D-1
Palo Alto, CA 94303-4739

Re: Revision of the No Contest Clause Statute

Dear Commissioners:

The purpose of this letter is to comment on the tentative recommendation for revision of the No Contest Clause Statute. I believe that the proposed changes are appropriate. Limiting a no contest clause to a "direct contest" eliminates most uncertainty. Elimination of the declaratory relief provision is long overdue.

Using the definition of a probable cause drawn from the Restatement (Third) of Property: Wills and Donative Transfers is appropriate to standardize that definition of probable cause. The protected instrument definition should eliminate uncertainty as to whether the no contest clause applies to other estate planning documents.

Does the statement that the common law governs enforcement of a no contest clause to the extent this part does not apply leave open an number of possible grounds for contest beyond the "direct contest"?

The proposed new Sections 21330-21335 are a significant improvement over existing law. I would support their enactment.

Although I have practiced probate law for more than 30 years, I have had very little personal experience with actual contests where the instrument contains a no contest clause. If a person who wishes to contest a document is not a beneficiary, the clause obviously is inoperative and that is the most common situation in my experience.

EX 1

California Law Revision Commission
June 1, 2007
Page 2

Thank you for the very thorough analysis of the no contest clause in your multiple memos that have been sent out over the past on this topic. This letter represents my personal views, not those of this firm.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles A. Collier, Jr.', written in a cursive style.

Charles A. Collier, Jr.

CAC:pr

EMAIL FROM RICK LLEWELLYN (JUNE 5, 2007)

Subject: Comment on No Contest Report

I agree with the conclusion of your report. I also think it is that it will reinforce the public's belief that testamentary documents need to be upheld.

EMAIL FROM MARGARET DRAPER (JUNE 5, 2007)

Subject: No Contest

Dear Sir/Madam:

I would like to register my support for the Tentative Recommendation by the California Law Revision Commission on its no contest clause study. From what I have understood the problems to be, the approach outlined in the summary seems appropriate: simplify and sustain the general availability of the no-contest principle in wills.

The need to protect elders from elder abuse, is of course also important, and would perhaps be better addressed in another area, such as revising attestation proceedings or having a "cooling off" period for wills. The cost of the declarative relief for both heirs and the state makes it essential that some simplification be effected with regard to no-contest clauses. People need to know where they stand.

Sincerely,

Margaret Draper
Attorney at Law
POB 176
Bayside, CA 95524

EMAIL FROM THOMAS M. CARPENTER (JUNE 6, 2007)

Subject: Revision of No Contest Clause Statute

Congratulations on a job well done.

Extra filings are adding to the backlogs that are now starting to bury probate like they did civil a long time ago.

After 45 years of nothing but trusts and estates, there is no doubt in my mind that the policy underlying no contest clauses is sound.

All I have heard in the last few years on the subject is a lot of sound and fury.

Your proposed amendments are a needed simplification.

Don't worry about the "abusers" slipping through. Remember we snuck a roadblock against them into our "felonious heir" statute a while back (an action under which by no stretch of the imagination could be construed as a "contest").

Keep up the good work!

Thomas M. Carpenter
SB# 37837

EMAIL FROM DOUGLAS DUNCAN (JUNE 6, 2007)

Subject: no contest clause study

Dear members of the Commission:

This is a welcomed change. My concern is based on the scenario that follows:

1. Husband(5th marriage) and wife (3rd marriage) - married for 5 years, draft reciprocal (holographic) wills
2. The husband, who possessed (as his separate property) all of the real property of the marital estate, predeceases the wife
3. Wife obtains services of attorney who drafts living trust granting 20% to decedent's son (one of 4 original beneficiaries) and leaving the remainder of the joint estate to her 3 children.

Which of the exceptions authorizes the omitted children (grandchildren) to contest the Trust? My belief is that it falls under Fraud (both fraud in the

inducement to make the reciprocal will; and Fraudulent transfer of decedent's assets). However, as Fraud is described in the proposed legislation, I'm not sure that this contest would stand.

Please comment.

Sincerely,

H. Douglas Duncan, Attorney at Law
P.O. Box 2388
Lodi, CA 95241

209-339-9577 (phone/fax)

EMAIL FROM PAUL SMITH (JUNE 7, 2007)

Subject: No Contest Proposed Recommendations

Dear Commission members:

I assume that the agenda must already be set and this comment period is just perfunctory, why else would we only be given 10 day to provide comment on something that has been in the works for several years? However, I will take the bait as I have strong opinions on the subject. but constrained as I am and you are for time, I will be brief.

I appreciate the effort and time that has been put in and wish to thank those who have been involved. I like the main statute and the concept. Like the proponents, judges and others, I am not a big fan of no contest clauses, but the public is. A good half of my planning clients want to have a no contest clause even though they can not articulate a potential contestant nor are they making unequal distribution. They just want assurances that their estate is administered without litigation. So to repeat that no contest clauses are disfavored, as is the opinion of California appellate courts, is giving no voice to the people. On the other hand, most client don't understand the working of the legal system and most don't need such provisions so we are just looking out for their best interest-right?

My two main gripes are the lack of sanctions for contestants and not addressing prior case law. The latter first. If the purpose of the change is to provide clarity, predictability and avoid litigation, then why leave such an enormous loophole? There was plenty of inconsistent and diverse opinions prior to the implementation

of the “declaratory relief” provisions. The proposal does little to address predictability and consistency if it does not address prior case law head on.

The proposed change does not require losing contestants to pay attorney’s fees and the American rule is cited as grounds. It makes me wonder if I am appearing in a different system than the proponents. We do not apply the American rule in probate—the estate pays for everything with little exception. A conservator opposes a conservatorship, win or loose, his estate pays. Beneficiaries fight with trustees and executors, the estate pays. Even when beneficiaries fight with each other the estate pays. If you really want to cut down on litigation apply the American rule to all of probate and not just contests involving these clauses. Otherwise we need to discourage contest that are without reasonable cause and the easiest way to do so is to require a contestant to pay the estate attorney’s fees. All litigators know that courts are reluctant to make a finding that the action was without merit, so meritorious claims will not be stifled.

As to the comments regarding forced elections, I answer with a request. Provide a reasonable alternative- not that the parties should work it out ahead of time. If that happened we wouldn’t need laws, so get real. Sure there are abuses, but there are many situation where forcing an election discourages litigation. Example. A beneficiary provides services during the donors life. He/she expects something in return and the donor wants to pay, but does not want or have the ability to pay during life. Making a bequest conditioned upon not filing a creditors claim prevents the possibility of double dipping by the beneficiary and eliminates difficult to prove claims and the resulting litigation. Example 2. When spouses can not agree on distribution, forcing an election will insure that the deceased spouses property goes to his/her heir when enough is given to the survivor to discourage the survivor from advancing his/her statutory rights . I would think you could solve the concern about the donor’s spouses attempt to dispose of more property than he or she owns by excluding property ownership disputes from being contests.

Finally I complain that the grace period is too short. Discovering which plans contain effected clauses, contacting the clients, getting a response and making revisions can not reasonably be done in such a short time frame. I suggest a minimum of three years and would prefer five.

I have more, but am out of time.

Paul Smith

EMAIL FROM ROBERT DENHAM (JUNE 7, 2007)

Subject: Revision of No Contest Clause Statute

I agree with the general thrust of the tentative recommendation, but I think Prob C §21333 should be amended to clarify the status of forced election provisions that do not meet the statutory definition of a no contest clause, which requires that the provision would penalize a beneficiary who files a contest as defined in the statute.

While a “contest” is defined in Prob C §21330(a) to mean a pleading alleging the invalidity of a protected instrument, the discussion indicates that the proposed revision would effectively prevent the use of a no contest clause to create a “marital forced election” yet it is easy to imagine clauses that would require a spouse to waive community property interests as a condition of a gift but would not involve a potential contest as defined. For example, a clause might simply provide that the spouse shall receive a gift of specified separate property if the spouse waives her interest in other specified property without stating whether the latter property is in fact the separate property of the testator.

In this case, it is far from clear that the clause would constitute an unenforceable no contest clause because a claim by the spouse to a community property interest in the property does not appear to allege the invalidity of the provision. In other words, it seems that the statute by its literal terms would allow the testator to condition a separate property gift on an agreement by the spouse to give up her interest in other property so long as the clause tacitly assumes that the spouse has an interest in the property. Nor is this necessarily inappropriate. But the language of the discussion implies that a more sweeping ban on forced elections is intended.

Thus, it might be desirable to amend the proposed statute to provide that a clause requiring a waiver of an interest as a condition of a gift will be deemed a no contest clause notwithstanding the definition unless the instrument admits that the spouse owns the interest being waived. (This might not work for other forced elections where the unlimited marital deduction is not available to shelter any deemed gifts.) This should eliminate the problem of the spouse being forced to give up a larger interest for a smaller one. Alternatively, the statute should provide that a clause requiring a waiver of an interest as a condition of a gift will be not be deemed a no contest clause unless the instrument asserts that the waiving spouse does not own the interest.

But unless noncommittal clauses are clearly ruled in or out, there is a possibility that an undesirable forced election clause will not be deemed a no contest clause and so will be enforced or that an arguably desirable forced election clause will be

deemed a no contest clause despite the literal definition of “contest” and so will not be enforced.

Thanks.

Robert Denham
CEB
300 Frank H. Ogawa Plaza, Suite 410
Oakland CA 94612

510-302-2178

EMAIL FROM SHIRLEY L. KOVAR (JUNE 9, 2007)

Subject: CLRC/no contest clause study

Brian, with respect to 21330(d), does “instrument” include amendments or just the specific document that contains the no contest clause? In other words, if the no contest clause is in the initial trust agreement, does that automatically cover amendments or does the initial trust agreement have to specifically have to say it covers “amendments.” If the former, then an undue influencer could cause the trustor/testator to sign an amendment and that amendment would be covered by the no contest clause.

