

Memorandum 2008-3

Revision of No Contest Clause Statute (Discussion of Issues)

At the December 2007 meeting, the Commission considered a staff draft recommendation on revision of the no contest clause statute. The Commission approved that draft, with changes on a few points, and instructed the staff to prepare a revised staff draft that would implement the Commission's decisions. The revised draft is attached to this memorandum.

This memorandum includes further discussion of the enforcement of a no contest clause in response to a creditor claim or property ownership dispute. A supplement to this memorandum will discuss transitional issues with respect to the proposed law.

After reviewing the attached draft and considering the matters discussed in this memorandum and its supplement, the Commission should decide whether to adopt the revised draft as its final recommendation, with or without any changes.

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

CREDITOR CLAIMS

Background

Under existing law, a transferor can draft a no contest clause that would be triggered by a beneficiary filing *any* creditor claim against the transferor's estate, including a claim for debts that have not yet arisen and that are not anticipated by the transferor. Such broad application can be used to deter bogus claims that may be raised for the first time after the transferor's death.

However, such open-ended application to all creditor claims can also result in unintended consequences, by applying the no contest clause to a creditor claim that the transferor did not anticipate and would not have intended to be subject to the 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.

For example, suppose a transferor executes an estate plan with a no contest clause that applies, by its terms, to all creditor claims. The estate plan makes a gift of \$50,000 to each of the transferor's four grandchildren. Ten years later, one of the grandchildren contracts to build an addition to the transferor's home, for \$25,000. The work is performed, but before the debt is paid, the transferor dies. If the no contest clause applies to the creditor claim, the beneficiary must choose between claiming the \$25,000 contractual debt (thereby forfeiting the \$50,000 gift) or waiving the debt in order to receive the \$50,000 gift. Under those facts, it seems unlikely that the transferor would have intended the no contest clause to apply to the later-arising contractual debt.

Other unanticipated "creditor claims" might include a petition for a statutory family allowance, a claim for reimbursement of the expenses of the transferor's last illness, or a claim for reimbursement of the transferor's funeral expenses. See Section 11421. It is unlikely that a transferor would intentionally condition a gift on the waiver of such claims.

Furthermore, enforcement of a no contest clause against such claims would seem to violate public policy, by punishing a person for making a claim for support or compensation that is guaranteed by statute.

Proposed Revision

In order to avoid the unintended application of a no contest clause to unanticipated creditor claims, the Commission decided that the proposed law should differentiate between a creditor claim for a pre-existing debt that is specifically identified in a no contest clause (which the attached draft calls a "specified debt"), and a debt that arises after execution of the no contest clause or that is not specifically identified as being subject to the clause (which the attached draft calls an "unspecified debt").

As under existing law, there would be no limitation on the enforcement of a no contest clause against a beneficiary who brings a creditor claim for a *specified* debt. That would continue the ability of a transferor to use a no contest clause to create an express forced election with respect to known debts.

However, the attached draft would provide a probable cause defense for a beneficiary who brings a creditor claim for an *unspecified* debt. So long as the beneficiary has probable cause to bring the creditor claim, doing so would not cause a forfeiture under the no contest clause. In the hypothetical above, the amount owed the grandchild for work on the transferor's house would be an

unspecified debt. Therefore, the grandchild could make a creditor's claim for payment of the debt without forfeiting the gift made by the estate plan. Similarly, a beneficiary could make a legitimate claim for a family allowance, compensation of funeral expenses, or the like without forfeiture of the gift made by the transferor's estate plan.

By contrast, a beneficiary who files a bogus creditor claim in order to harass or pressure the transferor's estate would still forfeit under the no contest clause. The probable cause exception would not save a person making an unjustified creditor claim.

Implementing Language

The approach described above is implemented in the attached draft by revising proposed Sections 21310 and 21311 as follows:

§ 21310. Definitions

21310. ...

(f) "Specified debt" means a debt or liability that satisfies both of the following conditions:

(1) The debt or liability is expressly identified in a no contest clause, either individually or as part of an identifiable class of debts or liabilities, as being subject to the no contest clause.

