

## Memorandum 2007-52

**Revision of No Contest Clause Statute (Draft Recommendation)**

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In April 2007, the Commission approved a tentative recommendation on *Revision of the No Contest Clause Statute* (April 2007). The Commission has considered public comments on the tentative recommendation and has made some changes to the proposed law.

A draft recommendation that incorporates all of the Commission's decisions to date is attached. After considering the issues discussed in this memorandum, the Commission should decide whether to adopt the attached draft as its final recommendation.

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

## STRUCTURE OF THE PROPOSED LAW

The existing no contest clause statute consists of a "part" divided into two "chapters." Chapter 1 includes the main provisions on the operation of a no contest clause. Chapter 2 includes provisions relating to declaratory relief.

The proposed law would repeal Chapter 1 entirely and replace it with a new Chapter 1. That will avoid confusion that might result if existing section numbers were reused in the new law.

Chapter 2 would be preserved, with an amendment to the provision that governs the scope of declaratory relief (Section 21320).

An uncodified section of the proposed law would provide a one-year deferred operative date. That would provide a one-year grace period after enactment of the law, during which existing law would continue.

## DEFINITIONS

Proposed Section 21310 would provide definitions for key terms used in the proposed law. Two issues relating to those definitions are discussed below.

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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](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

## **“Pleading”**

The proposed law uses the term “pleading” in defining a contest:

“Contest” means a pleading filed with the court that would result in a penalty under a no contest clause, if the no contest clause is enforced.

Thus, the only action that can trigger a no contest clause is a “pleading” that is “filed with the court.”

Proposed Section 21310(d) defines a “pleading” as follows:

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

That definition is similar to the existing definition of pleading in Section 21305(f). However, the definition in Section 21305(f) also includes a catch-all: “or other document filed with the court that expresses the position of a party to the proceedings.”

**The staff invites comments on whether the definition of “pleading” in the proposed law should be revised to include the catch-all provision, or make some other change.**

## **“Protected Instrument”**

The term “protected instrument” would be used to describe which instruments are governed by a no contest clause. Under proposed Section 21310(e), a no contest clause would protect the instrument that contains the clause as well as:

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.

A question arose in discussions with the liaison of the Executive Committee of the Trusts and Estates Section of the State Bar (“TEXCOM”). Suppose an instrument incorporates a no contest clause by reference or by republication of the instrument that includes the no contest clause. Is such an instrument itself a protected instrument?

For example, a trust includes a no contest clause. An amendment to the trust expressly provides “the no contest clause in the trust is incorporated in this amendment by reference.” Is the amendment to the trust a protected instrument?

The question is one of the transferor’s intention. In the example given above, it is clear that the transferor intended the amendment to be governed by the incorporated no contest clause and that should be the result. In other cases, the intention may be less clear.

The staff worked with TEXCOM to see whether language could be added to the definition of “protected instrument” to address the matter. No consensus was reached.

**The staff recommends that the matter be addressed in the Comment to Section 21310.** In the attached draft, the Comment provides in part:

Subdivision (e)(1) provides that a protected instrument includes an instrument that contains a no contest clause. That may include an instrument that expressly incorporates or republishes a no contest clause in another instrument.

#### ENFORCEMENT OF NO CONTEST CLAUSE

Proposed Section 21311 would govern the enforcement of a no contest clause. It provides for enforcement against three types of contests: (1) a direct contest brought without probable cause, (2) a creditor claim, and (3) a property ownership dispute.

Issues relating to those rules are discussed below.

#### **Direct Contest**

TEXCOM is generally supportive of the proposed law on the enforcement of a no contest clause against a direct contest. However, it has expressed concern about whether a direct contest should include an action to disqualify a beneficiary under Section 21350.

#### *Action to Disqualify a Beneficiary Under Section 21350*

Section 21350 disqualifies certain specified types of beneficiaries unless the beneficiary can prove a lack of duress, menace, fraud, and undue influence in the formation of the gift. TEXCOM is concerned that lack of clarity as to who may be disqualified under Section 21350 would make it unfair to enforce a no contest clause against an action under that section. The staff disagrees.

Existing Sections 21306(a)(3) and 21230 expressly recognize that a no contest clause may be enforced against such an action. That is proper, because Section 21350 is grounded in concerns about menace, duress, fraud, and undue influence — all traditional grounds for a direct contest.

Furthermore, the operation of Section 21350 is not overly complex. The list of persons who may be disqualified is fairly straightforward. The principal source of uncertainty, whether the provision disqualifying a care custodian applies to a personal friend who provides services on a volunteer basis, has been settled by the California Supreme Court. See *Bernard v. Foley*, 39 Cal. 4th 794, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (no exception to care custodian disqualification provision for personal friend who provides services informally as volunteer). The existing rules are likely to change (the Commission has been charged with studying the statute) but don't present much uncertainty at present.

Finally, the application of a no contest clause to action under Section 21350 would be subject to the probable cause exception. Because the grounds for disqualification under Section 21350 are fairly straightforward, it should be clear whether a contestant has probable cause to act under that section.

**The staff recommends that the proposed law continue existing law allowing a no contest clause to be enforced against an action brought under Section 21350 without probable cause.** That is the approach taken in the attached draft. See proposed Section 21310(a)(6).

*Action to Disqualify a Beneficiary Under Section 6112*

On a related point, the definition of "direct contest" should also include action to disqualify a beneficiary under Section 6112. Subdivision (c) of that section provides:

Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof. This presumption does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity.

It is clear that action under that section is a species of direct contest. It is an attempt to invalidate a provision of a will on the grounds of duress, menace, fraud, or undue influence. What's more, existing law already provides that a no contest clause can be enforced against an action to contest a gift to a witness of the instrument making the gift. Section 21307(c).

As with action under Section 21350, the staff does not see any problem that would result from including Section 6112 in the definition of a "direct contest." The factual criteria stated in the section are clear. It should be obvious whether a

contestant has probable cause to contest a gift under that section. **The attached draft includes action under Section 6112 in the definition of “direct contest.”** See proposed Section 21310(a)(6).

### **Probable Cause**

Proposed Section 21311(a) provides a statutory standard for determining whether a contestant has probable cause to bring a direct contest:

For the purposes of this subdivision, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.

The draft comment to that provision explains its origin and meaning:

The standard for determining whether there is probable cause to bring a direct contest is drawn in part from former Section 21306(b), with two exceptions:

(1) The former standard referred only to the contestant’s factual contentions. By contrast, subdivision (a) refers to the granting of relief, which requires not only proof of the factual contentions but also a legally sufficient ground for the requested relief.

(2) The former standard required only that success be “likely.” One court interpreted that standard as requiring only that a contest be “legally tenable.” *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard. There must be a “reasonable likelihood” that the requested relief will be granted. The term “reasonable likelihood” has been interpreted to mean more than merely possible, but less than “more probable than not.” See *Alvarez v. Superior Court*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033). See Section 21310(b) (“direct contest” defined).

The proposed standard implements the Commission’s decision to start with the existing language in Section 21306 (defining “reasonable cause”) and modify it to raise the required quantum of probability of success.

### **Objection to “Reasonable Likelihood” Standard**

In response to a previously published version of the standard, the Commission received a comment from David C. Nelson. He finds the proposed range of probabilities to be too wide, making the standard too unpredictable:

The standard does not establish a meaningful baseline or threshold for “reasonable likelihood.” We know it does not have to be more probable than not, and so does not have to be greater than a 50% probability (and probably does not have to be 50%). But how much less than 50% is sufficient? The explanation says “more than merely ‘possible.’” But even a 1% chance is possible. So at what point between 1% and 50% does a claim stop being a “mere possibility” and become a “reasonable likelihood”? Assume you have a claim with roughly a 25% chance of success. One judge could call that a reasonable likelihood while another judge might not. If there is going to be a probable cause exception, the standard needs to provide a clear threshold. “More likely than not” is reasonably clear because it can be equated to greater than a 50% chance. But reasonable likelihood is ambiguous because it does not identify a meaningful threshold.

See Second Supplement to CLRC Memorandum 2007-44, Exhibit pp. 1-2.

The staff does not believe that the likelihood of success on a claim can be reduced to a numerical percentage. The standards of proof used in the law are rough approximations. They define a conceptual range of probability.

For example, what is meant by “clear and convincing evidence?” More than a preponderance, but less than beyond a reasonable doubt. It defines a wide range of probabilities, from 51% to near certainty. That standard poses exactly the same problems identified by David Nelson. Is 52% clear and convincing? Is 60%?

Reasonable likelihood and clear and convincing evidence both define a range of probabilities that are of roughly equivalent magnitude (though covering different ground). If clear and convincing evidence provides a workable standard, then reasonable likelihood should be just as workable. To the staff’s knowledge, the clear and convincing evidence standard is used widely throughout the law, without causing any significant problems. A standard of reasonable likelihood should prove equally workable.

**The staff recommends the use of “reasonable likelihood” in the probable cause standard.**

### **Creditor Claim**

The proposed law would continue existing law providing for the enforcement of a no contest clause in response to the “filing of a creditor’s claim or prosecution of an action based on it.” See proposed Section 21311(c). The proposed language is drawn verbatim from Section 21305(a)(1).

At the October meeting, the Commission invited input from interested persons and groups on *noncontroversial* ways that the creditor claim language might be improved. The staff will present any such suggestions at the December meeting.

### **Property Ownership Dispute**

The proposed law would also continue existing law providing for the enforcement of a no contest clause in response to a property ownership dispute. See proposed Section 21311(b). The Commission's decision at the October meeting was the same as the decision on creditor claims: continue existing language from Section 21305(a), but invite suggestions for noncontroversial improvement.

The staff and TEXCOM have informally discussed one possible improvement to avoid overbroad interpretation of the property ownership dispute provision. That potential problem and the proposed solution (which is explained and implemented in the attached draft) are discussed below.

#### *Potential Problem*

Existing Section 21305(a)(2) provides for enforcement of a no contest clause in response to:

An action or proceeding to determine the character, title, or ownership of property.

The problem is that this language could be read to describe two distinctly different kinds of claims:

- (1) The transferor is claiming ownership of an asset that belongs to me. It should not be part of the transferor's estate.
- (2) I do not dispute the transferor's ownership of a purported estate asset, but I claim that, properly effectuated, the estate plan would transfer the asset to me.

The first type of claim is clearly what the provision is meant to govern. The beneficiary is disputing the *transferor's* ownership of an asset. If such a claim is successful, the property is not part of the transferor's estate. This is the sort of claim that gives rise to a forced election. The beneficiary can be forced to choose between acquiescing in the characterization of property stated in the transferor's estate plan (and take whatever gift is offered by that plan), or dispute the transferor's ownership of purported estate assets (and forfeit the gift).