Law Revision Commission
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June 18, 2007

JUN 20 2007

File: _____

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: *Tentative Recommendation for Revision of No Contest Clause Statute*

Dear Commissioners:

I have read the Tentative Recommendation for the Revision of No Contest Clause Statute. I applaud the attempt to simplify the no contest law. But I have reservations about some of the proposed changes.

Qualifications. I have been practicing law for almost 45 years (my first 6 years in Illinois and since 1969 in California). From 1965 to date I have had extensive experience in estate and trust law. For the past 17 years my practice has been devoted almost exclusively to probate and trust litigation. I have served as the chair of the Trusts and Estates section of the Orange County Bar Association and have appeared on numerous CEB programs on estate and trust law.

Overriding Importance of Transferor's Intent. As the Background section of the Recommendation points out, California has a strong public policy of effectuating the transferor's intent. That policy should have compelling importance absent some overwhelming countervailing public policy. In my view completely eliminating the indirect contest in many instances would defeat a transferor's intent. As an example I point to *McKenzie v. Vanderpoel* that just came down last week. (See copy of opinion attached.)

The Number of Safe Harbor Petitions Is Manageable. In my experience the Recommendation exaggerates the "excessive litigation" issue. The Recommendation states that Orange County considers some 100 to 150 safe harbor petitions per year. I often sit through a morning calendar in the Orange County probate court which has as many as 40 diverse petitions on calendar. If the probate court on average hears only two or three safe harbor petitions a week, the number seems quite manageable. This is especially true because many of the safe harbor petitions are unopposed and granted routinely.

The Expense of a Safe Harbor Petition Acts as a Control. I suspect that in general, safe harbor petitions are filed only where serious money is involved. The expense of the preparation and presentation of a weak safe harbor petition in a case where the assumed amount in controversy would be small, should be a deterrent in and of itself to filing the petition.

EX 9

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The Probable Cause Safeguard May Just Create Another Layer of Litigation. In my view, limiting enforcement of a no contest clause to direct contests that are not brought with probable cause could proliferate, not reduce, contest litigation. First, the contestant calculates the potential benefit of a successful contest. The contestant then weighs that benefit against (1) possibility of forfeiting the bequest in the instrument, (2) the litigation costs of a contest and (3) the chances, if the contest fails, of persuading the court that probable cause existed. If the contestant goes forward with the contest, then all of the expense and delay of the litigation ensues. If the contestant loses the contest, then litigation starts all over again over the issue of probable cause. So, even if the new statute allows a no contest clause to bar only direct contests, I would eliminate the probable cause exception.

The Transferor Should Be Able to Bar Some Indirect Contests. My experience tells me that the new statute should allow the no contest clause to bar at least some types of indirect contests. Two types of indirect contests spring to mind, namely, the creditor's claim and the community property claim.

The case of *Zwirn v. Schweizer* (attached) demonstrates the flaw of allowing a creditor's claim to evade a no contest clause. There, the beneficiary asserted in a creditor's claim a right to 50% of the estate based on an oral contract. The beneficiary argued that his creditor's claim was not a contest. The Court of Appeal disagreed. A claimant should not be allowed to mask a contest by merely changing the label from "contest" to "creditor's claim." If a transferor cannot declare that the filing of a creditor's claim is a contest, then the clever contestant can avoid a forfeiture simply by labeling his contest as a creditor's claim.

The other claim that a transferor should be able to penalize is the community property claim. Persons entering marriage often have substantial separate property. This is especially true in the case of second (or even later) marriages. Where the separate property value increases substantially during the marriage, the surviving spouse may assert a community interest in that property. Disputes over the characterization of property can be avoided by carefully drawn pre-marital agreements. However, often people with substantial property overlook or ignore this financial aspect at the start of a marriage. Unless the transferor can put his or her spouse to an election with a no contest clause, expensive litigation can arise. The determination of the extent of the community component acquired during a lengthy marriage in the separate property can be enormously expensive and time consuming. The determination involves forensic accountants analyzing years of financial records and tax returns in order to calculate the community property amount under the *Pereira/Van Camp* cases. Other experts such as appraisers and business consultants also may be necessary.

I recently was involved in a case where the surviving spouse claimed that she had acquired a community property interest in her deceased husband's shopping center. They had been married for some 14 years. The preparation of the case involved numerous depositions,

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Page 3

production of in excess of 12,000 documents as well as numerous computer disks, several discovery motions, and the designation of three accountants, two property managers, and two real estate appraisers as expert witnesses. The husband's trust actually left a substantial bequest to the widow and contained a general no contest clause. However, the trust did not have a clause putting the widow to an election to take the bequest in lieu of any community property claim. Not only is the separate versus community property analysis fact intensive and time consuming, the deceased transferor's successor is at a distinct disadvantage. The deceased transferor is no longer around to testify to his or her side of the case. The surviving spouse is not only liberated from the conflicting testimony of the deceased spouse but also may very well have the benefit of all of the presumptions in favor of community property. The decedent should be allowed to nip this whole process in the bud with a specific no contest clause.

The case that I just mentioned is not an isolated event in my practice. I have settled two such cases just this year with the litigation costs on each side in each case far exceeding \$100,000. And these cases were settled before trial.

Sincerely,

RUTAN & TUCKER, LLP



Theodore I. Wallace, Jr.

TIW:lf
Enclosures

To: Brian Hebert
From Shirley L. Kovar, Liaison to CLRC from TEXCOM
Re: *McKenzie v. Vanderpoel*
Date: June 22, 2007

Brian, the following are some thoughts on the *McKenzie* case. I would be happy to discuss this with you at any time.

I. *McKenzie* would trigger a no contest clause upon the filing of a petition for modification.

McKenzie v. Vanderpoel, filed June 13, 2007, 2007 Cal. App. LEXIS 972, highlights the fatal flaws of the existing statute regarding no contest clauses and exposes a loophole in the CLRC Tentative Recommendation to correct those flaws. *McKenzie* expands the application of a standard no contest clause to a petition for modification by a beneficiary attempting to exercise her rights under the California Principal and Income Act (CUPIA).

McKenzie is a case of first impression to my knowledge and could result in a substantial increase in the filing of the already ubiquitous “safe harbor” petition under section 21320. For example, I have filed dozens of petitions for modification over the years and have never preceded the petition for modification with a safe harbor petition. Now, practitioners do not dare file a petition for any relief from the court based on any statutory procedure or any petition for modification without first filing a 21320 petition. Although *McKenzie* involved the CUPIA, the Court’s reasoning could be read to apply to any petition for modification. The courts will become even more clogged with “safe harbor” petitions attempting to avoid the wake of *McKenzie*.

The primary goal of the CLRC Tentative Recommendation is to clarify the meaning of “contest” thereby permitting the repeal of the “safe harbor” petition under 21320 to obtain a court order that a proposed petition does not violate the no contest clause. Since *McKenzie* involved an indirect contest, and the CLRC proposal would repeal the enforceability of the no contest clause against indirect contests, this aspect of existing law should be resolved, providing that the effective date of the CLRC proposal applied in the particular case.

II. Current law and CLRC Tentative Recommendation Have Effective Date Loophole.

Both the existing legislation on the enforceability of no contest clauses and the CLRC Tentative Recommendation fail to apply their respective effective dates to all irrevocable trusts, regardless of when they became irrevocable. As a result, the thousands of trusts that become irrevocable prior to January 10, 2010, will not be affected by the CLRC Tentative Recommendation. This substantially limits the impact of the important reforms contained in the CLRC Tentative Recommendation, if enacted into law.

III. The CLRC Tentative Recommendation should be revised to apply to all irrevocable trusts, whenever executed, as a matter of public policy.

A Public policy favors strict construction, as codified in Probate Code section 21304.

1. Intent of trustor

McKenzie is a good example of case law that ignores the policy of “strict construction” set forth in Probate Code section 21304. The no contest clause in *McKenzie* was a standard, generic no contest clause. The no contest clause did not specifically apply to a petition based on the CUPIA or even a petition for modification. Moreover, the instrument containing the no contest clause provided that ‘matters relating to principal and income shall be governed by the provisions of the Principal and Income Law *from time to time existing*.’ (Emphasis added.) Despite this specific incorporation of CUPIA and despite the express intent to apply the law of CUPIA “from time to time existing” *McKenzie* concluded that “the availability of a statutory procedure under CUPIA to reallocate principal and income does not exempt the [proposed] petition from the scope of the trust’s no contest clause.” *McKenzie* at 24.

2. Intent of CUPIA

The Court in *McKenzie* also observed that the “[t]here is nothing in the CUPIA provisions cited by plaintiff that indicates a legislative intent to exempt these procedures from the scope of a no contest clause.” The reasoning should be just the opposite, to wit, there is nothing in the sections governing petitions for modification or CUPIA that suggest that these sections *are* preempted by a no contest clause. The public policy of the CUPIA should trump a no contest clause, especially where the no contest clause does not specifically refer to the CUPIA.

Under the approach the Court has taken in *McKenzie*, the entire Chapter 3 of the Probate Code dealing with “Modification and Termination of Trusts” would be inoperative for any instrument containing a generic no contest clause. The only exception may be section 15409(a), which expressly states that “the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.”

One explanation for the result in *McKenzie* may be the Court went beyond the task before it—does the no contest clause apply to a the proposed petition—and was influenced by the Court’s bias on the outcome on the merits of the proposed petition, despite the Court’s lip service that the merits of the proposed petition was not at issue in this proceeding.

3. *McKenzie* if decided under existing law if effective date applied.