(2) The debt or liability arose before the execution of the no contest clause that identifies it.

(g) "Unspecified debt" means a debt or liability that is not a specified debt.

§ 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

...

(3) The filing of a creditor's claim or prosecution of an action based on it, for a specified debt.

(4) The filing of a creditor's claim or prosecution of an action based on it, without probable cause, for an unspecified debt. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

...

Comment. ...

Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change, except that a debt or liability must pre-date a no contest clause in order to be subject to the no contest clause under this provision. See Section 21310(f) ("specified debt"). Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(4) is new. It provides for limited enforcement of a no contest clause against a creditor claim based on a debt or liability that arises after the execution of the no contest clause or that is not expressly identified in the no contest clause as being subject to the no contest clause. See Section 21310(g) (“unspecified debt”). The no contest clause must expressly provide for such application. Probable cause is a defense to the enforcement of a no contest clause under this provision.

...

Should this substantive reform of existing law be included in the proposed law?

PROPERTY DISPUTES

Background

Existing law provides for the application of a no contest clause to an “action or proceeding to determine the character, title, or ownership of property.” See Section 21305(a)(2).

That language allows a transferor to create a forced election, providing that a beneficiary who contests the transferor’s ownership of purported estate assets forfeits any gift to that beneficiary made by the estate plan.

There are two issues relating to that provision that need to be considered. They are discussed below.

Problem with Existing Language

The existing statutory language appears to be overbroad. Any action that would determine a beneficiary’s right to a gift under an estate plan could be characterized as an action to determine the “title or ownership of property.” Under that reading, a no contest clause could be enforced against any pleading that would determine the distribution of property under the transferor’s estate.

The proposed law would restate the property dispute provision, so as to continue its substance while preventing an overbroad interpretation. At the December 2007 meeting, the Commission approved that general approach and gave the staff additional guidance on drafting the restated provision. Consistent with that guidance, the attached draft includes the following provision on the enforcement of a no contest clause against a property ownership dispute:

§ 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

...
(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.
...

That language focuses on the key issue: Is the beneficiary challenging the transferor's dispositional control of a transferred asset? If so, then the no contest clause could be enforced.

That would continue a transferor's ability to use a no contest clause to create a marital forced election. For example, suppose a transferor believes that her surviving spouse has some community property interest in her estate, but is unsure of its magnitude. In order to avoid costly litigation to quantify the surviving spouse's community property interest, the transferor leaves her surviving spouse a large gift, combined with a no contest clause providing expressly that all of the property listed in the estate plan is her separate property and that any pleading filed by the surviving spouse asserting a community property interest in that property will cause the forfeiture of the gift. Under the proposed language, the no contest clause would be enforceable (as it would be under existing law).

By contrast, if the surviving spouse does not assert any community property interest in estate assets, but merely files a petition for construction of an ambiguous term, a no contest clause could not be enforced against that petition (again, that result would be consistent with existing law).

The staff believes that the proposed language accomplishes the goal of preserving and clarifying the substance of existing law, and recommends that it be included in the proposed law.

Bifurcation of Property Dispute Provision

In addition to clarifying the provision as discussed above, the Commission also directed the staff to consider whether it might be feasible to change the rule substantively, so as to treat property ownership disputes in the same way as creditor claims.

In other words, would it be workable to differentiate between a property ownership dispute that involves “specified” property as opposed to an ownership dispute involving “unspecified” property? A no contest clause would then apply without limitation to a pleading that disputes the transferor’s ownership of *specified* property, but there would be a probable cause defense for a beneficiary who disputes the transferor’s ownership of *unspecified* property.

Thus:

§ 21310. Definitions

21310. ...

(h) “Specified property” means property that satisfies both of the following conditions:

(1) The property is expressly identified in a no contest clause, either individually or as part of an identifiable class of property, as being subject to the no contest clause.

(2) The property is purported to have been acquired by the transferor before the execution of the no contest clause that identifies it.

(i) “Unspecified property” means property that is not specified property.