The second type of claim would be problematic. Under that reading, any action that would determine a person's right to a gift under an estate plan could be characterized as an action to determine the "ownership of property." For example, if a beneficiary petitions for judicial construction of an ambiguous provision in a trust, the result might be to determine who receives a gift under that provision. It could then be argued that the petition to construe the trust was actually a pleading to determine the "ownership" of the property at issue in the ambiguous provision.

That is clearly not the intended meaning of the provision. Such broad application would swallow all exceptions, opening the door to enforcement of a no contest clause against many types of indirect contests that are expressly exempt from enforcement as a matter of public policy. See, e.g., Section 21305(b)(9) (action to interpret instrument is exempt).

#### *Proposed Solution*

Proposed Section 21311(b) would revise the language on determination of property ownership to limit it to the first situation. Under the proposed language, a no contest clause could be enforced against:

A pleading to determine whether an asset is part of the transferor's estate, if the no contest clause expressly provides for that application.

As revised, the language would focus exclusively on the question of whether the transferor has dispositional control of an asset. It would not encompass questions about who should receive an asset by operation of the transferor's estate plan.

The proposed language would preserve the substance of existing law, while avoiding the overbreadth described above. **The staff recommends that it be included in the proposed law.**

#### APPLICATION OF COMMON LAW

Proposed Section 21313 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.

That language continues existing Section 21301 verbatim.

Some members of TEXCOM have objected to continuation of that provision, on the ground that it would be unnecessary after enactment of the proposed law and might be problematic. It could undo the benefits of the proposed law, by preserving outdated concepts from the case law.

The staff does not see that as a significant risk. The language expressly provides that the common law applies *only to the extent that the statute does not apply*. That leaves intact court decisions that address matters not addressed by the statute, while superseding decisions on matters that the statute covers. For example, proposed Section 21311 provides that a no contest clause shall “only” be enforced against the specified types of contests. That language would not allow for enforcement of a no contest clause in any other circumstances, notwithstanding any court precedent suggesting otherwise.

**The staff recommends that proposed Section 21313 be included in the proposed law.**

#### DECLARATORY RELIEF

Because the proposed law would continue existing law on the enforcement of a no contest clause against a creditor claim or property ownership dispute, there will probably still be some uncertainty as to whether a no contest clause applies to those sorts of contests. For that reason, the proposed law would continue the existing declaratory relief provisions, with one substantive change. The scope of declaratory relief would be expressly limited to questions involving a creditor claim or property ownership dispute. With the proposed amendments, Section 21320 would read as follows:

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a proposed pleading would be a contest within the terms of the no contest clause and whether the no contest clause could be enforced against the pleading under subdivision (b) or (c) of Section 21311. The court shall not make a determination under this section if the determination would depend on the merits of the proposed pleading.

(b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a).

(c) The statute of limitations for filing any pleading referred to in subdivision (a) is tolled beginning with the date an application for the court’s determination is made under this section and ending with the date the court’s determination becomes final.

**Comment.** Section 21320 is amended to limit its scope of application. The procedure provided in the section may only be used to determine whether a contemplated action would fall within the intended scope of a no contest clause that would be enforceable under Section 21311(b) or (c).

Subdivision (c) continues former Section 21308 without substantive change.

Proposed subdivision (b) probably isn't necessary. The staff sees no way that action under Section 21320 could be construed as one of the types of contests that would be subject to a no contest clause under proposed Section 21311. Nonetheless, subdivision (b) is existing law and would probably provide comfort to those who proceed under the section. Deletion of the provision might invite confusion about whether a substantive change was intended.

**The staff recommends that Section 21320 be amended to read as proposed above.**

#### STAFF RECOMMENDATION

The staff recommends that the Commission approve the attached draft as its final recommendation. It would provide the following benefits:

##### *Simplification*

- Eliminate confusion about the operative date provisions that apply to Section 21305.
- Eliminate gaps in the coverage of the public policy exceptions provided in Section 21305(b) (e.g., no application to a petition under the Uniform Principal and Income Act; no application if the trustor died before the operative date of the exception).
- Eliminate confusion about when, if ever, an indirect contest is actually a direct contest, under Section 21305(e).
- Eliminate confusion resulting from the overlap of the "reasonable cause" exception provided in Section 21306 and the "probable cause" exception provided in Section 21307.

##### *Protection Against Elder Financial Abuse*

- Generalize the probable cause exception so that it applies to all direct contests, thereby making it easier to challenge elder financial abuse.
- Clarify the standard for establishing "probable cause."
- Revise the standard so that it does more than deter frivolous claims.

*Reduction in the Use of Declaratory Relief*

- Limit declaratory relief to the determination of whether a creditor claim or property ownership determination would violate a no contest clause.

The proposed law would not make any substantive changes to the laws governing the enforcement of a no contest clause in response to a creditor claim or property ownership dispute. That may be a missed opportunity for improvement, but it would not cause any new problems. Given the lack of widespread support for substantive change on these matters, that is probably the best that can be done at this time.

Respectfully submitted,

Brian Hebert  
Executive Secretary

#L-637

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**STAFF DRAFT**

RECOMMENDATION

Revision of No Contest Clause Statute

December 2007

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335  
<commission@clrc.ca.gov>

## SUMMARY OF RECOMMENDATION

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is intended to reduce litigation by beneficiaries whose expectations are frustrated by the donative scheme of the instrument.

After reviewing the policies favoring enforcement and nonenforcement of a no contest clause and the varying approaches to enforcement used in other jurisdictions, the California Law Revision Commission recommends that the general rule in California be preserved: a no contest clause should be enforced so long as it does not conflict with public policy.

However, the Commission recommends several changes to the existing statute to clarify its operation and make minor substantive improvements. The most significant changes to existing law would be as follows:

- Enforcement of a no contest clause would be expressly limited to an exclusive list of contest types (a direct contest, creditor claim, or property ownership dispute).
- The existing list of public policy exceptions to the enforcement of a no contest clause would be eliminated.
- The probable cause exception for enforcement of a no contest clause against certain types of direct contests would be extended to apply to all direct contests.
- The meaning of “probable cause” would be clarified.
- The scope of the existing procedure for judicial construction of a no contest clause would be narrowed.

This recommendation was prepared pursuant to Resolution Chapter 122 of the Statutes of 2005.

## REVISION OF NO CONTEST CLAUSE STATUTE

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### BACKGROUND

2 A no contest clause (also called an *in terrorem* clause) is a provision inserted in  
3 a will, trust, or other instrument to the effect that a person who contests or attacks  
4 the instrument or any of its provisions takes nothing under the instrument or takes  
5 a reduced share. Such a clause is intended to reduce litigation by beneficiaries  
6 whose expectations are frustrated by the donative scheme of the instrument.<sup>1</sup>

7 The Legislature has directed the Law Revision Commission to prepare a report  
8 weighing the advantages and disadvantages of enforcing a no contest clause in a  
9 will, trust, or other estate planning instrument.<sup>2</sup> In preparing the report, the  
10 Commission is to do the following:<sup>3</sup>

11 Review the various approaches in this area of the law taken by other states and  
12 proposed in the Uniform Probate Code, and present to the Legislature an  
13 evaluation of the broad range of options, including possible modification or repeal  
14 of existing statutes, attorney fee shifting, and other reform proposals, as well as  
15 the potential benefits of maintaining current law.

16 This report discusses the arguments for and against the enforcement of a no  
17 contest clause, the approach to enforcement taken in California and in other states,  
18 and problems that have arisen under the California statute. It concludes with a  
19 recommendation for changes to the existing statute.

20

### POLICIES FAVORING ENFORCEMENT

21 The longstanding general rule in California is that a no contest clause will be  
22 enforced: “No contest clauses are valid in California and are favored by the public  
23 policies of discouraging litigation and giving effect to the purposes expressed by  
24 the testator.”<sup>4</sup> Policies supporting that general rule are discussed below.

#### 25 **Effectuating Transferor’s Intent**

26 The law should respect a person’s ability to control the use and disposition of  
27 the person’s own property. That includes the ability to make a gift, either during

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1. The statutory law that governs enforcement of a no contest clause was enacted in 1990, on the recommendation of the Law Revision Commission. See *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7 (1990). It has been amended several times since enactment, adding a number of specific exceptions to the enforcement of a no contest clause. See 1994 Cal. Stat. ch. 40; 1995 Cal. Stat. ch. 730; 2000 Cal. Stat. ch. 17; 2002 Cal. Stat. ch. 150; 2004 Cal. Stat. ch. 183.

2. See SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122.

3. *Id.*

4. *George v. Burch*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

1 life or on death. An owner may place a condition on a gift, so long as the condition  
2 imposed is not illegal or otherwise against public policy:

3 [The] testatrix was at full liberty to dispose of her property as she saw fit and  
4 upon whatever condition she desired to impose, so long as the condition was not  
5 prohibited by some law or opposed to public policy. The testatrix could give or  
6 refrain from giving; and could attach to her gift any lawful condition which her  
7 reason or caprice might dictate. She was but dealing with her own property and  
8 the beneficiary claiming thereunder must take the gift, if at all, upon the terms  
9 offered.<sup>5</sup>

10 As noted, there are some situations in which a no contest clause is unenforceable  
11 as a matter of public policy, notwithstanding the intentions of the transferor.<sup>6</sup>

### 12 **Avoiding Litigation**

13 There are a number of good reasons why a transferor would want to avoid  
14 litigation contesting the transferor's estate plan:

15 *Cost and Delay.* The cost of litigation depletes assets that were intended to go to  
16 the transferor's beneficiaries. That is generally undesirable, but it can also have  
17 unexpected effects on the relative value of the gifts given to different  
18 beneficiaries. For example, where one beneficiary is given a specifically identified  
19 asset and the other beneficiary takes the residue of the estate, litigation costs will  
20 disproportionately affect the second beneficiary.<sup>7</sup>

21 By deterring contest litigation, a no contest clause preserves the corpus of the  
22 estate and the transferor's dispositional plan.

23 *Discord Between Beneficiaries.* A dispute over the proper disposition of a  
24 transferor's estate can pit family members and friends against one another. The  
25 dispute may be protracted, emotional, and destructive of important personal  
26 relationships.

27 A transferor may execute a no contest clause in order to avoid just that sort of  
28 discord. For example, in *Estate of Ferber*,<sup>8</sup> the transferor had served as the  
29 personal representative of his father's estate, which was open for 17 years. He did  
30 not want his own representative to go through the same difficulties: "Due to his  
31 angst over this state of affairs and its negative impact on his health and quality of  
32 life, ... he directed his attorneys to prepare the strongest possible no contest  
33 clause."<sup>9</sup>

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5. Estate of Kitchen, 192 Cal. 384, 388-89, 220 P. 301 (1923).