If the current statute (Probate Code section 21305(b)(1) had applied, *McKenzie* would presumably have turned out differently. That section determines that a petition for modification does not violate a no contest clause as a matter of public policy. However, 21305(b) does not apply to the trust in *McKenzie* because that section only applies to documents that become irrevocable on or after January 1, 2001, and the *McKenzie* trust was 40 years old.

B. The older a trust is-- the more need for a petition for modification may exist.

One of the axioms of sound estate planning, especially for long-term trusts, is providing for flexibility due to changes in circumstances, especially in the economic environment. In “Drafting Flexible Irrevocable Trusts” (Lurie and Burford, ACTEC Journal, Summer, 2007, v. 33, no. 1), the authors point out the need for judicial intervention when there are changed circumstances: “Trusts drafted in the United States have traditionally been narrowly tailored and well defined in scope and purpose, requiring judicial intervention---sometimes unsuccessfully---to adapt to changing wishes, needs and circumstances”. The authors go on to compare the traditional trust in the United States to the “broad, open-ended discretion common outside of the United States. . . .” *Id.* at 33.

McKenzie would turn on its head the public policy of the Probate Code to permit beneficiaries to file a petition for modification, without penalty (other than possibly losing the case). The prophylactic approach taken by the *McKenzie* Court prevents beneficiaries from having their day in court to prove up a case of changed circumstances or other basis for the proposed modification.

IV. Conclusion

This is to urge CLRC to apply the January 1, 2010, effective date in its Tentative Recommendation to all irrevocable trusts and not just those that become irrevocable on or after January 1, 2010. Public policy favors “strict construction” of the no contest clause (Probate Code section 21304); a full hearing for a petition under CUIA (Probate Code section 16320, et. seq; and a full hearing for a beneficiary who wants to prove up a petition for modification (Probate Code sections 15400, et. seq.). The Courts are not carrying out these policies; the only way to address this problem is for CLRC to change the effective date in its Tentative Recommendation to apply to all irrevocable trusts, not just those that become irrevocable after January 1, 2010.

EMAIL FROM ROBERT DENHEM (JUNE 28, 2007)

Subject: no contest clause

The following comments are in addition to my comments of June 7, in which I expressed concern that the proposal left open the question of whether various forced election provisions would be enforced when the provisions did not appear to satisfy the literal definition of no contest clause. Those comments point up a larger difficulty with the proposal.

Under the current regime, in which penalty and forfeiture provisions are generally enforced, there is no need to identify the subset of such provisions that are considered no contest clauses. Rather, it is only necessary to specify the circumstances in which such provisions are not enforced. Thus, a no contest clause is defined as a provision that, if enforced, would penalize a beneficiary who files a contest, which in turn is defined as any action identified in a no contest clause as a violation of the clause. Probate Code §21300(a), (d). The circularity of this definition does not prevent us from identifying the cases in which enforcement is not allowed because it includes everything, and everything is presumptively enforceable unless otherwise provided. The definition further states that contests include both “direct and indirect contests” but does not state that contests are limited to these, and these more narrowly defined concepts are only used to identify the subset of no contest clauses (subset of a subset) that are not enforced.

In contrast, the proposal attempts to identify the subset of provisions that will not be enforced by specifying the subset of no contest clauses that will be enforced. For this purpose, the proposal uses a limited noncircular definition of contest that includes the cases identified by the current definitions of direct and indirect contest. Prop Prob C §21330(a). However, the proposal purportedly eliminates enforcement of some provisions that are not within the definition of no contest clause. At a minimum, the proposal needs to include a safe harbor for specified types of conditional gifts (if any) that will be enforced. The statute could also specify types of provisions that will not be enforced without regard to whether those provisions are no contest clauses under the general definition. But the statute cannot clearly identify the subset of all provisions that will not be enforced by simply stating that a subset of a subset of those provisions will be enforced, and the rest of that subset will not be enforced.

Thanks.

Robert Denham

CEB

300 Frank H. Ogawa Plaza, Suite 410, Oakland CA 94612

510-302-2178

EMAIL FROM ROBERT L. BLETCHER (JULY 3, 2007)

Subject: Revision of No Contest Clause Statute

Message: After 43 years of practice in the field of estate planning, I strongly object to the proposed legislation to revise the law on no contest clauses. Particularly offensive is the elimination of the application of a no contest clause to a creditor claim or property ownership dispute. Under existing law, a no contest clause can be applied to those pleadings, but only if the clause itself expressly states such application, and so the law should remain.

We need the ability to bring certainty to marital property characterization (clean up the co-mingling) and deter property ownership (particularly tracing) litigation and enforcement through no contest clauses is vital to do so.

Do not enact this legislation!

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OF COUNSEL
JAMES R. NICHOLS, JR.

July 3, 2007

California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
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JUL -5 2007

File: _____

RE: Revision to No-Contest Clause Statute

Ladies and Gentlemen:

Thank you for your report and recommendations with regard to the California no-contest clause statutes. We agree that the current statutory scheme is confusing and in need of repair.

We strongly believe, however, that creditor's claim and property ownership disputes should continue to be covered by no-contest clauses. It isn't just the typical "forced election" technique that needs protection. It is the carefully-crafted spousal property characterization agreements that we use so frequently to clean up our clients' commingling, achieve certainty regarding characterization, and create "integrated" estate plans upon which spouses can rely, particularly in second-marriage situations. Without the no-contest clause to enforce compliance with characterization agreements, there is nothing to preclude a spouse from accepting benefits under the decedent's estate plan and asserting a property ownership claim as well.

The current draft of the proposed statute will increase monumentally the occurrence of spousal post-death litigation, and deprive spouses of the peace of mind they currently enjoy with a forcefully worded no-contest clause.

Thank you for your consideration.

Sincerely,



Steven F. Barnes



Margaret V. Barnes

SF/MV/B:et

EX 17

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July 3, 2007

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Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

JUL 15 2007

Re: Revision of No Contest Clause

File: _____

Dear Commission Members:

As a State Bar Board of Legal Specialization Certified Specialist in Probate, Estate Planning and Trust law, and an active litigator in the fields of Estates and Trusts, I have eagerly awaited your proposed revisions to California's no contest clause statutes.

I have received and read with interest your April 2000 Tentative Recommendations.

I am writing to you on the single most glaring deficiency of the proposed revisions. That is that the effective date of the proposed changes would be January 1, 2010 and it would not apply to any document created by a person dying before January 1, 2010 or document becoming irrevocable prior to that date.

The enforcement or non-enforcement of no contest clauses is a matter of public policy and if the public policy of the State of California is to limit the applicability of no contest clauses and the possibility of forfeiture to only "direct contests" brought without probable cause, then a delay in the implementation of the statute is inappropriate.

Also, I should express my considered opinion that the present statutory scheme pertaining to no contest clauses leads to time-consuming and expensive litigation relating to the clauses which disrupts administration of Estates and Trusts and delays resolution of the real issues sometimes for years. The proposed revisions generally eliminating the effectiveness of no contest clauses in most of the areas where the litigation has arisen is in my mind absolutely, positively a good thing.

Very truly yours,

BLOOM & RUTTENBERG

By: _____
GARY M. RUTTENBERG

GMR/bm

IRS Circular 230 Notice: Any U.S. Federal tax advice contained in the foregoing communication (including any attachments) was not intended to be used, and cannot be used, by any person for the purpose of avoiding tax penalties that may be imposed with respect to the matters addressed. No one, without our express prior written permission, may use any part of this communication (including any attachments) in promoting, marketing or recommending an arrangement relating to any federal tax matter to one or more taxpayers.

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July 9, 2007

JUL 11 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
Attention: Executive Committee

File: _____

Re: Request for Public Comment - No Contest Clause

Dear Committee:

I support the Commission's recommendation that the no contest clause in general only apply to direct contests, as enumerated in its tentative recommendation. However, I disagree with eliminating the application for declaratory relief under Section 21320(a), in fact that is part of the Commission's recommendation. To eliminate said section would eliminate a tool which is useful in determining the intention of the creator of the instrument as to whether the no contest clause for example applies to all subtrusts, or just certain subtrusts. This issue is not discussed by the Commission. It was litigated to a certain extent in the case of *Scharlin v. Superior Court*, 9 Cal.App.4th 162, 11 Cal.Rptr.2d 448 (1992) and *McIndoe v. Olivos*, 132 Cal.App.4th 483, 33 Cal.Rptr.3d 689 (2005). Not all "no contest clauses" are drafted the same and there may be a question of interpretation as to whether or not the clause is intended to apply to a proposed petition, even though the petition itself would be considered a direct contest. I believe that the Commission would be eliminating the necessity of filing applications for declaratory relief in the majority of cases by limiting the no contest clause to direct contests, but the application for declaratory relief should still be available where there may be a question of interpretation.

Respectfully submitted,


Peter R. Palermo

PRP/drb

EMAIL FROM LINDA ROODHOUSE (JULY 11, 2007)

Subject: No Contest Clause Reform

Commission members, I am the chair of the Alameda County Trusts and Estates Section's Estate Planning subcommittee. Today at lunch a group of trusts and estates practitioners discussed the proposed changes to the new statute at our monthly meeting. I have not been authorized to speak for this subcommittee or the section as a whole, to be clear. The opinions which follow are my own, but I can say that there were no objections voiced at the meeting about the Commission's proposed revisions.

I have read your report (well-written) and am glad the Commission understands the importance of a person's being free to attach conditions to gifts of that person's property and that the basic principal of no-contest clauses will be retained. I favor clarity in statutes, and your proposal of a clear list of actions that constitute a "direct contest" certainly is an improvement over the current situation.

