

First Supplement to Memorandum 2007-52

Revision of No Contest Clause Statute (Public Comment)

Memorandum 2007-52 presents a staff draft of the recommendation on *Revision of the No Contest Clause Statute*. We have received public comment in response to that memorandum.

A subcommittee of the Executive Committee of the Trusts and Estates Section of the California Bar ("TEXCOM subcommittee") wrote to suggest three changes to the proposed law. Its letter is attached as an Exhibit. The TEXCOM subcommittee indicates that it would support the proposed law if its suggestions were implemented.

The staff also received informal feedback from attorney David C. Nelson of Los Angeles. He offers some additional suggestions for changes to the proposed law.

The proposed changes are discussed briefly below. They should be discussed at the December meeting.

All statutory references in this memorandum are to the Probate Code.

DEFINITION OF "PLEADING"

Under the proposed law, the term "contest" is defined as a "pleading" filed in any court that would "result in a penalty under a no contest clause, if the no contest clause is enforced." See proposed Section 21310(a).

The term "pleading" is critical to that definition. Its scope will define which sorts of actions could constitute a contest that would trigger forfeiture under a no contest clause.

Proposed Section 21310(d) would define the term as follows:

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

That broad definition is drawn from existing Section 21305(f), governing exceptions to the enforcement of a no contest clause.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The TEXCOM subcommittee proposes that the definition be revised to delete the defensive pleadings (i.e., objection, answer, and response). See Exhibit.

The staff is concerned that this would exclude some matters that should be considered contests. For example, Section 8250 provides in part that a person contesting a will “shall file with the court an *objection* to probate of the will.” (Emphasis added.) The staff will discuss this issue further with the TEXCOM liaison and will report back orally at the December meeting.

DEFINITION OF “PROTECTED INSTRUMENT”

Proposed Section 21310(e) would define the term “protected instrument” as follows:

“Protected instrument” means all of the following instruments:

- (1) The instrument that contains the no contest clause.
- (2) An instrument that is 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.

The purpose of that provision would be to describe which instruments are governed by a no contest clause.

David C. Nelson objects to the requirement that an instrument be “expressly identified.” He is concerned that this would require widespread revision of estate documents that currently refer to instruments by class (e.g., “other trusts created by me”). It would also be cumbersome going forward and would invite accidental omissions.

APPLICATION OF NO CONTEST CLAUSE TO CREDITOR CLAIM

Under proposed Section 21311(c), a no contest clause could apply to:

The filing of a creditor’s claim or prosecution of an action based on it, if the no contest clause expressly provides for that application.

That provision would continue the substance of existing Section 21305(a)(1).

The TEXCOM subcommittee proposes that the provision be revised to limit the application of a no contest clause to a creditor claim that is *specifically identified* in the no contest clause as being covered by it. See Exhibit.

That would limit the unintended application of a no contest clause to a debt that the transferor did not actually have in mind at the time of executing the no

contest clause. That issue was discussed at length in Memorandum 2007-44, at pp. 3-7.

However, such a change would also prevent a no contest clause from being used to deter bogus creditor claims, which necessarily could not be identified in advance.

On balance, the Commission decided to preserve existing law on this issue. The TEXCOM subcommittee is urging reconsideration of that decision.

APPLICATION OF NO CONTEST CLAUSE TO PROPERTY OWNERSHIP DISPUTE

Proposed Section 21311(b) would provide for the enforcement of a no contest clause in response to the following action:

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

That language would restate the substance of existing Section 21305(a)(2), which provides for the enforcement of a no contest clause in response to the following action:

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

The reason for restating the law as proposed is discussed in Memorandum 2007-52 at pp. 7-8.

Technical Drafting Issue

The TEXCOM subcommittee suggests that proposed Section 21311(b) be revised as follows:

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

See Exhibit.

The point would be to make clear that an action by a personal representative or trustee would not trigger a no contest clause. The staff has no objection to that rule, but is reluctant to make the change in this one provision without also making similar changes throughout the proposed law. Otherwise, it might appear that proposed Section 21311(b) is stating a special rule, rather than a general one.