6. See discussion of "Public Policy Exceptions" *infra*.

7. See Prob. Code § 21402 (order of abatement).

8. 66 Cal. App. 4th 244, 77 Cal. Rptr. 2d 774 (1998).

9. *Id.* at 247.

1        *Privacy.* A contest proceeding may bring to light “matters of private life that  
2 ought not to be made public, and in respect to which the voice of the testator  
3 cannot be heard, either in explanation or denial....”<sup>10</sup> Unless a no contest clause is  
4 given effect, the resulting squabbles between disappointed beneficiaries could lead  
5 to “disgraceful family exposures,” as a result of which “the family skeleton will  
6 have been made to dance.”<sup>11</sup>

7        An effective no contest clause can prevent that sort of public airing of private  
8 matters.

#### 9        **Avoiding Settlement Pressure**

10        A disappointed beneficiary may attempt to extract a larger gift from the estate  
11 by threatening to file a contest. So long as the amount demanded is less than the  
12 cost to defend against the contest, there will be pressure to accede to the demand,  
13 regardless of its merits.

14        A no contest clause can be used to avoid that result. The potential contestant’s  
15 bargaining position is much reduced if filing a nuisance suit would forfeit the gift  
16 made to that person under the estate plan.

#### 17        **Use of Forced Election to Avoid Ownership Disputes**

18        In some cases, the proper disposition of a transferor’s property may be  
19 complicated by difficult property characterization issues.

20        For example:

21                A decedent is survived by his wife of many years. It was a second marriage for  
22 both spouses, each of whom had significant separate property assets of their own.  
23 Over the years of their marriage it became increasingly difficult to characterize  
24 ownership of their assets as separate or community property: gifts were made (or  
25 implied), accounts were mingled, community property contributions were made to  
26 separate property business interests, etc. Rather than put his beneficiaries to the  
27 expense and delay that would be required for a thorough property  
28 characterization, the transferor uses a no contest clause to avoid the issue.

29                The transferor claims that all of the disputed assets are his separate property,  
30 gives a gift to his surviving wife that is clearly greater than the amount she would  
31 recover if she were to contest the property characterization, and includes a no  
32 contest clause. This forces the surviving spouse to make a choice between  
33 acquiescing in the decedent’s estate plan and taking the amount offered under that  
34 plan, or forfeiting that amount in order to pursue her independent rights under  
35 community property law.

36                If the offer made in the estate plan is fair to the surviving spouse, she can save  
37 the estate money and time by accepting the gift offered (thereby effectively  
38 waiving any community property claim to purported estate assets).

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10. Estate of Hite, 155 Cal. 436, 441, 101 P. 443 (1909) (quoting *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898)).

11. Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 *Hastings L.J.* 45 (1963) (citations omitted).

1 Similar facts were at issue in a recent case involving a forced election:

2 [Estate] planning for many married couples now entails allocating a lifetime of  
3 community and separate assets between the current spouse and children from a  
4 previous marriage. The difficulties inherent in ascertaining community interests in  
5 otherwise separate property pose a significant challenge to the testator or testatrix.  
6 If the testator or testatrix errs in identifying or calculating the community interests  
7 in his or her property, costly and divisive litigation may ensue and testamentary  
8 distributions in favor of one or more beneficiaries might unexpectedly be  
9 extinguished. As both the Legislature and courts have long recognized, no contest  
10 clauses serve an important public policy in these situations by reducing the threat  
11 of litigation and uncertainty.<sup>12</sup>

12 There are other situations, besides the disposition of marital property, that may  
13 give rise to a forced election of the type described above. For example, business  
14 partners may have mingled assets in a way that would make proper division  
15 difficult, or there may be a disputed debt owed by the decedent to a beneficiary. In  
16 such cases, a no contest clause and a sufficiently generous gift can resolve the  
17 matter without litigation.

18 **Continuity of Law**

19 Many existing estate plans have been drafted in reliance on existing law. Any  
20 significant substantive change in the law governing the enforcement of a no  
21 contest clause could result in transitional costs, as transferors would be required to  
22 review their estate plans and make whatever changes make sense under the new  
23 law. If a transferor were to die before adjustments could be made, the estate plan  
24 could operate in an unintended way. Those concerns weigh in favor of continuing  
25 the substance of existing law.

26 **POLICIES FAVORING NON-ENFORCEMENT**

27 It is true that a transferor generally has the right to dispose of property on death  
28 as the transferor sees fit. The law does not require that an estate plan be wise or  
29 fair.

30 However, it has long been held that public policy concerns can trump a  
31 transferor's intention to create a no contest clause.<sup>13</sup> Specific policy concerns are  
32 discussed below.

33 **Access to Justice**

34 As a general matter, a person should have access to the courts to remedy a  
35 wrong or protect important rights. A no contest clause works against that policy,

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12. *George v. Burch*, 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

13. *Estate of Kitchen*, 192 Cal. 384, 388-89, 220 P. 301 (1923) (no contest clause enforceable "so long as the condition was not prohibited by some law or opposed to public policy.").

1 by threatening a significant loss to a beneficiary who files an action in court. In  
2 one of the earliest decisions holding that a no contest clause is unenforceable, the  
3 court based its holding on the importance of access to justice:

4 [It] is against the fundamental principles of justice and policy to inhibit a party  
5 from ascertaining his rights by appeal to the tribunals established by the State to  
6 settle and determine conflicting claims. If there be any such thing as public  
7 policy, it must embrace the right of a citizen to have his claims determined by  
8 law.<sup>14</sup>

#### 9 **Forfeiture Disfavored**

10 Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy.  
11 Accordingly, a no contest clause should be applied conservatively, so as not to  
12 extend the scope of application beyond what was intended: “Because a no contest  
13 clause results in a forfeiture ... a court is required to strictly construe it and may  
14 not extend it beyond what was plainly the testator’s intent.”<sup>15</sup>

#### 15 **Judicial Action Required to Determine or Implement Transferor’s Intentions**

16 In order to effectuate a transferor’s intentions, it is necessary to ascertain those  
17 intentions. In some situations, a judicial proceeding may be required to do so. In  
18 those cases, a no contest clause could work against the effectuation of the  
19 transferor’s intentions, by deterring action that is necessary to determine or  
20 preserve those intentions. Areas of specific concern are discussed below.

21 *Capacity and Freedom of Choice.* An instrument should only be enforced if it  
22 expresses the free choice of a transferor who has the legally required mental  
23 capacity to understand the choice being made. An instrument that is the product of  
24 menace, duress, fraud, or undue influence is not an expression of the transferor’s  
25 free will and should not be enforced.<sup>16</sup> An instrument executed by a transferor who  
26 lacks the requisite mental capacity is also not a reliable expression of the  
27 transferor’s wishes and is invalid.<sup>17</sup> For obvious reasons, a forgery is not given  
28 effect.

29 If a no contest clause deters a beneficiary from challenging an instrument on any  
30 of those grounds, it may work against the transferor’s actual intentions, by  
31 protecting an instrument that should not be given effect.

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14. *Mallet v. Smith*, 6 Rich. Eq. 12, 20 (S.C. 1853). Notwithstanding that decision, South Carolina now follows the Uniform Probate Code approach; a no contest clause will be enforced in the absence of probable cause to bring a contest. S.C. Code Ann. § 62-3-905.

15. *George v. Burch*, 7 Cal. 4th at 254. See also Prob. Code § 21304 (no contest clause to be strictly construed).

16. See Section 6104 (will procured by duress, menace, fraud, or undue influence is ineffective); Civ. Code §§ 1565-1575 (contract procured by duress, menace, fraud, or undue influence is voidable).

17. See Prob. Code §§ 811-812 (capacity to convey property and contract), 6100.5(a) (capacity to make will).

1     *Ambiguity.* If a provision of a donative instrument is ambiguous, it may be  
2 difficult to determine the transferor’s intentions. Different beneficiaries may argue  
3 for different meanings. Judicial construction of the instrument may be necessary to  
4 resolve the matter.<sup>18</sup>

5     To the extent that a no contest clause would deter the beneficiaries from seeking  
6 judicial construction of an ambiguous provision, it works against the policy of  
7 effectuating the transferor’s intentions.

8     *Reformation or Modification of Instrument.* There may be instances where the  
9 meaning of a donative instrument is clear, but there is an unanticipated change in  
10 circumstances that would make the instrument ineffective to implement the  
11 transferor’s purpose. In such a case, it may be appropriate to seek judicial  
12 modification of the instrument.

13     For example, a court may modify or terminate a trust, on the petition of a trustee  
14 or a beneficiary, “if, owing to circumstances not known to the settlor and not  
15 anticipated by the settlor, the continuation of the trust under its terms would defeat  
16 or substantially impair the accomplishment of the purposes of the trust.”<sup>19</sup>

17     In such a case, a no contest clause could deter beneficiaries from seeking a  
18 judicial modification of an instrument that is necessary in order to effectuate the  
19 transferor’s actual intentions.

## 20     **Judicial Supervision of Fiduciary**

21     Important public policies are served by judicial supervision of an executor,  
22 trustee, or other fiduciary, and such supervision should not be impeded by the  
23 operation of a no contest clause: “No contest clauses that purport to insulate  
24 executors completely from vigilant beneficiaries violate the public policy behind  
25 court supervision.”<sup>20</sup>

## 26     **Misuse of Forced Election**

27     As discussed above,<sup>21</sup> a no contest clause may be used to force a beneficiary to  
28 either take whatever is offered under the transferor’s estate plan or forfeit that gift  
29 in order to assert an independent interest in the estate assets (e.g., by filing a  
30 creditor’s claim or disputing ownership or dispositive control of marital property).

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18. See 64 Cal. Jur. 3d *Wills* § 355 (2006) (construction of will); Prob. Code § 17200(b)(1) (construction of trust). In California, an action to construe an instrument is exempt from enforcement of a no contest clause. Prob. Code § 21305(b)(9).

19. Prob. Code § 15409. In California, an action to modify or reform an instrument is exempt from enforcement of a no contest clause. Prob. Code § 21305(b)(1), (11).

20. Estate of Ferber, 66 Cal. App. 4th 244, 253-54, 77 Cal. Rptr. 2d 774 (1998). In California, an action relating to the supervision of a fiduciary is exempt from enforcement of a no contest clause. Prob. Code § 21305(b)(6)-(8), (12).

21. See discussion of “Use of Forced Election to Avoid Ownership Disputes” *supra*.

1 Such a forced election may be entirely fair, where the amount offered to the  
2 beneficiary is sufficiently large to justify acquiescence in the estate plan. Costly  
3 litigation will be avoided and the details of the transferor's estate plan can be  
4 implemented as intended.