I also favor eliminating "forced elections". The forced election is highly manipulative. It has historic connotations of "Father knows best". It is offensive to me for that reason. One's community property interests are vested, and the forced election impliedly guts that vested, historically earned right. I realize it can be used by either spouse (or partner) and is not gender-biased. Nevertheless....

I should add that I have not been involved in any litigation involving a no-contest clause. I speak only from the planner's perspective. Thank you for your hard work on this complex issue.

Linda C. Roodhouse
Attorney at Law
Certified Specialist, Estate Planning,
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July 12, 2007

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

Re: Tentative Recommendation re Revision of No Contest Clause Statute

Dear Mr. Hebert:

I am writing both on behalf of myself and as the designated spokesperson for the California Trusts and Estates Practice Group of my firm, Loeb & Loeb LLP, to express our comments regarding the California Law Revision Commission's Tentative Recommendation Regarding Revision of No Contest Clause Statute (the "Tentative Recommendation") and the corresponding proposed statutory revisions (the "Proposed Legislation").

To the best of my knowledge, Loeb's California Trusts and Estates Practice Group constitutes the largest such practice group in the State.¹ Our practice spans the full spectrum of trusts and estates-related legal services, including wealth succession planning, trust and estate administration, and litigation. Collectively, we have drafted, implemented and/or litigated literally thousands of no contest clauses.² These clauses are extremely important to the vast majority of our estate planning clients. Almost without exception, these clients specifically authorize us to include a detailed no contest clause in their testamentary instruments in order to discourage litigation and deter interference with their wishes. They then review and approve such clauses before executing their testamentary instruments.

For this reason, we are troubled by certain aspects of the Tentative Recommendation and the Proposed Legislation. In our view, very little change to the current no contest clause statutes is either necessary or warranted. We reluctantly recognize, however, that some change may be inevitable. We therefore discuss below several of our specific concerns regarding the Tentative Recommendation and the Proposed Legislation. We also enclose for consideration our own suggested version of the Proposed Legislation.

¹ In addition to myself, the current attorney members of the practice group (in alphabetical order) are: Laura B. Berger, Leah M. Bishop, Tarin G. Bross, Regina I. Covitt, Linda N. Deitch, Andrew S. Garb, Lillian C. Henry, Neal B. Jannol, Deborah H. Korney, Thomas Lawson, Jeffrey M. Loeb, Ronald C. Pearson, Alyse N. Pelavin, Stanford K. Rubin, Paul A. Sczudlo, Adam F. Streisand, Stuart P. Tobisman, Nicholas J. Van Brunt and Gabrielle Vidal.

² I personally have litigated numerous no contest clause cases in the trial courts and have served as counsel of record in at least a dozen no contest clause appeals, including, most notably, *Colburn v. Northern Trust Company* (2007) ___ Cal.App.4th ___, *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, and *Estate of Ferber* (1998) 66 Cal.App.4th 244.

Permissible Scope of No Contest Clauses

Our most serious concern regarding the Tentative Recommendation and the Proposed Legislation is that they would severely limit the permissible scope of no contest clauses exclusively to “direct contests” of an instrument based on such things as forgery, lack of due execution, lack of capacity, undue influence, fraud, etc. Doing so would preclude enforcement of no contest clauses with respect to numerous types of “independent rights claims” that case law and statute have long recognized as permissible subjects of no contest clauses, including such things as creditor’s claims, claims concerning the characterization of property (e.g., community property or separate property characterizations), and claims to title to or ownership of property. In our experience, inclusion of such independent rights claims as contests within a no contest clause has been extremely important, if not critical, to many of our clients to ensure that their wishes are carried out.³

For nearly 100 years, California law has consistently held that:

- Giving effect to a transferor’s intent is the paramount rule in administering estates and trusts;
- Because they are purely gratuitous, a transferor has the right to impose any conditions he wants on his gifts as long as those conditions are not illegal or contrary to public policy; and
- No contest clauses are a valid means for imposing conditions and, while they must be interpreted narrowly, nevertheless are favored by the public policies of avoiding litigation and giving effect to a transferor’s wishes.

³ The recent *Colburn* case is just one example of this. In that case, the settlor left the residue of his substantial trust to a charitable foundation. However, at the time of his death, the settlor was subject to certain open-ended financial obligations to his former wife and their minor children under a marital dissolution judgment. Because those obligations would survive the settlor’s death and were open-ended, the amount of the residue passing to the foundation therefore might not have been ascertainable, and it might have been impossible to make distributions to the charitable foundation for many years after the settlor’s death. Moreover, the open-ended nature of the obligations to the settlor’s former wife and the children raised estate tax issues regarding the extent to which a charitable deduction would be allowed for the residual gift to the charitable foundation. To avoid these potential problems, the settlor attempted to quantify his financial obligations to his former wife and the children and included in his trust generous provisions to satisfy those obligations as so quantified, as well as substantial additional gifts beyond those obligations. The settlor also included a no contest clause that, among other things, would disinherit the former wife or the children if they claimed entitlement to open-ended amounts under the marital dissolution judgment. In effect, the settlor’s former wife and the children could take under the marital dissolution judgment, or under the settlor’s trust, but not both. The former wife and the children wished to bring precisely such claims while at the same time retaining their conditional rights under the trust. The Court of Appeal upheld the applicability of the no contest clause to their proposed claims. As a result, the former wife and the children were discouraged from asserting their claims and the settlor’s intent was preserved.

With this in mind, we emphasize again that, in our experience, transferors often specifically include independent rights claims as contests in their no contest clauses precisely because they wish to discourage litigation and claims that would interfere with their wishes. Until now, this has been permissible. By eliminating independent rights claims – which are neither illegal nor contrary to any recognized public policy – from no contest clauses, the Tentative Recommendation and the Proposed Legislation would effect a fundamental and far-reaching change to a century of settled law and policy that would seriously interfere with, if not often defeat, the intentions of countless transferors. We believe that such an extreme change should not be made absent exceptionally compelling reasons for doing so.

In this regard, the Tentative Recommendation sets forth what it refers to as “several reasons for concern” about including independent rights claims in the permissible scope of no contest clauses: (a) an heir may settle for less than what is due; (b) the estate plan may be inconsistent with the heir’s own dispositional preferences; and (c) unilateral disposition of community property violates public policy. We believe that these “reasons for concern” are misplaced and do not warrant such a sweeping change in law and policy.

An Heir Settling for Less Than What Is Due

The Tentative Recommendation explains this perceived concern as follows:

“Suppose that a surviving spouse has a good reason to believe that the transferor’s estate plan would transfer \$100,000 of property that is actually owned by the surviving spouse. If it would cost \$30,000 to adjudicate the matter, the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the inconvenience, risk, and delay of litigation are significant detriments, the surviving spouse might accept even less.”

Perhaps we are missing something, but we do not see the problem with this example. As an alternative to giving the surviving spouse \$80,000 and including a no contest clause, the transferor instead could give the surviving spouse nothing and still purport to dispose of the \$100,000 claimed by the surviving spouse. In that event, the surviving spouse would still have to litigate the claim at a cost of \$30,000, and therefore (if successful) would only receive a net amount of \$70,000 instead of \$80,000. The transferor’s estate plan thus is actually more advantageous to the surviving spouse than the alternative.

The last sentence of the Tentative Recommendation’s explanation indirectly suggests another important point that should not be overlooked. The surviving spouse’s claim may be of dubious merit. The transferor nevertheless might be concerned that the surviving spouse could tie up his or her estate or trust in protracted litigation over the claim. To avoid such litigation, the transferor therefore may decide to leave the surviving spouse a significant gift – perhaps as much as or even more than the surviving spouse reasonably could anticipate receiving through litigating the claim – subject to a no contest clause that would cause a forfeiture of the gift if the surviving spouse pursues the claim. Again, such an estate plan could only be advantageous to the surviving spouse, while at the same time facilitating the administration of the transferor’s estate or trust.

Estate Plan Inconsistent with Heir's Dispositional Preferences

The example the Tentative Recommendation recites here is that a transferor may attempt to dispose of a surviving spouse's interest in community property in a manner inconsistent with the surviving spouse's wishes. The short answer to this example is that the surviving spouse is free to claim his or her community property interest. A no contest clause does not and cannot prevent this. A no contest clause might cause a forfeiture of gifts the transferor makes to the surviving spouse. But the clause would be meaningful only if the transferor's gifts to the surviving spouse that would be forfeited are of equal or greater value than the surviving spouse's community property interest. By structuring an estate plan in this way, the transferor essentially is doing nothing more than offering to buy the surviving spouse's interest, with the consideration being gifts to the surviving spouse that the transferor has no obligation to make. As with any purchase offer, the surviving spouse can choose to accept it, forego his or her community property interest, and receive the gifts given as consideration. Or, the surviving spouse instead can choose to reject the offer, assert and retain his or her community property interest, and forego the gifts offered as consideration. In either event, the choice is entirely up to the surviving spouse. We see no problem with affording a surviving spouse such a choice.

Unilateral Disposition of Community Property Violates Public Policy

The complete answer to this perceived concern is that the Supreme Court squarely rejected it in *Burch v. George* (1994) 7 Cal.4th 246 as being based on a false premise – *i.e.*, that a no contest clause constitutes or effects a unilateral disposition or taking of property. In *Burch*, the settlor's trust sought to dispose of property in which the surviving spouse, Marlene, wished to claim a community property interest. The Court rejected Marlene's argument that application of the trust's no contest clause to her claim would violate public policy as a unilateral taking of her community property. In doing so, it explained that application of the no contest clause to a community property claim does not constitute a taking of property, but simply puts the surviving spouse to a permissible choice:

“Both Marlene and the dissent misapprehend the purpose and effect of a no contest clause. Such a clause essentially acts as a disinheritance device, *i.e.*, if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument. Thus, while the enforcement of a no contest clause might work a forfeiture of a surviving spouse's conditional right to take under the trust instrument, it does not, as Marlene and the dissent urge, work any forfeiture or conversion of the spouse's community property. We have no doubt that no contest clauses discourage some spouses from litigating over perceived community property rights in estate property. However, the fact that a no contest clause might discourage a surviving spouse in this way does not mean that a ‘theft’ of community property has occurred. Such a clause does not deprive the spouse of his or her community interests in property, nor does it hinder the ability of the spouse to assert such interests. To the extent

the spouse believes valid community claims may be made against the estate property, the spouse remains free to pursue them at his or her option. In doing so, however, the spouse may not retain the distribution conditionally provided under the estate plan.” *Id.* at 265.