If the Commission decides that clarification would be useful, the staff would recommend that it be added in proposed Section 21310(a), as follows:

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

Preference for Existing Language

David C. Nelson would prefer that the proposed law use existing language from Section 21305(a)(2), rather than restating it as proposed. He believes that the problem discussed in Memorandum 2007-52 could be addressed with Comment language. He is also concerned that a reference to property being part of the transferor’s “estate” might be ambiguous. Would it include property transferred by a nonprobate transfer? Former TEXCOM liaison Shirley Kovar also expressed concern about the possible ambiguity of the term “estate” in the proposed law.

A possible alternative phrasing of proposed Section 21311(b), which would avoid the problem described in Memorandum 2007-52 without use of the term “estate,” would be as follows:

A pleading to determine whether, at the time of the transferor's death, an asset was the transferor's property or was held by a trust created by the transferor, if the no contest clause expressly provides for that application.

The staff invites comment on that alternative language.

DECLARATORY RELIEF

The proposed law would continue the existing declaratory relief procedure, but would limit its scope. As revised, 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).

The point of the revision would be to limit the remedy to questions involving the application of a no contest clause to a property ownership dispute or creditor claim.

David C. Nelson is concerned that the proposed language might contain a loophole. It might be read as providing for *two* different determinations, with only the *second* determination limited to the specified types of contests.

He suggests that it be revised along the following lines:

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~~ a proposed 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).

The staff sees Mr. Nelson's point and has no objection to making that change.

RETROACTIVITY OF PROPOSED LAW

The proposed law is silent on whether it would apply retroactively. Under existing law, that silence would result in retroactive application, except as to completed acts and court decisions, subject to a fairness exception that a court could invoke. See Section 3.

Retroactive application would apply the Legislature's policy judgments about the proper scope of a no contest clause to instruments created before the operative date of the proposed law. For example, the Legislature has already determined, as a matter of public policy, that an action relating to the supervision of a fiduciary should not be subject to a no contest clause. Section 21305(b)(6)-(8), (12). Why shouldn't that same policy apply to a trust that vested before the policy was codified, but is still being administered by a trustee today?

David C. Nelson objects to retroactive application on two grounds:

- (1) It would require that many existing estate plans be reevaluated and possibly revised.
- (2) It might overturn decisions that have already been litigated regarding the effect of a no contest clause in a trust that has vested

and is still being administered. Expectations have been formed in reliance on those decisions and should not be disturbed.

Those concerns should be discussed at the December meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

**EMAIL FROM NEIL HORTON, CLRC SUBCOMMITTEE, EXECUTIVE
COMMITTEE, ESTATES AND TRUSTS SECTION OF THE CALIFORNIA
STATE BAR
(NOVEMBER 29, 2007)**

Dear Brian,

Texcom's CLRC committee met to consider MM 07-52. A majority of the committee supports the December 2007 proposed legislation with the following "noncontroversial" amendments:

1. Amend 21310(d) to delete defensive pleadings. As amended, section 21310 should read: "The term 'pleading' is limited to a petition, complaint, cross-complaint, or claim."

No contest clauses should apply to pleadings that attack an instrument, not ones that are defensive in nature. The proposed definition as well as the current definition of pleading in Probate Code section 21305(f) is far too broad. It applies to defensive pleadings that seek to uphold a transferor's intent, for example, an answer responding to an 850 petition seeking the return of property that the transferor placed in joint tenancy after signing the instrument containing the no contest clause.

2. Amend section 21311(c) of the proposed statute with respect to creditor's claims to read: "The filing of a creditor's claim or the prosecution of an action based on it, if the no contest clause **specifically identifies the claim and** expressly provides for that application."(additional language in bold)

MM 07-44, pp. 3-7, is persuasive that, without the limiting language, no contest clauses may be enforced in circumstances that the transferor would not have anticipated and that would be contrary to the transferor's intent.

3. Amend section 21311(b) to add the words in bold: "A pleading **by a beneficiary** to determine whether an asset is part of the transferor's estate, if the no contest clause expressly provides for that application."

Without the limiting language, section 21311(b) applies on its face to an 850 petition filed by the transferor's trustee or personal representative to recover property for the estate. The change also is consistent with section 21320(a) which limits declaratory relief petitions to beneficiaries.

Thank you for considering these proposals.

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