5 However, there are reasons for concern about the use of a no contest clause to  
6 force an election:

- 7 (1) *The beneficiary may settle for less than what is due.* Suppose that a  
8 surviving spouse has good reason to believe that the transferor's estate plan  
9 would transfer \$100,000 of property that is actually owned by the surviving  
10 spouse. If it would cost \$30,000 to adjudicate the matter, the surviving  
11 spouse might rationally accept a gift of \$80,000 rather than forfeit that  
12 amount in order to recover a net amount of \$70,000. If the inconvenience,  
13 risk, and delay of litigation are significant detriments, the surviving spouse  
14 might accept even less.
- 15 (2) *The estate plan may be inconsistent with the beneficiary's own dispositional*  
16 *preferences.* For example, a surviving spouse would have liked her share of  
17 a family business to pass to her children from a former marriage. Under  
18 community property law, she should be free to make that disposition of her  
19 own interest in the property. Instead, the transferor's estate plan transfers the  
20 entire business to his children from a former marriage. A no contest clause  
21 may coerce the surviving spouse into accepting that result, even though it is  
22 contrary to her own preferences as to the disposition of property that is by  
23 law under her control.
- 24 (3) *Unilateral disposition of community property violates public policy.*  
25 California law provides that one spouse may not make a gift of community  
26 property without the written consent of the other spouse,<sup>22</sup> but a forced  
27 election may, as a practical matter, have that effect. The surviving spouse  
28 has not given advance written consent. Any acquiescence in the result may  
29 well be the result of coercion. That may be especially true for an elderly  
30 surviving spouse.

31 These problems result from the "take it or leave it" nature of a forced election.  
32 The transferor is given unilateral control to frame the choice, without an  
33 opportunity for negotiation. The choice may be framed benevolently, so as to  
34 benefit everyone concerned, or it may be framed cynically or carelessly, offering a  
35 choice between two undesirable results.<sup>23</sup>

36 The benefits of a forced election could often be achieved through advance  
37 consultation and joint estate planning. If spouses cannot agree during life on the  
38 characterization or disposition of estate property, allowing one spouse to make  
39 unilateral decisions on death might be especially problematic.

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22. Fam. Code §§ 1100-1102.

23. See also *George v. Burch*, 7 Cal. 4th 246, 283-87, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (Kennard, J., dissenting) (arguing against use of no contest clause to create marital forced election).

1 TREATMENT OF NO CONTEST CLAUSES  
2 IN OTHER JURISDICTIONS

3 In all but two states, a no contest clause is generally enforceable. However,  
4 enforcement may be subject to a number of restrictions:

- 5 • In most states, a no contest clause will not be enforced if there is probable  
6 cause to bring the contest.
- 7 • In a few states, a probable cause exception applies to some, but not all, types  
8 of contests.
- 9 • In general, a no contest clause will not be enforced if enforcement would  
10 conflict with an important public policy. This has led to a number of specific  
11 public policy exceptions to enforcement. Some derive from court holdings,  
12 while others have been enacted by statute. California law includes several  
13 express public policy exceptions.
- 14 • Many states provide special rules of construction that limit or clarify the  
15 application of a no contest clause.

16 The differing approaches to the enforcement of a no contest clause are discussed  
17 more fully below.

18 **No Contest Clause Unenforceable**

19 In Florida and Indiana, the enforcement of a no contest clause is prohibited by  
20 statute.<sup>24</sup>

21 Florida's prohibition was added in 1974 as part of a general adoption of the  
22 Uniform Probate Code.<sup>25</sup> It is not clear why Florida chose to diverge from the  
23 Uniform Probate Code approach of enforcing a no contest clause in the absence of  
24 probable cause to bring a contest.<sup>26</sup> Prior to enactment of the 1974 statute, the  
25 Florida courts would enforce a no contest clause unless the contest was brought in  
26 good faith and with probable cause, or was brought to "settle doubtful rights" and  
27 not for the purpose of destroying the will.<sup>27</sup>

28 Indiana's statutory prohibition on the enforcement of a no contest clause dates  
29 back to at least 1917.<sup>28</sup>

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24. See Fla. Stat. Ann. §§ 732.517 (wills), 737.207 (trusts); Ind. Code § 29-1-6-2.

25. H. Fenn & E. Koren, *The 1974 Florida Probate Code – A Marriage of Convenience*, 27 U. Fla. L. Rev. 615 (1974). A parallel provision governing trusts was added in 1993. See 1993 Fla. Stat. ch 257, § 12. The trust provision was recodified in 2006. See 2006 Fla. Stat. ch. 217, § 11.

26. "While this provision eliminates litigation about what constitutes 'probable cause,' it may have the effect of encouraging a disappointed beneficiary to use a will contest (or the threat thereof) to establish a bargaining position." *Id.* at 43.

27. See *Wells v. Menn*, 158 Fla. 228, 28 So.2d 881 (1946).

28. See *Doyle v. Paul*, 119 Ind. App. 632, 640-41, 86 N.E.2d 98 (1949) (quoting Acts of 1917, ch. 46, § 1, Burns' 1933, § 7-501).

1 **General Probable Cause Exception**

2 The majority approach in the United States is to provide a probable cause  
3 exception to the enforcement of a no contest clause. A no contest clause will only  
4 be enforced if the contestant lacks probable cause to bring the contest. That is the  
5 approach taken in the Uniform Probate Code,<sup>29</sup> which has been adopted in 17  
6 states.<sup>30</sup> Another 11 states have adopted a probable cause exception that is not  
7 derived from the Uniform Probate Code. In some of those states, good faith is also  
8 expressly required.<sup>31</sup>

9 No state has expressly defined the meaning of “probable cause” to bring a  
10 contest. However, the Restatement (Third) of Property states that probable cause  
11 exists if, at the time of instituting a proceeding, there is evidence that “would lead  
12 a reasonable person, properly informed and advised, to conclude that there was a  
13 substantial likelihood that the challenge would be successful.”<sup>32</sup>

14 **Selective Probable Cause Exception**

15 In New York and Oregon, there is a probable cause exception to enforcement of  
16 a no contest clause, but only if the contest is based on a claim of forgery or  
17 revocation.<sup>33</sup>

18 **Public Policy Exceptions**

19 In states that enforce a no contest clause, there are a number of specific  
20 exceptions that are based on public policy:<sup>34</sup>

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29. See Unif. Prob. Code §§ 2-517, 3-905 (1990).

30. See Alaska Stat. §§ 13.12.517, 13.16.555 (Alaska); A.R.S. § 14-2517 (Arizona); Colo. Rev. Stat § 15-12-905 (Colorado); Haw. Rev. Stat. § 560:3-905 (Hawaii); Idaho Code § 15-3-905 (Idaho); Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (Maine); Mich. Comp. Laws Ann. § 700.2518 (Michigan); Minn. Stat. Ann. § 524.2-517 (Minnesota); Mont. Code Ann. § 72-2-537 (Montana); Neb. Rev. Stat. § 30-24.103 (Nebraska); N.J. Stat. Ann. § 3B:3-47 (New Jersey); N.M. Stat. Ann. § 45-2-517 (New Mexico); N.D. Cent. Code § 30.1-20-05 (North Dakota); 20 Pa.C.S.A. § 2521 (Pennsylvania); S.C. Code Ann. § 62-3-905 (South Carolina); S.D. Codified Laws § 29A-3-905 (South Dakota); Utah Code Ann. § 75-3-905 (Utah).

31. See *South Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917) (good faith also required) (Connecticut); *In re Cocklin’s Estate*, 17 N.W.2d 129, 136 (Iowa 1945) (good faith also required) (Iowa); *In re Foster’s Estate*, 190 Kan. 498, 500, 376 P.2d 784 (1963) (good faith also required) (Kansas); Md. Estates and Trusts Code Ann. § 4-413 (Maryland); *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794 (1998) (Nevada); *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952) (North Carolina); *Tate v. Camp*, 245 S.W. 839, 844 (Tenn. 1922) (Tennessee); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Ct. App. 1954) (Texas); *In re Estate of Chappell*, 127 Wash. 638, 646, 221 P. 336 (1923) (Washington); *Dutterer v. Logan*, 103 W. Va. 216, 221, 137 S.E. 1 (1927) (West Virginia); *In re Keenan’s Will*, 188 Wis. 163, 179, 205 N.W. 1001 (1925) (Wisconsin).

32. Restatement (Third) of Property: Wills & Donative Transfers § 8.5 (2003).

33. New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); O.R.S. § 112.272(2). California has a similar rule. See Prob. Code §§ 21306, 21307.

34. California has the most extensive list of public policy exceptions. See Prob. Code § 21305(b).

1        *Construction and Reformation of Instrument.* To effectuate the transferor’s true  
2 intentions, it may be necessary to seek judicial construction of an ambiguous  
3 provision or the modification, reformation, or termination of an instrument that  
4 has become incompatible with the transferor’s intentions. The need to determine  
5 the transferor’s actual intentions may trump the transferor’s desire to avoid  
6 litigation.

7            [It] is the privilege and right of a party beneficiary to an estate at all times to  
8 seek a construction of the provisions of the will. An action brought to construe a  
9 will is not a contest within the meaning of the usual forfeiture clause, because it is  
10 obvious that the moving party does not by such means seek to set aside or annul  
11 the will, bur rather to ascertain the true meaning of the testatrix and to enforce  
12 what she desired.<sup>35</sup>

13        A statutory exception for construction of an instrument exists in Arkansas, Iowa,  
14 and New York.<sup>36</sup>

15        *Action on Behalf of Minor or Incompetent.* In New York and Oregon, an action  
16 on behalf of a minor or incompetent to oppose the probate of a will is exempt from  
17 the application of a no contest clause.<sup>37</sup> Presumably, the concern is that a minor or  
18 incompetent should not suffer a forfeiture as a result of a decision that is made by  
19 another. The guardian may exercise poor judgment, resulting in a significant loss  
20 that cannot be recovered.

21        *Forfeiture for Action of Another.* In Louisiana, one court held that a no contest  
22 clause was unenforceable because it would cause all beneficiaries to forfeit if any  
23 of the beneficiaries were to contest the will.<sup>38</sup>

24        However, other jurisdictions, including California,<sup>39</sup> allow a no contest clause to  
25 condition a forfeiture of a beneficiary’s interest on the actions of another person.<sup>40</sup>

26        *Failure to Provide Alternative Disposition.* In Georgia, a no contest clause in a  
27 will is not enforceable if the will fails to provide an alternative disposition of the  
28 assets that would be forfeited under the clause.<sup>41</sup>

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35. Estate of Miller, 230 Cal. App. 2d 888, 903, 41 Cal. Rptr. 410 (1964).

36. Ellsworth v. Arkansas Nat’l Bank, 109 S.W.2d 1258, 1262 (Ark. 1937); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950); New York Est. Powers & Trusts § 3-3.5(b)(3)(E) (McKinney 2006).

37. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); O.R.S. § 112.272(3).

38. Succession of Kern, 252 So.2d 507 (La. App. 1971).

39. Tunstall v. Wells, 144 Cal. App. 4th 554, 50 Cal. Rptr. 3d 468 (2006).

40. “[A] transferor may provide for the rescission of a gift to a grandchild in the event that the disinherited parent of the grandchild institutes proceedings either to contest the donative document or to challenge any of its provisions.” Restatement (Third) of Property: Wills & Donative Transfers § 8.5 Comment (2003).

41. O.C.G.A. § 53-4-68(b).

1 *Procedural Exceptions.* New York provides a number of exceptions for  
2 specified actions relating to estate administration. A no contest clause does not  
3 apply to an objection to the jurisdiction of the court in which a will is offered for  
4 probate,<sup>42</sup> the preliminary examination of witnesses,<sup>43</sup> a beneficiary’s disclosure, to  
5 a court or otherwise, of information that is relevant to a probate proceeding,<sup>44</sup> or a  
6 failure to join in, consent to, or waive notice of a probate proceeding.<sup>45</sup>

### Strict Construction

7 In addition to substantive limitations on the enforcement of a no contest clause,  
8 many states, including California, provide that a no contest clause must be strictly  
9 construed.<sup>46</sup> “Strict construction is consistent with the public policy to avoid a  
10 forfeiture.”<sup>47</sup>

## SUMMARY OF CALIFORNIA LAW

11  
12 California law on the enforcement of a no contest clause combines a number of  
13 different rules, as summarized below:

- 14 • A no contest clause is generally enforceable, subject to the exceptions  
15 described below.<sup>48</sup>
- 16 • Some types of “direct contests”<sup>49</sup> are subject to a probable cause (or  
17 “reasonable cause”) exception.<sup>50</sup>

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42. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006).

43. New York Est. Powers & Trusts § 3-3.5(b)(3)(D) (McKinney 2006).

44. New York Est. Powers & Trusts § 3-3.5(b)(3)(B) (McKinney 2006).

45. New York Est. Powers & Trusts § 3-3.5(b)(3)(C) (McKinney 2006).

46. See Prob. Code § 21304. See also *Kershaw v. Kershaw*, 848 So.2d 942, 954-55 (Ala. 2002) (Alabama); *Estate of Pepler*, 971 P.2d 694, 696 (Colo. App. 1998) (Colorado) ; *Estate of Wojtalewicz*, 418 N.E. 2d 418 (Ill. 1st Dist. 1981) (Illinois); *Saier v. Saier*, 366 Mich. 515, 115 N.W.2d 279 (1962) (Michigan); *Matter of Alexander*, 90 Misc. 2d 482, 486, 395 N.Y.S.2d 598 (N.Y. 1977) (New York); *Estate of Westfahl*, 675 P.2d 21 (Okla. 1983) (Oklahoma); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. Ct. App. 1986) (Texas).

47. Prob. Code § 21304 Comment.

48. Prob. Code § 21303.

49. A “direct contest” is a contest that attempts to invalidate an instrument or one or more of the terms of an instrument on the grounds of incapacity, failure of execution formalities, forgery, mistake, misrepresentation, menace, duress, fraud, or undue influence. See Prob. Code § 21300(b). A direct contest is the “traditional” form of contest. See former Probate Code Section 371, which described a will contest as follows:

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

1931 Cal. Stat. ch 281.

- 1 • An extensive list of “indirect contests”<sup>51</sup> are exempt from the enforcement  
2 of a no contest clause on public policy grounds.
- 3 • An indirect contest based on a creditor claim or property ownership claim is  
4 subject to a no contest clause, but only if the no contest clause specifically  
5 provides for that application.<sup>52</sup> Application of a no contest clause to such  
6 claims creates a “forced election.”
- 7 • A no contest clause may apply to an instrument other than the instrument  
8 that contains the no contest clause, but only if the no contest clause  
9 specifically provides for that application.<sup>53</sup>
- 10 • A declaratory relief procedure is available to determine whether a pleading  
11 would violate a no contest clause.<sup>54</sup> The court may not provide declaratory  
12 relief if doing so would require determination of the merits of the  
13 contemplated action.
- 14 • A no contest clause is to be strictly construed.<sup>55</sup>

#### 15 PROBLEMS UNDER EXISTING LAW

16 The Trusts and Estates Section of the State Bar of California (hereafter, “Trusts  
17 and Estates Section”) has identified a number of problems with existing California  
18 law.<sup>56</sup> Existing law is perceived to be too complex and uncertain in its operation.  
19 That uncertainty leads to over-reliance on the declaratory relief procedure, to  
20 protect beneficiaries from any chance of unexpected forfeiture. The Trusts and  
21 Estates Section is also concerned that no contest clauses are being used to shield  
22 fraud and undue influence from judicial scrutiny. Finally, both the Trusts and  
23 Estates Section and the California Judges Association have expressed concern that  
24 forced elections may be used unfairly, to deprive an elderly surviving spouse of  
25 community property.<sup>57</sup>

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50. Prob. Code §§ 21306-21307. Sections 21306 and 21307 overlap in application, but state nominally different standards for the exception. Section 21306 provides an exception for “reasonable cause,” as defined. Section 21307 provides an exception for “probable cause.” A court construing Section 21306 stated, in *dicta*, that the terms were synonymous. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002).

51. An indirect contest is an action other than a direct contest that attempts to “indirectly invalidate” an instrument or one or more of its terms. Prob. Code § 21300(c).

52. Prob. Code § 21305(a)(1)-(2).

53. Prob. Code § 21305(a)(3).

54. Prob. Code § 21320.

55. Prob. Code § 21304.

56. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004; Baer, *A Practitioner’s View*, Cal. Tr. & Est. Q., Fall 2004; Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004. But see MacDonald & Godshall, *California’s No Contest Statute Should be Reformed Rather Than Repealed*, Cal. Tr. & Est. Q., Fall 2004.

57. See Second Supplement to Commission Staff Memorandum 2006-42, Exhibit p. 4 (Oct. 25, 2006) (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

1 In February 2006, the Commission conducted a survey of the members of the  
2 Trusts and Estate Section of the State Bar of California and the members of the  
3 California chapters of the National Academy of Elder Law Attorneys.<sup>58</sup> The  
4 survey was designed to answer two questions:

- 5 (1) Do practitioners believe that there are problems with existing law that are  
6 serious enough to justify a significant change in the law?
- 7 (2) Which of the problems identified in the survey is most problematic?

8 Most survey respondents agreed that problems with existing law are serious  
9 enough to justify a significant change in the law.<sup>59</sup>

10 The problems identified by practitioners are discussed more fully below.

### 11 **Uncertain Application**

12 The most common and serious problem reported by practitioners is uncertainty  
13 as to whether a particular no contest clause would apply to an intended action.<sup>60</sup>

14 That uncertainty has three main sources: (1) the open-ended definition of  
15 “contest,” (2) the complexity of existing law, and (3) the perceived failure of  
16 courts to construe no contest clauses strictly.

17 *Definition of “Contest.”* Under existing law, the concept of what constitutes a  
18 “contest” is open-ended. It can include any pleading in any proceeding in any  
19 court that “challenges the validity of an instrument or one or more of its terms.”<sup>61</sup>  
20 This means that any court pleading that affects estate assets or the operation of an  
21 instrument could potentially be governed by a no contest clause.<sup>62</sup>

22 The main limiting factor is the no contest clause itself. It defines what pleadings  
23 will trigger forfeiture under the clause.<sup>63</sup> If a clause is stated broadly or  
24 imprecisely, its scope of application may be uncertain. Each case will require the  
25 interpretation of unique language as applied to unique facts.

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58. For full survey results, see Commission Staff Memorandum 2007-7 (Feb. 21, 2007) (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)). The Commission received 351 responses to the survey. *Id.* at 4-5.

59. Of those who expressed an opinion, 63% agreed or strongly agreed that there is a need for reform. Support for reform was strongest among those who self-identified as elder law practitioners. Eighty percent of elder law practitioners who expressed an opinion see a need for reform. *Id.* at 5.

60. Of those who expressed an opinion, 63% believe that this problem is common or very common and 65% found the problem to be of moderate or serious severity.

61. Prob. Code § 21300(a)-(c).

62. See, e.g., *Hermanson v. Hermanson*, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 (2003) (petition to remove trustee); *In re Estate of Goulet*, 10 Cal. 4th 1074, 898 P.2d 425, 43 Cal. Rptr. 2d 111 (1995) (action to enforce premarital agreement); *Burch v. George*, 7 Cal. 4th 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92 (1994) (action to determine whether purported estate asset is community property).

63. Prob. Code § 21300(a) (“‘Contest’ means any action identified in a ‘no contest clause’ as a violation of the clause.”).

1 The Legislature has narrowed the scope of that problem by exempting many  
2 types of indirect contests from the operation of a no contest clause.<sup>64</sup> However,  
3 any attempt to list all pleadings that should be exempt as a matter of policy will  
4 inevitably be incomplete. Over time, new circumstances will arise that had not  
5 previously been considered.<sup>65</sup>

6 Existing law also provides that a no contest clause will not be enforced against a  
7 creditor claim or property ownership claim, or applied to an instrument other than  
8 the instrument that contains the no contest clause, unless the no contest clause  
9 specifically provides for such application.<sup>66</sup> The question of whether a no contest  
10 clause is sufficiently specific in providing for such application may itself be a  
11 source of interpretive uncertainty.

12 *Complexity of Existing Law.* The existing statute is overly complex. This  
13 complexity has two sources:

14 (1) There are two separate sections that provide for a probable (or reasonable)  
15 cause exception for certain types of direct contests.<sup>67</sup> The sections overlap in their  
16 application; both apply to an attempt to invalidate a gift to a person who drafts or  
17 transcribes the instrument making the gift.<sup>68</sup> The overlap is problematic because  
18 each of the sections uses different language in defining the exception that it  
19 provides. Section 21306 provides an exception for a contest brought with  
20 “reasonable cause,” which is expressly defined. Section 21307 provides an  
21 exception for a contest brought with “probable cause,” which is left undefined.<sup>69</sup>

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64. Prob. Code § 21305(b).

65. For example, under existing law a petition to modify a trust to reflect changed circumstances is not subject to a no contest clause as a matter of public policy. See Prob. Code §§ 15409, 21305(b)(1). Such a modification serves to preserve the transferor’s intentions rather than thwart them. It should not cause a forfeiture. However, existing law does not provide a public policy exception for a petition under the Uniform Principal and Income Act (“UPIA”) (Prob. Code 16320 *et seq.*). It arguably should. The UPIA 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 with modification of a trust under Section 15409, action under UPIA serves to preserve a transferor’s intentions despite an unanticipated change in circumstances. Nonetheless, a recent case held that a petition under UPIA would violate a no contest clause. *McKenzie v. Vanderpoel*, 151 Cal. App. 4th 1442, 60 Cal. Rptr. 3d 719 (2007).