* * *

“[W]e hold that a no contest clause is properly enforceable against a surviving spouse who, under the terms of a will or trust instrument, brings a contest against that instrument based on the assertion of community property rights to estate property. When a spouse decides to pursue such a challenge, we see no legal or policy reason that would justify the spouse to also take under the instrument in clear violation of the decedent’s wishes.” *Id.* at 267-68.

All of the foregoing “reasons for concern” recited in the Tentative Recommendation involve claims or potential claims by surviving spouses. This focus on surviving spouses apparently stems from the view, also expressed in the Tentative Recommendation, that “[u]nilateral decision making, backed by a threat of forfeiture, is arguably incompatible with the fiduciary relationship that spouses share with respect to the disposition of their community property.”

Of course, surviving spouses are not the only persons who may have independent rights claims to which a no contest clause would be applicable. Such claims also might be contemplated or asserted by creditors, business partners or associates, various non-spouse family members, former spouses, and countless others. Indeed, sometimes the inclusion of independent rights claims in a no contest clause can operate to protect a surviving spouse by discouraging claims that could be detrimental to the surviving spouse’s interests, including, for example, claims by disappointed children of the transferor from a prior marriage. Even if the spousal “fiduciary relationship” concern expressed in the Tentative Recommendation were valid, it therefore would not warrant the wholesale elimination of all independent rights claims from no contest clauses.

In fact, however, this spousal “fiduciary relationship” concern is misplaced. Contrary to the view recited in the Tentative Recommendation, and as held in *Burch*, a transferor who includes independent rights claims by a surviving spouse in his or her no contest clause is not engaging in “unilateral decision making.” Nor can the transferor do so. Rather, as explained in *Burch* and above, all the transferor can do and is doing is affording the surviving spouse a choice. The surviving spouse can accept the transferor’s estate plan and forego his or her claims. Or, the surviving spouse can assert his or her claims and forego the transferor’s gifts – gifts which the transferor is under no obligation to make. The transferor does not and cannot make that choice. Only the surviving spouse can do so.

Finally, besides being unwarranted for the reasons discussed above, the elimination of independent rights claims from no contest clauses also is puzzling because the same result could still be achieved in other ways. For example, a transferor could provide for a gift of \$1 million to his or her surviving spouse, but only on condition that the surviving spouse release any community property claim he or she may have to Blackacre. This condition is not a no contest clause, and so would not be precluded by the Tentative Recommendation and the Proposed Legislation. Yet, it would have exactly the same effect as a \$1 million gift to the

surviving spouse accompanied by a no contest clause causing a forfeiture of that gift if the surviving spouse asserts a community property claim to Blackacre. In either case, the surviving spouse can either have her interest in Blackacre or the \$1 million gift, but cannot have both. It therefore makes no sense and would serve no purpose to eliminate such independent rights claims from permissible no contest clauses.

In light of the foregoing, we strongly urge the Commission to reconsider its position and revise the Tentative Recommendation and Proposed Legislation to include independent rights claims as permissible contests. To that end, our enclosed version of the Proposed Legislation:

- Expands the proposed Section 21330(a) definition of “contest” to include “independent rights claims,” as well as direct contests;⁴
- Adds a new proposed Section 21330(c) defining “independent rights claims;”⁵ and
- Modifies Section 21333(a) to provide that a no contest clause is enforceable against a beneficiary “who engages in a contest” (as “contest” is defined in Section 21330(a)), rather than against a beneficiary “who brings a direct contest”

Definition of “Pleading”

In the Proposed Legislation, Section 21330(a) defines “contest” as “a pleading in a proceeding in any court” In our revised version of the Proposed Legislation, Sections 21330(b) and (c) similarly define “direct contest” and “independent rights claim” as “a pleading filed with a court” However, the Proposed Legislation does not include a definition of “pleading.” This creates a significant possibility of uncertainty as to what constitutes a “pleading,” and thus a “contest” (or a “direct contest” or “independent rights claim” in our version of the Proposed Legislation).⁶ In our version of the Proposed Legislation, we therefore have added a definition of “pleading” as Section 21330(e).

⁴ Our version of the Proposed Legislation also includes a third category of “contest” – to the extent provided by the no contest clause, the voluntary support of or participation in a direct contest or an independent rights claim. This is necessary to preclude collusion among multiple beneficiaries whereby, if one beneficiary contests and is disinherited, the remaining beneficiaries will share their interests with that beneficiary.

⁵ Our definition of “independent rights claims” lists several categories of such claims that could be included in a no contest clause, “but only to the extent specifically identified in the no contest clause as a contest.” The default, then, would be that independent rights claims are not included in a no contest clause. A transferor could elect specifically to include any or all of the specified categories, or could narrow – but not expand – the scope of any of the categories.

⁶ Illustrative of this is an appeal I currently am handling in which one issue is whether notices of appeal and appellate briefs filed in prior appeals – and not anything filed or done in any of the underlying trial court proceedings – are “pleadings” and thus can constitute contests in and of themselves.

Definition of “Protected Instrument”

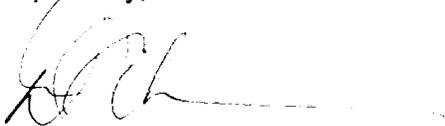
In interpreting no contest clauses, uncertainties can arise as to what documents, other than that containing the no contest clause, the clause is applicable. Among other things, it is not entirely clear whether a no contest clause in a will that applies simply to “this will” (without mentioning codicils) also applies to subsequent codicils or whether a no contest clause in a trust that applies simply to “this trust” (without mentioning amendments) also applies to subsequent amendments to the trust. Yet another question can arise where a no contest clause expressly applies to “this trust and any amendments thereto” and a beneficiary successfully challenges the validity of a purported amendment. One theory is that the challenge is a contest because it attacked the validity of an “amendment” to the Trust. Another theory is that the challenge is not a contest because the purported amendment, having been determined to be invalid, was not, in fact, an “amendment” to the trust.⁷ Although the Proposed Legislation provides a definition of “protected instrument” in Section 21330(d), that definition does not answer these questions. To afford greater clarity, our version of the Proposed Legislation therefore provides a more detailed definition of “protected instrument” in Section 21330(f).

Application of Part

Section 21335(b) of the Proposed Legislation provides that the new statutes do not apply either: (a) where the person who created the instrument died before January 1, 2010; or (b) where the instrument is or becomes irrevocable before January 1, 2010. We believe this double test for applicability is both unwieldy and unclear. For example, to what extent do the new statutes apply to a two-settlor trust (e.g., husband and wife) where only one settlor dies, and/or only part of the trust becomes irrevocable, before January 1, 2010? The Proposed Legislation’s version of Section 21335(b) does not answer these questions – it gives rise to them. In addition, application of the new statutes to existing revocable instruments could force thousands, or even hundreds of thousands, of transferors to incur the expense of modifying their current estate plans in light of the change in law. We believe a much simpler and more practical rule would be to apply the new statutes only to no contest clauses that are created or modified on or after January 1, 2010, and have stated that rule in Section 21335(b) of our version of the Proposed Legislation.

We appreciate the Commission’s difficult task in analyzing these issues and thank you in advance for your consideration of our comments and suggestions. Feel free to contact us if you have any questions.

Respectfully,



David C. Nelson
 Partner

cc: Distribution List (via email)

⁷ I currently am handling cases in the Los Angeles County Superior Court involving each of these issues.



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**LOEB & LOEB LLP VERSION OF PROPOSED
LEGISLATION RE NO CONTEST CLAUSES**

Section 21330. Definitions

As used in this part:

(a) “Contest” means all of the following:

- (1) A direct contest.
- (2) An independent rights claim.
- (3) To the extent specifically provided in the no contest clause, the voluntary support of or voluntary participation in a direct contest or an independent rights claim.

(b) “Direct Contest” means a pleading filed with a court that constitutes or includes an express attack on the validity of a protected instrument or any of its terms on any of the following grounds, except to the extent that the no contest clause specifically excludes any such ground or grounds as a contest:

- (1) Forgery.
- (2) Lack of due execution.
- (3) Lack of capacity.
- (4) Menace, duress, fraud, or undue influence.
- (5) Disqualification of a beneficiary under Section 21350.
- (6) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or the instrument.

(c) “Independent Rights Claim” means a pleading filed with a court that constitutes or includes any of the following, but only to the extent specifically identified in the no contest clause as a contest:

- (1) A claim, other than a claim for payment of funeral expenses or expenses of final illness, within the meaning of Section 9000 or Section 19100.
- (2) A claim concerning the characterization of property that is contrary to or inconsistent with any characterization of property set forth in a protected instrument.
- (3) A claim to title to or ownership of property or an interest therein that otherwise would pass to others under a protected instrument.
- (4) A claim that the transferor agreed, orally or in writing, to make a donative transfer to the beneficiary that is greater than or different from any donative transfers to the beneficiary under a protected instrument.
- (5) A claim that the transferor forgave or agreed to forgive any debt owed by the beneficiary to the transferor.

(d) “No Contest Clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary that engages in conduct specified in the provision.

(e) “Pleading” means a document that initiates a contest, including a complaint, a cross-complaint, a demurrer, an answer, a petition, a response to a petition, objections to a petition, a will contest, a petition to revoke probate, and a creditors claim under Section 9000 *et seq.* or Section 19100 *et seq.*

(f) “Protected Instrument” means all of the following:

- (1) The instrument that contains the no contest clause.
- (2) Instruments that are created or are in existence on the date that the instrument containing the no contest clause is executed to the extent that the no contest clause identifies such instruments as being subject to the no contest clause.
- (3) Valid instruments, including a codicil to a will and an amendment to an instrument, that are executed after the date on which the instrument containing the no contest clause is executed to the extent that the no contest clause identifies such later-executed instruments as being subject to the no contest clause.

Section 21331. Application of Common Law

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

Section 21332

This part applies notwithstanding a contrary provision in the instrument.

Section 21333. Enforcement of No Contest Clause

(a) A no contest clause is enforceable against a beneficiary who engages in a contest.

(b) Except as provided in subdivision (a), a no contest clause is not enforceable.

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

Section 21334. Strict Construction

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

Section 21335. Application of Part

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

(b) This part applies to a no contest clause that (i) is included in an instrument executed on or after January 1, 2010, (ii) is added to a pre-existing instrument by an instrument executed on or after January 1, 2010, or (iii) is included in a pre-existing instrument and is modified by an instrument executed on or after January 1, 2010.

(c) Except to the extent provided in subdivision (b), this part does not apply to no contest clauses included in instruments executed before January 1, 2010 and the law in effect prior to January 1, 2010 continues to govern such no contest clauses.

EMAIL FROM JAMES GRAHAM (JULY 14, 2007)

Subject: Revision of No Contest Clause Statute

Dear Commission and Staff:

I am sending this e-mail in response to the invitation for public comment with respect to the Tentative Recommendation concerning the revision of the no contest statute.

The Commission and its staff are to be commended for the reforms proposed in their Tentative Recommendation. Prior attempts to address the difficulties presented in this area of the law have largely failed to provide the simplicity and consistency which will result from the adoption of the reforms that have been proposed. My sincere thanks go to everyone who has contributed to the making of the current recommendation.

There are a few suggestions, however, that I would like to make.

First, I would strongly suggest that this very much needed legislation become operative at the earliest practicable date. The Tentative Recommendation has been made because the existing statute is overly complex, has contributed to uncertainty and has deterred legitimate inquiry into cases of elder financial abuse and fraud. Pages 15-20 of the Tentative Recommendation describe the "Problems Under Existing Law." In my judgment, the deficiencies in the existing statutes are sufficiently serious that the need to correct them as soon as possible should outweigh any justification for delay.

Until the existing law is completely repealed, notwithstanding the existing declaratory relief procedure, many practitioners will remain at risk of an inadvertent triggering of a no contest clause with catastrophic results for the client and the attorney. E.g. Estate of Pittman (1998) 63 Cal.App.4th 290, 295 (dismissal of contest shortly after it was filed held to result in forfeiture; Code of Civil Procedure section 473 relief on basis of mistake and excusable neglect denied).

Rather than delaying the operation of the proposed revision, Probate Code section 3, which specifies the governing rules regarding revisions to the Code, should apply. This statute was discussed and applied by the Supreme Court in Rice v. Clark (2002) 28 Cal.4th 89. There is no reason not to apply this statute to the proposed revision.

In addition, I would suggest that you delete proposed Probate Code section 21335(b)(2) which states the new legislation will not be applied to an instrument becoming irrevocable prior to January 1, 2010. Most trusts provide that they become irrevocable when the trustor becomes incapacitated. However, the question of when the trustor became incapacitated is one that is usually disputed in cases of this nature. Application of the proposed revision should not be made to depend on the outcome of a litigated issue.

Furthermore, I would suggest that you delete proposed Probate Code section 21335(b)(1) which states the new legislation will not be applied to an instrument created by a person dying before January 1, 2010. This is going to create problems since it will subject the most common type of estate planning device for married persons, namely, A-B trusts and A-B-C trusts, to two entirely different statutory schemes where one spouse dies before January 1, 2010, and the other dies after January 1, 2010.

I have noted that page 5 of the Tentative Recommendation states that “many estate plans have been drafted in reliance on existing law” and page 24 states that the new law will have a “one year deferred operative date...[to] provide a grace period for those who wish to revise their estate plans before the new law takes effect.” I presume this is the justification for delaying the effective date of the proposed revision, however, I would question whether there are many estate plans have been drafted in reliance on the existing law. The no contest clauses that I have seen and litigated have invariably been buried in boilerplate. I have yet to see a carefully crafted no contest clause that was designed to thwart a challenge that the decedent actually contemplated. If there are any estate plans that have been drafted in reliance on the existing no contest clause statute, I believe they would represent a rare exception. In any event, since the debate concerning this subject is well known among estate planning attorneys, they may reasonably be relied on to make any needed changes to the estate plans of their clients. In addition, I would note that since the new law will not generally invalidate no contest clauses nor will it require that any existing no contest clause be re-written, I would doubt that many estate plans will need to be changed in any event.

Second, I would strongly suggest that the language of proposed Probate Code section 21333(c) be reconsidered. There are three aspects of this proposed statute that concern me: (i) the recommendation that the probable cause standard be adopted that is set forth in the Restatement Third, (ii) the requirement that any probable cause determination be based only on evidence available at the time of initiating the contest and (iii) the failure to make a probable cause determination exempt from the no contest clause. In my judgment, the combined effect of the foregoing will be to close the door to direct contests being initiated in all but the most exceptional case.

The Restatement Third standard of probable cause should be rejected in favor of the existing standard set forth in Probate Code section 21306 as delineated in Estate of Gonzalez (2002) 102 Cal.App.4th 1296. A continuation of the section 21306 standard will give greater certainty to the law. This is especially true since the section 21306 standard is based on a large body of existing California cases. The Tentative Recommendation has not identified any problems with section 21306 other than the fact that it is too narrow in scope. Adopting the Restatement Third standard will thrust probate litigators into a void that will be filled only as future decisions apply the new definition.

The policy reason behind the recommendation that the probable cause determination be based only on the evidence existing at the time the contest is initiated is not clear. Presumably, the policy reason is to make for a streamlined probable cause hearing that will not be too costly to the parties or too time consuming on the courts. But if this is so, it would seem to me that this policy objective could be achieved by simply specifying that the probable cause hearing would be one that would have to be determined on the basis of declarations with no testimony and no cross-examination allowed so that the proceeding does not turn into a mini-trial on the merits.

In any event, I would submit that if proposed Probate Code section 21333(c) is not revised, it will set the bar at too high a level and discourage too many otherwise meritorious direct contests from being made. I doubt that very many probate litigators will be willing to render an opinion that probable cause exists.

Always making a correct probable cause determination---which is what the new law will require since the probable cause determination is not going to be exempt from the no contest clause---is usually going to be a great challenge for probate litigators for several reasons. The 120-day statute of limitations to bring an action always imposes severe time constraints. By the time a proposed contest comes before the probate litigator, usually very little time is left. In addition, since trusts and beneficiary designations may become operative without two independent witnesses to attest to the validity of the instrument, making an assessment of the prospects of a contest is always difficult. Direct proof is often not available which means cases have to be proven circumstantially. Making an accurate capacity determination of a deceased person without access to medical records is problematic since lay witnesses are often unreliable. Likewise, making an accurate determination of where funds went without access to financial records is difficult. Since the usual elder adult abuser is in control of the decedent during his or her final days, making an accurate assessment of the prospects of a case is usually a great challenge. If you require probate litigators to make a probable cause determination to the standard required by the Restatement Third without

discovery and on the basis that an incorrect determination will be a violation of the no contest clause, as a matter of business judgment, not many of us are going to be willing to recommend litigation except in the clearest of cases since the malpractice risks will be too high.

There is one other part of proposed Probate Code section 21333(c) that requires comment. The proposed revision is silent on the subject of when the probable cause determination is to be made which means that in some cases it will not be made until after the contest has been tried. Further, the proposed revision states that a no contest clause will not be enforced if there is probable cause to believe the contest will be successful. In the context of a contest of a single instrument, making the determination whether the contest will be “successful” will be far simpler than when the contest challenges multiple instruments executed on different dates. For example, assume a no contest clause applies to challenges to trusts, trust amendments, wills, codicils and beneficiary designations. Further assume a contest challenges a codicil, a trust amendment, an annuity beneficiary designation, a life insurance beneficiary designation and an IRA beneficiary designation. If two of the five contests are successful, will the contestant have to prove there was probable cause to initiate other contests? Will the result change if the contest is successful as to a majority of the challenges? What if the contest is predicated on the five instruments being challenged on lack of capacity, undue influence and fraud causes of action but at trial success is obtained only on lack of capacity grounds---will this make any difference? I would suggest in order to avoid any uncertainty, that you either provide a definition in the proposed statute of what is meant by “successful” or that you offer some guidance in the comment accompanying proposed section Probate Code section 21333(c).

The Tentative Recommendation requests comment regarding the proposal concerning forced elections. The proposal is excellent and should be adopted. The Tentative Recommendation further solicits comment regarding the deletion of misrepresentation and mistake as grounds for a direct contest. This proposal is excellent too, however, I would suggest that you add a comment indicating that misrepresentation is subsumed into fraud and that a pleading to reform an instrument based on mistake will continue to be exempt as it was under Probate Code section 21305(b)(11) which statute, I presume, is to be repealed.