66. Prob. Code § 21305(a).

67. See Prob. Code §§ 21306-21307.

68. Compare Prob. Code § 21306(a)(3) with Prob. Code § 21307(a)-(b). The overlap between these sections did not exist in the statute that was enacted on the Commission’s recommendation. See 1990 Cal. Stat. ch. 79; *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7, 18-19 (1990).

69. The inconsistent “reasonable cause” and “probable cause” standards used in these sections did not exist in the statute that was enacted on the Commission’s recommendation. See 1990 Cal. Stat. ch. 79; *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7, 18-19 (1990).

1 One court case has held, in dicta, that the terms were synonymous, but the  
2 question has not been decisively settled.<sup>70</sup>

3 (2) The limitations and exceptions that apply to indirect contests are governed  
4 by a complex set of application provisions.<sup>71</sup> The limitation on forced elections  
5 only applies to instruments executed on or after January 1, 2001.<sup>72</sup> A codicil or  
6 amendment is governed by a different rule, which is drafted in very confusing  
7 language.<sup>73</sup> Certain public policy exceptions only apply if the transferor dies or the  
8 instrument becomes irrevocable after January 1, 2001.<sup>74</sup> The remainder apply if  
9 the transferor dies or the instrument becomes irrevocable after January 1, 2003.<sup>75</sup>

10 In addition, certain specified exceptions do not apply if the contest is actually a  
11 “direct contest.”<sup>76</sup> There is no explanation of how the actions described in the  
12 specified exceptions might actually be direct contests. Nor is there any clear  
13 reason why certain exceptions have been singled out as posing that risk, while the  
14 remainder have not.

15 The complexity of these rules invites error. It contributes to uncertainty as to  
16 whether a particular action would be exempt from a no contest clause as a matter  
17 of law.

18 *Strict Construction.* Probate Code Section 21304 requires that a no contest  
19 clause be strictly construed. The Law Revision Commission recommended that  
20 rule in order to provide greater certainty as to the application of a no contest  
21 clause:

22 A major concern with the application of existing California law is that a  
23 beneficiary cannot predict with any consistency when an activity will be held to  
24 fall within the proscription of a particular no contest clause. To increase  
25 predictability, the proposed law recognizes that a no contest clause is to be strictly  
26 construed in determining the donor’s intent. This is consistent with the public  
27 policy to avoid a forfeiture absent the donor’s clear intent.<sup>77</sup>

28 Some practitioners believe that the courts have strayed from the rule of strict  
29 construction, by considering extrinsic evidence in construing the application of a

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70. In re Estate of Gonzalez, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306).

71. See generally Prob. Code § 21305. The complex scheme of exceptions and limitations provided in Section 21305 did not exist in the statute that was enacted on the Commission’s recommendation. See 1990 Cal. Stat. ch. 79; *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7, 17-18 (1990).

72. Prob. Code § 21305(a).

73. Prob. Code § 21305(c).

74. Prob. Code § 21305(d).

75. *Id.*

76. Prob. Code § 21305(e).

77. *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7, 12 (1990).

1 no contest clause.<sup>78</sup> If extrinsic evidence is considered in construing a no contest  
2 clause, then a beneficiary cannot simply read the instrument to determine the  
3 meaning of the no contest clause. That creates a risk of unanticipated application  
4 and forfeiture.

5 **Over-Reliance on Declaratory Relief**

6 The uncertainty that exists under current law can sometimes be resolved by  
7 declaratory relief pursuant to Probate Code Section 21320. That provision  
8 authorizes a beneficiary to seek judicial interpretation of a no contest clause to  
9 determine whether it would apply to a particular pleading. If the court finds that it  
10 does not apply, the beneficiary may proceed with the pleading without risk of  
11 forfeiture. The declaratory relief provides a safe harbor.

12 That protection against forfeiture (and attorney malpractice) has led to  
13 widespread use of the declaratory relief procedure:

14 Prudent practitioners now routinely file petitions for declaratory relief under  
15 Probate Code § 21320. Californians now expect to have two levels of litigation  
16 when instruments contain a no contest clause: file a Probate Code § 21320  
17 petition and litigate the declaratory relief, and then litigate the substantive issues  
18 in another, separate proceeding.<sup>79</sup>

19 In fact, there may be a need for more than one declaratory relief proceeding in  
20 connection with a contest. If, in the course of litigation a contestant discovers new  
21 facts that could affect the nature of the contest, a “prudent practitioner will advise  
22 her client to file a new petition for declaratory relief. ... Indeed, in any complex  
23 proceeding with discovery producing evidence of new potential claims, a second  
24 or third filing pursuant to Probate Code § 21320 is likely.”<sup>80</sup>

25 That additional source of litigation adds costs to estates, beneficiaries, and the  
26 courts.<sup>81</sup>

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78. Hartog, *supra* note 56, at 10.

79. *Id.*

80. *Id.*

81. The Executive Committee of the Trusts and Estates Section has estimated the typical cost to a petitioner to obtain declaratory relief as follows:

In 20% of cases, \$1,500-5,000.

In 40% of cases, \$5,000-20,000.

In 30% of cases, \$20,000 to 50,000.

In 10% of cases, \$50,000 to 100,000.

The Executive Committee also surveyed several Superior Courts as to the average number of declaratory relief petitions filed in a year:

Alameda County Superior Court:	50 per year
Los Angeles County Superior Court:	212 per year
Orange County Superior Court:	100-150 per year
San Diego County Superior Court:	12-19 per year

1 Respondents to the Commission’s survey ranked the cost and delay associated  
2 with declaratory relief proceedings as the second most common and serious of the  
3 problems identified in the survey.<sup>82</sup>

4 **Fraud and Undue Influence Shielded From Review**

5 An unscrupulous person may use a no contest clause to deter inquiry into  
6 whether a gift in an estate planning instrument was procured through duress,  
7 menace, fraud, or undue influence. “Experienced practitioners are well aware that  
8 the no contest clause is a favorite device of undue influencers and those who use  
9 duress to become the (unnatural) object of a decedent’s bounty.”<sup>83</sup>

10 In general, the only way to contest a suspect instrument without forfeiture is to  
11 successfully invalidate the instrument. Even in a case where there is strong reason  
12 to suspect foul play, a beneficiary may still fall short of certainty that a contest  
13 would be successful. In such a case, the abuse may stand unchallenged.

14 Most Commission survey respondents indicate that the use of a no contest clause  
15 to shield elder financial abuse is a serious problem, but not a common one.<sup>84</sup>

16 **Problematic Forced Election**

17 As discussed, a no contest clause can be used to create a forced election; the  
18 beneficiary is then forced to choose between taking the gift offered under the  
19 estate plan or forfeiting that gift in order to assert an independent legal right (such  
20 as a creditor claim or a claim of a community property interest in purported estate  
21 assets). A forced election can be used in a way that benefits all parties by making a  
22 generous gift to the beneficiary and thereby avoiding costly litigation.<sup>85</sup> A forced  
23 election can also be used in an unfair way, with the transferor claiming property  
24 that belongs to the beneficiary and offering a choice between the lesser of two

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San Francisco County Superior Court: 25 per year

If the average cost to a petitioner for declaratory relief is \$10,000, the figures above would suggest that declaratory relief procedure in the listed counties is costing petitioners over four million dollars in legal costs and fees annually. There would also be costs to those opposing the petitions and to the courts.

See Commission Staff Memorandum 2006-42 (Oct. 10, 2006), Exhibit pp. 7, 9-10 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

82. Of those who expressed an opinion, 61% believe that this problem is common or very common; 63% found the problem to be of moderate or serious severity.

83. See Hartog, *supra* note 56, at 11.

84. Of those who expressed an opinion, 55% believe that this problem is of moderate or serious severity, but only 42% found the problem to be common or very common. Concern is greater among self-identified elder law practitioners: 67% of those who expressed an opinion found the problem to be of moderate or serious severity; 62% found it to be common or very common. That probably reflects the nature of the cases handled by these specialists. Commission Staff Memorandum 2007-7 (Feb. 21, 2007) (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

85. See “Use of Forced Election to Avoid Ownership Disputes” *supra*.

1 evils: acquiesce in my disposition of your property or face forfeiture and the cost,  
2 delay, and uncertainty of litigation to secure your rights.<sup>86</sup>

3 The Commission asked survey participants to rank the frequency and severity of  
4 the following problem that could result from the use of a no contest clause:  
5 “Deterrence of a reasonable claim of ownership of estate assets.” The purpose of  
6 the question was to gauge the extent to which forced elections are seen by  
7 practitioners as problematic.

8 Respondents rated the deterrence of reasonable property ownership claims to be  
9 the least common and least serious of the problems described in the survey; most  
10 respondents found the problem to be rare or uncommon.<sup>87</sup>

11 The survey results are consistent with the Commission’s general impression of  
12 opinion within the estate planning community. Opinion appears to be significantly  
13 divided on whether forced elections should be preserved as a useful planning tool,  
14 or prohibited as potentially unfair. There is no consensus that significant reform of  
15 the forced election is needed.

#### 16 FEE SHIFTING ALTERNATIVE

17 The Trusts and Estates Section has proposed that all no contest clauses be made  
18 unenforceable. The deterrence of contest litigation would instead be achieved  
19 through an award of costs and fees against a person who brings an unsuccessful  
20 direct contest without reasonable cause.<sup>88</sup>

21 The Commission does not recommend that approach, for two reasons:

#### 22 **Transferor Intention Disregarded**

23 The rationale for enforcement of a no contest clause is based primarily on  
24 deference to a transferor’s intentions and the transferor’s fundamental right to  
25 place a lawful condition on a gift of the transferor’s property.

26 A statutory rule providing for an award of costs and fees against any  
27 unsuccessful contestant who lacks reasonable cause to bring a contest cannot be  
28 justified by reference to a transferor’s intentions. Absent that intention, it is not  
29 clear that a beneficiary should be sanctioned for bringing an unsuccessful contest.  
30 The law already provides sanctions for bringing a frivolous action.<sup>89</sup>

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86. See “Misuse of Forced Election” *supra*.

87. Fifty-five percent of those who responded felt that the problem was uncommon or rare, and 44% described the severity of the problem as minor or insignificant. Commission Staff Memorandum 2007-7 (Feb. 21, 2007) (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

88. See Horton, *supra* note 56, at 7-8.

89. See Code Civ. Proc. §§ 128.5-128.7.

1 **Deterrence Undermined**

2 The purpose of a no contest clause is to deter contest litigation. Many of the  
3 harms that can result from litigation occur early in a contest (e.g., reputational  
4 harm to the transferor or beneficiaries, acrimony between beneficiaries, and  
5 pressure to settle with a dissatisfied beneficiary).