This is the first time in my thirty-four year career that I have attempted to influence the legislative process. That I should do so in this case is an indication of the importance that I attach to revising the no contest clause statute. I hope my comments are helpful to the formulation of your final recommendation.

Since I am sending this e-mail from a system that I do not own, I would appreciate it if you would send me an acknowledgment of your receipt of this communication. Thank you very much.

Respectfully,

James S. Graham

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July 14, 2007

California Law Revision Commission
4000 Middlefield Rd, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation "Revision of No Contest Clause Statute" Study L-637

Dear Commissioners and staff:

I will summarize my thoughts as follows:

I. Prevention of Elder Abuse requires a "probable cause" exception for contests alleging lack of capacity and/or undue influence.

II. It is imperative that forced elections be allowed.

A. Any bill that that precludes the use of forced elections will not be enacted.

B. The suggested objections to forced elections do not withstand scrutiny.

III. The time for determining whether there is probable cause for a contest alleging undue influence and/or lack of capacity needs to be some date later than the date of commencement of the contest proceeding.

Amplifying the foregoing:

Fraud and Elder Abuse Exist and No-Contest Clauses Protect the Guilty.

I once won a will contest by proving that the decedent was impersonated at a mental exam on the day the will was signed. Most cases involving wills signed by incapacitated persons and/or persons who have been subjected to undue influence are not nearly so entertaining, but they appear to be common and will likely become more so as the population ages. I'm not surprised that Florida, with its large senior citizen population, is one of the states that does not enforce no-contest clauses.

Forced Elections and My Perception of Political Reality

I think it will be difficult to enact probable cause exceptions for incapacity and undue influence even if a bill addresses only those topics. It will be virtually impossible to enact any bill whatever if the bill goes beyond that and attempts to outlaw forced elections. In connection with my 23+ years working on the CEB Estate Planning and California Probate Reporter, I have

had many opportunities to debate the relevant issues with a significant number of highly experienced estate planning attorneys. The overwhelming majority of those attorneys believe that forced elections are legitimate and often necessary devices for accomplishing estate planning objectives. They are particularly concerned with situations in which a surviving spouse might claim an interest in a family farm, inherited newspaper, or you-name-it, that is primarily separate property of a deceased spouse and is devised to the descendants of the deceased spouse who are the current operators of the business. Claims of such community property interests are typically based on allegations that the deceased owner of the separate property business improved the business during lifetime by working in the business during the marriage. Forcing the surviving spouse to choose between asserting the claim or accepting a generous gift can avoid litigation (and family strife) while accomplishing the objective of keeping the farm in the family that has owned it for multiple generations.

The Objections to Forced Elections Do Not Withstand Scrutiny.

The Tentative Recommendation lists three “reasons for concern about the use of a no contest clause to force an election.” [pp.8-9]

First, it is suggested that the spouse might “settle for less than what is due.” I would suggest that it would be highly unusual to see a clause in which the offered gift is not generous enough to assure that the spouse will be motivated to take the gift rather than make claims to the family farm. But even if this were not so, **the surviving spouse is always better off having a choice under the will or trust than the spouse would be with no choice.** A spouse with no choice must either incur the expense of litigating to final judgment or accepting a settlement offer. Trying to eliminate the possibility that the spouse will “settle for less than what is due” is a fools’ errand. If the other heirs can make a settlement offer after much litigation and family strife, what harm is done by letting the deceased spouse make an offer up front?

Second, the Tentative Recommendation suggests that an estate plan that forces an election “may be inconsistent with the heir’s own dispositional preferences.” The poorly suggested example states, “For example, a surviving spouse would have liked her share of a vacation home to pass to her children from a former marriage.” (Would the spouse really want to force her children to share a vacation home with the decedent’s children?) Be that as it may, **it is again the case that the spouse is better off with a choice than with no choice.**

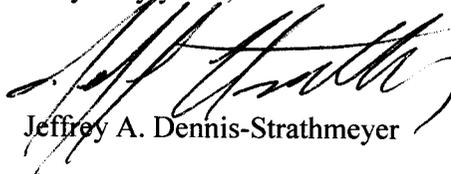
Third, the Tentative Recommendation suggests that, “Unilateral disposition of community property violates public policy.” But forced elections do not involve unilateral dispositions. The spouse must agree and consent. The Recommendation suggests that the spouse’s consent is being coerced, but **again it appears that the spouse is better off with a choice than with no choice.**

Failure to enforce forced elections would be inequitable.

What could be more unfair than allowing the spouse to have the cake and eat it too—keeping both the legal claim and the alternative gift?

The time for determining the existence of probable cause for bringing a contest alleging lack of capacity or undue influence must be delayed. I am concerned that there are many cases in which the potential contestant will find it impossible to investigate a suspicious will without initiating legal action. It may be impossible to gather relevant information concerning the circumstances of the creation of the will or trust. The drafter may be unknown or unwilling to provide credible evidence. Witnesses are often not impartial persons who are willing to provide information. Medical records often are not available without court proceedings. Accordingly, if there is a desire to avoid protecting the guilty, the contestant must be able to initiate the contest and continue it for a reasonable period of discovery without being deemed to have *per se* acted in bad faith and without probable cause. In that case, assuming it is not shown that the contestant had actual knowledge that probable cause would not be discovered, the significant issue would be whether the contestant *continued* the contest after discovering a lack of probable cause.

Very truly yours,



Jeffrey A. Dennis-Strathmeyer

To: Brian Hebert
From: Shirley L. Kovar, Liaison from TEXCOM to CLRC on the no contest clause; and Neil Horton, Chair, TEXCOM subcommittee on CLRC
Subject: CLRC Tentative Recommendation on No Contest Clause Study
Date: July 17, 2007

TEXCOM discussed CLRC's Tentative Recommendation on the no contest clause at its June 16, 2007 meeting. Below we show the motions that TEXCOM passed, the vote, and the reasons for the vote.

I. Motion to *support* CLRC's proposal that a no contest clause should be enforceable against a direct contest [and not enforceable against an indirect contest.]

Vote to *support*: yes—18; no—2; abstain—1

An unacceptable level of uncertainty exists under the present no contest clause statute as to what actions will result in a forfeiture. Because courts have found a wide variety of different petitions to be indirect contests, beneficiaries routinely petition for declaratory relief under Probate Code section 21320 before filing any kind of court proceeding. The result has been unnecessary litigation, burdening the courts and causing additional expense and delay in trust and probate administration.

TEXCOM introduced legislation to end enforcement of no contest clauses. The legislature responded by calling for the present study and report. Because the greatest source of litigation are petitions for declaratory relief to determine whether a proposed action is an indirect contest, TEXCOM supports the proposed prohibition against enforcing no contest clauses against indirect contests, and supports limiting the enforcement of no contest clauses to direct contests.

II. Motion to *support* CLRC's proposal for a probable cause exception to enforcing no contest clauses against direct contests, *except that TEXCOM supports a less strict probable cause standard.*

Vote to support as modified above: yes-17; no-2; abstain-1

TEXCOM believes that a more liberal standard for the probable cause exception is essential to CLRC's proposal. Filing a direct contest against a donative instrument is different from most other types of litigation, where the plaintiff knows a great deal about what happened. Most direct contests include allegations of undue influence. In those cases, the disappointed potential contestants knows only that the testamentary instrument's provisions appear "unnatural," for example, a child whose inheritance is substantially less than that going to a sibling.

Although an “unnatural” testamentary disposition is an indication of undue influence (*Estate of Yale* (1931) 214 Cal. 115), that factor alone does not satisfy the probable cause standard in the Tentative Recommendation (“...”)f ... the evidence available... would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that a contest will be successful.”).

Undue influence usually takes place behind closed doors. It is difficult to prove by direct evidence; it “can only be established by proof of circumstances from which it may be deduced.” *Estate of Ferris* (1960) 185 Cal. App. 2d 731, 734. By the time the possibility of undue influence is under investigation, the decedent is no longer available to discuss the reasons for the “unnatural” gift.

Among the factors that indicate the presence of undue influence are that the will’s dispositions differ from the intentions that the decedent expressed both before and after its execution; the chief beneficiaries had the opportunity to control the testamentary act; the decedent’s weakened mental and physical condition was such as to permit a subversion of his or her free will; and the chief beneficiary was active in procuring the instrument (*Estate of Lingenfelter* (1952) 38 Cal. 2d 571, 585; *Estate of Yale, supra.* at p. 122).

A beneficiary has only 120 days in which to file a contest. Probate Code sections 16061.8 (trust contests) and 8270(a) (will contests). During this limited period, the would-be contestant has no means to compel discovery of the information needed to determine whether the contest would be successful.

Significant sources of information that “would lead a reasonable person, properly informed and advised, to conclude that it is more likely than not that the contest will be successful” include the drafting attorney’s testimony and files, the decedent’s physician’s testimony, and the decedent’s medical records.

The drafting attorney’s testimony and files are likely to provide information as to whether dispositions under the instrument in question differ from the decedent’s intentions as expressed before and after its execution, whether the chief beneficiary had the opportunity to control the testamentary act, and the extent to which the chief beneficiary was instrumental in procuring the instrument. But most drafting attorneys will not voluntarily discuss the decedent’s estate plan or make their files available to a potential contestant.

The descendant’s physician and medical records will be helpful in determining the extent to which the decedent was susceptible to undue influence. But the Health Insurance Portability and Accountability Act (HIPPA) (Pub L 104-191, 110 Stat 1936) and California’s Confidentiality of Medical Information Act (Civil Code section 56 et. Seq.), prevent a would-be contestant from reviewing the decedent’s medical records or examining the decedent’s physicians until *after* the contest is filed.

CRLC’s strict standard of probable cause places an unrealistically high burden for would-be contestants to overcome. The result will increase the number of instruments procured by undue influence. Although TEXCOM did not vote on an alternative definition, it urges CLRC to adopt a definition of “probable cause” that is realistic in the context of contests based on undue influence.