6 To deter those harms, forfeiture of a gift under a no contest clause is triggered  
7 by the mere filing of a pleading.<sup>90</sup> This creates a clear choice for a contestant. The  
8 only way to avoid forfeiture is to take no court action at all.

9 The proposed fee shifting alternative would not present that sort of bright line  
10 choice. Because the penalty for bringing an unreasonable contest would be the  
11 payment of defense costs and fees, the magnitude of the penalty would be  
12 proportional to the duration of the litigation. A contestant who simply files a  
13 pleading would bear little cost for doing so. A contestant who is willing to bear  
14 larger costs could go on to conduct discovery, in the hopes of finding evidentiary  
15 support for the contest. That sort of incremental exploratory litigation could cause  
16 many of the harms that a no contest clause seeks to avoid. It would also strengthen  
17 the bargaining position of a disappointed beneficiary who wants to negotiate a  
18 settlement that makes a larger gift to the beneficiary.

19 **RECOMMENDATIONS**

20 The Law Revision Commission recommends against making any fundamental  
21 substantive change to the existing no contest clause statute. As under existing law,  
22 a no contest clause should be enforceable unless it conflicts with public policy. A  
23 transferor should have the right to place lawful conditions on an at-death gift of  
24 the transferor's property.

25 Although the general policy of existing law would remain unchanged, the  
26 Commission recommends the following improvements to the existing statute:

- 27 • The statute should be simplified and clarified.  
28 • The probable cause exception that applies to many direct contests should be  
29 extended to all direct contests.  
30 • The scope of declaratory relief should be narrowed.

31 Those recommendations are discussed below.

32 **Statutory Simplification and Clarification**

33 The uncertainty that arises under existing law is largely a result of the open-  
34 ended definition of "contest," combined with a complex and lengthy set of  
35 exceptions. Because any pleading relating to an estate could be governed by a no  
36 contest clause, every such pleading must be examined to determine whether it  
37 would, in fact, trigger a no contest clause. That analysis requires interpretation of

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90. See Prob. Code §§ 21300, 21303.

1 the language used in the no contest clause and the interpretation and application of  
2 the statutory exemption scheme.

3 A simpler approach would be to limit the enforcement of a no contest clause to a  
4 list of specified contest types. Under that approach, any pleading that is not one of  
5 the expressly covered types would not be governed by a no contest clause. No  
6 further analysis would be required. That would eliminate both the open-ended  
7 definition of “contest” as well as the lengthy (and inevitably incomplete) list of  
8 statutory exceptions.

9 That is the approach taken in the proposed law.<sup>91</sup> A no contest clause could only  
10 be enforced in response to three types of contests: (1) a direct contest, (2) a  
11 creditor claim, or (3) a property ownership dispute.

12 *Direct Contest.* A direct contest would be defined as an attempt to invalidate an  
13 instrument on one or more of the following grounds: forgery; lack of due  
14 execution; lack of capacity; menace, duress, fraud, or undue influence; revocation  
15 of the instrument; or disqualification of a beneficiary under Section 6112 or  
16 21350.<sup>92</sup> No other pleadings would constitute a direct contest. There should be no  
17 ambiguity about whether a contest is a direct contest. The grounds for a direct  
18 contest would be limited and clear.

19 *Creditor Claim.* A creditor claim would be defined using language from existing  
20 law.<sup>93</sup> The Commission investigated whether the existing language could be  
21 refined so as to preclude unintended application of a no contest clause to a creditor  
22 claim. The principal concern is that a no contest clause will be applied to a debt  
23 that the transferor did not have in mind at the time of executing the no contest  
24 clause and never intended to be governed by the no contest clause.

25 That risk could be eliminated by requiring that a no contest clause specifically  
26 identify the debts that it is intended to govern, or by providing that a no contest  
27 clause only applies to debts that pre-date the execution of the clause.

28 However, such restrictions would also narrow the utility of a no contest clause.  
29 A transferor may intend that a no contest clause apply to all creditor claims,  
30 whether identifiable at the time of execution of the clause or not, in order to deter  
31 beneficiaries from bringing fabricated claims after the transferor’s death. The  
32 restrictions described above would prevent such use of a no contest clause.

33 The Commission did not find sufficient support within the legal community for  
34 a substantive narrowing of the creditor claim provision.

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91. See proposed Prob. Code § 21311 *infra*.

92. See proposed Prob. Code § 21310(b) *infra*.

93. See Prob. Code § 21305(a)(1).

1 *Property Ownership Determination.* Existing law provides for the application of  
2 a no contest clause to an “action or proceeding to determine the character, title, or  
3 ownership of property.”<sup>94</sup>

4 That language is overbroad. Any action that would determine a person’s right to  
5 a gift under an estate plan could be characterized as an action to determine the  
6 “ownership of property.”<sup>95</sup>

7 The proposed law would restate the existing provision, so as to continue its  
8 substance while preventing overbroad interpretation. Under the restated language,  
9 a no contest clause could be enforced in response to a “pleading to determine  
10 whether an asset is part of the transferor’s estate....”<sup>96</sup>

11 That language focuses on the proper question, whether disputed property is  
12 owned by the transferor and is therefore properly part of the transferor’s estate.<sup>97</sup>  
13 Unlike existing law, the proposed language could not be inaptly construed to  
14 encompass a pleading that accepts the transferor’s ownership of an asset and  
15 merely requests a determination of who is entitled to receive the asset under the  
16 transferor’s estate plan.<sup>98</sup>

17 The Commission also considered whether existing law should be substantively  
18 narrowed, so as to prevent unintended application of a no contest clause to a  
19 property ownership determination. However, any such limitation would also  
20 narrow the utility of the forced election as a planning tool, by limiting the scope of  
21 its application. The Commission did not find sufficient support within the estate  
22 planning community for such a significant substantive change in the law.

23 *Other Indirect Contests.* One of the main benefits of limiting the enforcement of  
24 a no contest clause to an express and exclusive list of contest types is that the  
25 existing attempt to describe public policy exceptions can be abandoned. That  
26 would eliminate a significant source of complexity and confusion in existing law.

27 The substantive effect of that change would be relatively modest. Existing law  
28 already exempts nearly all types of indirect contests from the operation of a no

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94. Prob. Code § 21305(a)(2).

95. For example, if a beneficiary petitions for judicial construction of an ambiguous provision in a trust, the result might be to determine who receives a gift under that provision. That could be described as an action to determine the ownership of the gifted property. Under existing law, an action to construe an instrument is exempt from enforcement of a no contest clause as a matter of public policy. Prob. Code § 21305(b)(9).

96. See proposed Prob. Code § 21311(b) *infra*.

97. For example, a claim that a purported estate asset is the community property of the transferor’s surviving spouse would fall within the scope of the proposed language, because it would involve a determination of whether the disputed property is part of the transferor’s estate.

98. For example, an action to construe an ambiguous will provision disposing of a specific asset would be beyond the scope of the proposed language, so long as the beneficiary does not dispute the transferor’s right to dispose of the asset.

1 contest clause (other than forced elections).<sup>99</sup> The policy implication of that trend  
2 is clear. A beneficiary should not be punished for bringing an action to ensure the  
3 proper interpretation, reformation, or administration of an estate plan. Such an  
4 action serves the public policy of facilitating the fair and efficient administration  
5 of an estate and helps to effectuate the transferor’s intentions, which might  
6 otherwise be undone by mistake, ambiguity, or changed circumstances.

7 The proposed law would merely extend that principle to its logical end, the  
8 exemption of all indirect contests other than forced elections.

9 *Terminology.* The proposed law would also define and use the term “protected  
10 instrument” to provide a clear rule as to which instruments are governed by a no  
11 contest clause.<sup>100</sup> Other minor terminological clarifications would also be made.<sup>101</sup>

### 12 **Declaratory Relief Narrowed**

13 By limiting the application of a no contest clause to an exclusive list of defined  
14 contest types, the proposed law would eliminate much of the uncertainty that  
15 arises under existing law.

16 There should be little or no uncertainty as to whether a no contest clause would  
17 apply to a direct contest. The proposed law would eliminate declaratory relief as to  
18 that issue.

19 However, there could still be some uncertainty as to whether a no contest clause  
20 would apply to a creditor claim or property ownership dispute. The existing  
21 declaratory relief procedure would be retained for those issues only.<sup>102</sup>

22 The narrowed scope of the declaratory relief remedy should result in a  
23 significant reduction in pre-contest proceedings, with a savings in procedural costs  
24 for estates, beneficiaries, and the courts.

### 25 **Expansion of Probable Cause Exception**

26 Existing law already provides a probable cause exception for a contest based on  
27 the following grounds:<sup>103</sup>

- 28 • Forgery.
- 29 • Revocation.
- 30 • The beneficiary is disqualified under Probate Code Section 21350.
- 31 • The beneficiary drafted or transcribed the instrument.

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99. Where the existing list of public policy extensions does not apply to an indirect contest, the gap in coverage is probably inadvertent. See *supra* note 65.

100. See proposed Prob. Code § 21310(e) *infra*.

101. See proposed Prob. Code § 21310(a) (“contest”), (c) (“no contest clause”), (d) (“pleading”) *infra*.

102. See proposed amendment to Prob. Code § 21320 *infra*.

103. Prob. Code §§ 21306-21307.

- 1 • The beneficiary directed the drafter of the instrument (unless the transferor
- 2 affirmatively instructed the drafter regarding the same provision).
- 3 • The beneficiary is a witness to the instrument.

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

7 ***Direct Contest Based on Incapacity, Menace, Duress, or Lack of Due Execution***

8 The existing probable cause exception does not apply to a direct contest brought  
9 on the following grounds: incapacity, menace, duress, or lack of due execution.  
10 The Commission sees no policy justification for that distinction. The proposed law  
11 would extend the existing probable cause exception to all types of direct  
12 contests.<sup>104</sup>

13 That extension of the existing exception would provide greater latitude to  
14 contest an instrument that is believed to have been the product of fraud, undue  
15 influence, or other misconduct.

16 ***Definition of Probable Cause***

17 The proposed law would define “probable cause” as follows:

18 [Probable] cause exists if, at the time of filing a contest, the facts known to the  
19 contestant would cause a reasonable person to believe that there is a reasonable  
20 likelihood that the requested relief will be granted after an opportunity for further  
21 investigation or discovery.<sup>105</sup>

22 That standard is drawn from existing Probate Code Section 21306, with two  
23 substantive changes:

24 (1) Existing law focuses only on the likelihood that the contestant’s “factual  
25 contentions” will be proven. The proposed law would require a likelihood that the  
26 requested relief will be granted.<sup>106</sup> That question depends not only on the proof of  
27 facts, but on the proof of facts that are sufficient to establish a legally sufficient  
28 ground for the requested relief. That is a more complete expression of the concept  
29 of probable cause.