III. Motion to *support* CLRC’s proposal that a no contest clause be enforceable against a direct contest of a document other than the document that contains the no contest clause, *but to modify the proposal to require that the outside document be “in existence” at the time the document containing the no contest clause is executed and that the outside document be identified with particularity.*

Vote to support: as modified: Yes—16; no—4; abstain—1.

TEXCOM supports the general concept that a no contest clause should be enforceable against a “direct contest” of a document other than the document containing the no contest clause, so long as the document is in existence and is identified with particularity in the no contest clause.

If the no contest statute does not include the words “in existence” then a no contest clause could apply to documents that a decedent never intended to be a direct contest. For example, after a settlor signs a trust containing a no contest clause, a family member unduly influences the settlor to sign a beneficiary designation to a retirement plan. Such a settlor would not want a trust beneficiary to forfeit her rights because she filed a successful direct contest against another instrument that did not exist when the settlor signed the no contest clause.

Requiring no contest clauses to identify the instruments to which they apply with particularity should end the custom of drafting no contest clauses that apply to open-ended categories of donative instruments, such as “any beneficiary designation under any retirement account, insurance policy, or annuity agreement.”

IV. Motion that TEXCOM *oppose* proposed section 21331, and that in its place, language be inserted that the new provisions regarding the no contest clause and donative transfers be the exclusive law under which the no contest clause will be governed.

Vote to oppose: Yes—19; no—0; abstain –0

TEXCOM believes that the new law should apply to all instruments whenever executed. No contest clauses in instruments executed in the middle of the 20th century are now being used to prevent beneficiaries from enforcing their rights during trust administration. E.g., *Hearst v. Ganzi* (2006) 145 Cal. App. 4th 1195 (claim that trustees breached their fiduciary duty of impartiality by favoring the remainder beneficiaries over the income beneficiaries); *McKenzie v. Vanderpoel* (2007) 151 Cal. App. 4th 1442 (claim seeking to enforce rights to reallocate principal and income under California Uniform Principal and Income Act). It is a strained legal fiction that claims to enforce a decedent’s intent to exact a forfeiture when beneficiaries seek to enforce rights under circumstances that the decedent could not have anticipated. These cases deserve to be

adjudicated on their merits, not under the guise of enforcing a decedent's intent in a no contest clause.

V. The CLRC proposal uses the term “pleading” without definition. TEXCOM proposes that “pleading” be defined.

Vote in favor of motion: Yes– 11; no – 7; abstain – 3

TEXCOM believes that the current definition of “pleading” in Probate Code section 21305(f) should be modified to mean “a petition, complaint, objection answer, or response.”

VI. Motion to *support* CLRC’s definition of “direct contest” on the grounds listed at 21330(b), except for (5) “disqualification of a beneficiary under section 21350,” which should be deleted.

Vote to support as modified: Yes—21; no—0; abstain—0

Probate Code Section 21350 creates a special class of persons to whom donative transfers are presumptively invalid absent some form of additional verification by an attorney who is independent of the transferee. TEXCOM's position is based on the belief that CLRC will propose, and the legislature will adopt, a statute that more narrowly tailors the class of persons who are protected from “care custodians” and more narrowly tailors the definition of “care custodian” to effect the salutary purpose of section 21350 without unduly limiting the ability of clients to make testamentary gifts to friends and Good Samaritans.

Frequently a disqualified person will have the donor include a no contest clause in the donative instrument in order to deter contests. TEXCOM believes that a contestant should not be required to demonstrate probable cause in order to contest a donative transfer to a disqualified person.

VII. Motion to *support* CLRC that a no contest clause should not be enforceable against a forced election.

Vote to support: Yes—15; no—4; abstain—3

A forced election is a version of an indirect consent. It requires a spouse or domestic partner to accept a decedent's disposition of the spouse's or domestic partner's community property interests or to forfeit the provisions for that spouse or domestic partner in the decedent's will or trust. The reason in favor of creating an exception for forced elections is that many spouses find it difficult to address the issue of their rights to community property during life. This reason is not compelling. As the Tentative Recommendation points out, public policy favors enforcing the community property rights of surviving spouses and domestic partners.

VIII. Motion to *oppose* a pretrial determination of probable cause. *

Vote to oppose—unanimous

* This vote was taken at a prior TEXCOM meeting.

The probable cause determination should not be made before the contest is tried. A pre-trial probable cause determination will not reduce litigation. If the court finds probable cause to exist before trial, the court will hear the same testimony at trial.

Moreover, the proposal for a pretrial determination of probable cause ignores the likelihood that the beneficiary who loses the pretrial determination is likely to seek appellate review, particularly during the period that the courts of appeal determine how to apply the probable cause standard. Thus, the likelihood exists that a pre-trial probable cause determination will result in as much appellate litigation and delay as the current declaratory relief procedure.

In addition, the proposal for pre-trial determination of probable cause ignores the fact that a probable cause determination of a direct contest will be fact-intensive. It differs in this respect from the current procedure for declaratory relief, which usually involves determining a decedent's intent. Parties will want to take depositions and engage in substantial discovery before the pre-trial determination.

On the other hand, requiring the court to make the probable cause determination after trial will result in fewer determinations of probable cause because the weaker cases will settle or be dismissed before trial. It will avoid the trial court having to consider the same evidence twice. And it will result in fewer appeals as the losing contestant or the losing respondent will file one appeal, not two.

IX. Section 21333(b) should be amended to read: “A no contest clause shall not be enforced against any pleading that is not a direct contest, regardless of the terms of the instrument.”

Although TEXCOM did not vote on this recommendation, a consensus exists to support this change.

CLRC's tentative recommendation seeks to simplify no contest clause enforcement by limiting enforcement to traditional direct contests. All “indirect contests” will be exempt from the operation of a no contest clause.

The proposed legislation defines “Direct Contest” to mean “a contest” based on one or more of six specifically enumerated grounds.

But section 21333(b) fails to explicitly prohibit enforcement of no contest clauses against indirect contests. It states, “A no contest clause shall not be enforced against a **contest** that is not a direct contest, regardless of the terms of the instrument.” (Emphasis added) “Contest” is a defined term, namely, “a pleading in a proceeding in any court alleging the invalidity of a protected instrument or one or more of its terms.” Section 21333(b) fails to capture many

actions – often characterized as indirect contests – that seek to enforce a beneficiary’s legal rights but do not directly seek to invalidate an instrument or one or more of its terms, for example, a pleading that seeks to enforce rights under federal law (*Burch v. George* (1994) 7 Cal. 4th 246) or even rights under the California Revised Uniform Principal Income Act (*McKenzie v. Vanderpoel, supra.*)

CLRC can remedy this defect by amending section 21333(b) to read, “A no contest clause shall not be enforced against **any pleading** that is not a direct contest, regardless of the terms of the instrument.” (Emphasis added)

In summary, TEXCOM supports CLRC’s Tentative Recommendation on the no contest clause with the modifications set forth above.

Respectfully submitted,

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

Neil Horton, Chair, TEXCOM subcommittee on CLRC



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July 31, 2007

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

**Re: Revision of No Contest Clause Statute
Study L-637 (Tentative Recommendation)**

Dear Brian:

As you know I am a chair of various volunteer legislative committees, but I am writing now solely as an individual who has some familiarity with the issues concerning the current no contest clause statutes. The following comments are technical only and do not reflect my views on whether the approach proposed by the Commission is appropriate.

In your discussion of the declaratory relief petitions and the proposed repeal of Probate Code section 21320 (see, pages 18-19 and 22-23 of the Tentative Recommendation), coupled with the retention of the balance of the common law (in proposed section 21331), raised doubts as to whether you have accomplished the proposed objective and will not have eliminated entirely declaratory relief litigation. What seems to have been overlooked is the pre-code case law, such as *Estate of Friedman*, 100 Cal. App. 3d 810, 161 Cal. Rptr. 311 (1979) (heirship petition under former Probate Code section 1080 treated as a petition for declaratory relief), allowing for "common law" declaratory relief actions to determine whether a proposed action would violate a no contest clause.

Brian Hebert
California Law Revision Commission
July 31, 2007
Page 2

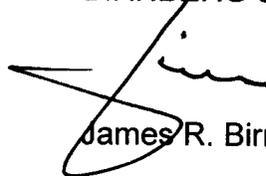
In a similar vein, I am not sure what is meant in section 21331 by "This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent that this part does not apply." I realize this is the same language as current section 21301, but the following questions remain: What portion of the common law is not included within the statutory scheme? Is this not just an invitation for litigation over what is or is not part of the statutory scheme and what is still left of the common law rules for enforcement of no contest clauses?

I have another unrelated concern: The effective date in section 21335 may not allow enough time for people to make revisions of their estate plans (see, Tentative Recommendation, at page 24), particularly if court proceedings for conservatees under Probate Code section 2580 are required. Given the complete shift in approach that is proposed, I think that a longer delay for the effective date is required. (See, examples of delayed effective dates in IRC sections 2041(a)(1)(B) and 2041(b)(3); also see Treas. Regs. section 20.2041-2, all pertaining to pre-1942 powers of appointment.) Because a revision of an estate plan for a conservatee may be impossible because of an absence of evidence of alternate intent, another possibility would be to have the prior law continue to apply in those cases where the testator-settlor is incompetent at the time of what would otherwise be the effective date.

I sincerely hope that these comments are helpful to you in your further review of the Tentative Recommendation.

Very truly yours,

OLDMAN, COOLEY, SALLUS, GOLD,
BIRNBERG & COLEMAN, LLP



James R. Birnberg

JRB:Deb

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