30 (2) Existing law requires only that it be “likely” that the contestant will prevail.  
31 That degree of probability has been equated with the standard that governs a  
32 malicious prosecution case, requiring only that the contest be “legally tenable.”<sup>107</sup>

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104. See proposed Prob. Code § 21311(a) *infra*.

105. *Id.*

106. See proposed Prob. Code § 21311(a) *infra*.

107. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Prob. Code § 21306). See also *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (discussing malicious prosecution and frivolous appeal standards).

1 The Commission believes that such a standard is too forgiving. A no contest  
2 clause should deter more than just a frivolous contest. General law already  
3 provides sanctions for frivolous actions.<sup>108</sup>

4 Instead, the proposed law would require a “reasonable likelihood” of being  
5 granted relief.<sup>109</sup> That standard has been interpreted as requiring more than a mere  
6 possibility, but less than a likelihood that is “more probable than not.”<sup>110</sup>

#### 7 **Grace Period**

8 The proposed law would have a one year deferred operative date.<sup>111</sup> That would  
9 provide a grace period for those who wish to revise their estate plans before the  
10 new law takes effect.

11 Once the proposed law becomes operative, it would apply to any instrument,  
12 including an instrument executed before the operative date of the proposed law.<sup>112</sup>  
13 That is appropriate because the proposed law would not impair existing  
14 substantive rights; a no contest clause would continue to be applicable to a direct  
15 contest, creditor claim, or property ownership dispute.

16 Retroactive application would extend the existing public policy exemption of  
17 indirect contests (other than forced elections) to previously existing instruments.  
18 Under existing law, the public policy exceptions do not apply to instruments that  
19 become irrevocable prior to enactment of the exception. Consequently, the  
20 question of whether enforcement of a no contest clause would violate public  
21 policy may depend on the date that the transferor died, regardless of when the  
22 potential contest arises.<sup>113</sup> The Commission sees no justification for that result. A  
23 transferor has no reasonable expectation that a no contest clause will be enforced  
24 where the Legislature has declared that enforcement would violate public policy.

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108. See Code Civ. Proc. §§ 128.5-128.7.

109. See proposed Prob. Code § 21311(a) *infra*.

110. See *Alvarez v. Superior Court*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033).

111. See Section 4 (uncodified) of the “Proposed Legislation” *infra*.

112. Application would be limited by the Probate Code’s general transitional provision. See Prob. Code § 3. That provision allows retroactive application to previously existing instruments, but does not allow new law to disturb completed judicial acts. Thus, the completed administration of an estate would not be affected by the proposed law, but any actions arising after the operative date of the proposed law would be subject to the proposed law.

113. For example, the Legislature has determined that a pleading challenging the exercise of a fiduciary power is exempt from a no contest clause as a matter of public policy. Prob. Code § 21305(b)(6). However, that rule only applies to an instrument that became irrevocable on or after January 1, 2001. Consequently, in a 2006 case involving an action asserting a breach of duty by a trustee, the statutory public policy exception did not apply, because the transferor had died in 1951. The court held that challenging an action of the trustee with respect to the ongoing administration of the trust would cause a forfeiture under the trust’s no contest clause. See *Hearst v. Ganzi*, 145 Cal. App. 4th 1195, 52 Cal. Rptr. 3d 473 (2006).

## PROPOSED LEGISLATION

1 **Prob. Code §§ 21300-21308 (repealed). No contest clause**

2 SECTION 1. Chapter 1 (commencing with Section 21300) of Part 3 of Division  
3 11 of the Probate Code is repealed.

4 **Comment.** Sections 21300-21308 are repealed as of January 1, 2010. For the rules governing  
5 the enforcement of a no contest clause, see Sections 21310-21314.

6 **Prob. Code §§ 21310-21314 (added). No contest clause**

7 SEC. 2. Chapter 1 (commencing with Section 21310) is added to Part 3 of  
8 Division 11 of the Probate Code, to read:

9 CHAPTER 1. GENERAL PROVISIONS

10 **§ 21310. Definitions**

11 21310. As used in this part:

12 (a) “Contest” means a pleading filed with the court that would result in a penalty  
13 under a no contest clause, if the no contest clause is enforced.

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

17 (1) Forgery.

18 (2) Lack of due execution.

19 (3) Lack of capacity.

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

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

24 (6) Disqualification of a beneficiary under Section 6112 or 21350.

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

27 (d) “Pleading” means a petition, complaint, cross-complaint, objection, answer,  
28 response, or claim.

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

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

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

34 **Comment.** Section 21310 is new. Subdivision (a) continues part of the substance of former  
35 Section 21300(b). See Section 21117(a) (“specific gift” defined).

1 Subdivision (b)(1)-(5) continues the substance of former Section 21300(b), except that mistake  
2 and misrepresentation are no longer included as separate grounds for a direct contest.

3 Subdivision (b)(6) is consistent with former Sections 21306(a)(3) and 21307(c).

4 Subdivision (c) continues the substance of former Section 21300(c).

5 Subdivision (d) restates the substance of former Section 21305(f).

6 Subdivision (e) is new. Subdivision (e)(1) provides that a protected instrument includes an  
7 instrument that contains a no contest clause. That may include an instrument that expressly  
8 incorporates or republishes a no contest clause in another instrument. Subdivision (e)(2) is similar  
9 to former Section 21305(a)(3).

#### 10 § 21311. Enforcement of no contest clause

11 21311. A no contest clause shall only be enforced against the following types of  
12 contests:

13 (a) A direct contest that is brought without probable cause. For the purposes of  
14 this subdivision, probable cause exists if, at the time of filing a contest, the facts  
15 known to the contestant would cause a reasonable person to believe that there is a  
16 reasonable likelihood that the requested relief will be granted after an opportunity  
17 for further investigation or discovery.

18 (b) A pleading to determine whether an asset is part of the transferor's estate, if  
19 the no contest clause expressly provides for that application.

20 (c) The filing of a creditor's claim or prosecution of an action based on it, if the  
21 no contest clause expressly provides for that application.

22 **Comment.** Section 21311 is new. Subdivision (a) generalizes the probable cause and  
23 reasonable cause exceptions that governed some direct contests under former Sections 21306 and  
24 21307.

25 The standard for determining whether there is probable cause to bring a direct contest is drawn  
26 in part from former Section 21306(b), with two exceptions:

27 (1) The former standard referred only to the contestant's factual contentions. By contrast,  
28 subdivision (a) refers to the granting of relief, which requires not only the proof of factual  
29 contentions but also a legally sufficient ground for the requested relief.

30 (2) The former standard required only that success be "likely." One court interpreted that  
31 standard as requiring only that a contest be "legally tenable." In re Estate of Gonzalez, 102 Cal.  
32 App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard.  
33 There must be a "reasonable likelihood" that the requested relief will be granted. The term  
34 "reasonable likelihood" has been interpreted to mean more than merely possible, but less than  
35 "more probable than not." See Alvarez v. Superior Court, 154 Cal. App. 4th 642, 653 n.4, 64 Cal.  
36 Rptr. 3d 854 (2007) (construing Penal Code § 938.1); People v. Proctor, 4 Cal. 4th 499, 523, 15  
37 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033). See Section 21310(b) ("direct contest"  
38 defined).

39 Subdivision (b) restates the substance of former Section 21305(a)(2).

40 Subdivision (c) continues former Section 21305(a)(1) without substantive change.

#### 41 § 21312. Construction of no contest clause

42 21312. In determining the intent of the transferor, a no contest clause shall be  
43 strictly construed.

44 **Comment.** Section 21312 continues former Section 21304 without change.

1 § 21313. Application of common law.

2 21313. This part is not intended as a complete codification of the law governing  
3 enforcement of a no contest clause. The common law governs enforcement of a no  
4 contest clause to the extent this part does not apply.

5 **Comment.** Section 21313 continues former Section 21301 without change.

6 § 21314. Effect of contrary instrument

7 21314. This part applies notwithstanding a contrary provision in the instrument.

8 **Comment.** Section 21314 continues former Section 21302 without change.

9 § 21315. Application of part

10 21315. This part applies to all instruments, whether executed before, on, or after  
11 January 1, 2010.

12 **Comment.** Section 21315 is new. The application of the new law is also governed by Section 3  
13 (general transitional provision).

14 **Prob. Code § 21320 (amended). No contest clause**

15 SEC. 3. Section 21320 of the Probate Code is amended to read:

16 21320. (a) If an instrument containing a no contest clause is or has become  
17 irrevocable, a beneficiary may apply to the court for a determination of whether a  
18 ~~particular motion, petition, or other act by the beneficiary, including, but not~~  
19 ~~limited to, creditor claims under Part 4 (commencing with Section 9000) of~~  
20 ~~Division 7, Part 8 (commencing with Section 19000) of Division 9, an action~~  
21 ~~pursuant to Section 21305, and an action under Part 7 (commencing with Section~~  
22 ~~21700) of Division 11, proposed pleading would be a contest within the terms of~~  
23 ~~the no contest clause and whether the no contest clause could be enforced against~~  
24 ~~the pleading under subdivision (b) or (c) of Section 21311. The court shall not~~  
25 ~~make a determination under this section if the determination would depend on the~~  
26 ~~merits of the proposed pleading.~~

27 (b) A no contest clause is not enforceable against a beneficiary to the extent an  
28 application under subdivision (a) is limited to the procedure and purpose described  
29 in subdivision (a).

30 ~~(c) A determination under this section of whether a proposed motion, petition, or~~  
31 ~~other act by the beneficiary violates a no contest clause may not be made if a~~  
32 ~~determination of the merits of the motion, petition, or other act by the beneficiary~~  
33 ~~is required.~~

34 ~~(d) A determination of whether Section 21306 or 21307 would apply in a~~  
35 ~~particular case may not be made under this section.~~

36 The statute of limitations for filing any pleading referred to in subdivision (a) is  
37 tolled beginning with the date an application for the court's determination is made  
38 under this section and ending with the date the court's determination becomes  
39 final.

1       **Comment.** Section 21320 is amended to limit its scope of application. The procedure provided  
2 in the section may only be used to determine whether a contemplated action would fall within the  
3 intended scope of a no contest clause that would be enforceable under Section 21311(b) or (c).  
4       Subdivision (c) continues former Section 21308 without substantive change.

5       **Operative date (uncodified)**

6       SEC. 4. This act becomes operative on January 1, 2010.

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