§ 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

...

(2) A pleading to challenge a transfer of specified property on the grounds that it was not the transferor’s property at the time of the transfer.

(3) A pleading, filed without probable cause, to challenge a transfer of unspecified property on the grounds that it was not the transferor’s property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

...

The staff believes that approach would be problematic for a transferor who wants to create a marital forced election. It seems likely that the typical intention of a transferor who creates a marital forced election would be to deter a surviving spouse from claiming *any* interest in the transferor’s estate. The approach described above would make that difficult.

Suppose, for example, that a transferor owns a large business. He believes that it is mostly his separate property, but that his wife has some community property interest as a result of investments of time and money into the business

during their marriage. He wants to avoid post-death litigation to determine the extent of his wife's interest in the business. In 2005, he creates a revocable trust that provides a large gift to his wife on his death, declares the business to be entirely his separate property, and includes a no contest clause that expressly provides for forfeiture of the wife's gift if she claims a community property interest in the business. He dies in 2010, without having amended his estate plan. His surviving spouse takes the gift and then proceeds to claim a community property interest in the business' income and appreciation in value from 2005 to 2010. That would arguably be a dispute as to the ownership of *unspecified* property, because the value being claimed would have been created after execution of the no contest clause. The probable cause exception would then apply and the surviving spouse would not forfeit the gift.

In order to avoid that sort of gap in coverage, a transferor would need to repeatedly amend the no contest clause, so as to roll its date of application forward to cover property interests acquired since the preceding amendment.

The staff recommends against the approach described above. A transferor who wishes to create a marital forced election will typically want to make it comprehensive. The proposed approach would make that difficult and costly to accomplish, to little purpose.

Alternative Bifurcation of Property Disputes

Neil Horton has informally suggested another possible approach to property disputes: differentiate between a community property claim and all other sorts of property ownership disputes. A forced election would still apply without limitation to a community property dispute. A probable cause defense would be created for other types of property ownership disputes. Thus:

§ 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

...

(2) A pleading to challenge a transfer of property on the grounds that the property is the community property of the transferor's surviving spouse or surviving domestic partner. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

(3) A pleading, other than a pleading under paragraph (2), filed without probable cause, to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this

paragraph if the no contest clause expressly provides for that application.

...

Comment. ...

Subdivision (a)(2) continues former Section 21305(a)(2) with respect to a claimed community property interest in purported estate assets. The no contest clause must expressly provide for such application. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(3) is new. It provides for limited enforcement of a no contest clause against a beneficiary who disputes the transferor's ownership of a purported estate asset on grounds other than a claim that the asset is community property. The no contest clause must expressly provide for such application. Probable cause is a defense to the enforcement of a no contest clause under this provision.

...

This would preserve the ability to use a no contest clause to create a forced election with respect to the thorniest property characterization issue: the tracing and valuation of community property.

However, the approach described above would limit the ability to create a forced election as to other types of property ownership disputes.

The staff invites comment on the merits of this alternative approach.

Respectfully submitted,

Brian Hebert
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Revised Staff Draft RECOMMENDATION

Revision of No Contest Clause Statute

January 2008

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REVISION OF NO CONTEST CLAUSE STATUTE

1

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.¹

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.² In preparing the report, the
10 Commission is to do the following:³

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.”⁴ 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

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.⁵

10 As noted, there will be situations in which a no contest clause is unenforceable
11 as a matter of public policy, notwithstanding the intentions of the transferor.⁶

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.⁷

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*,⁸ 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."⁹

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

6. See "Specific Public Policy Exceptions" *infra*.

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

8. 66 Cal. App. 4th 244 (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....”¹⁰ 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.”¹¹

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).

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.¹²

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.¹³ 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,

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.¹⁴

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.”¹⁵

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.¹⁶ 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.¹⁷ 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.

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.¹⁸

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.”¹⁹

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.”²⁰

26 **Misuse of Forced Election**

27 As discussed above,²¹ 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).

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

19. Prob. Code § 15409. Note that California exempts an action to modify or reform an instrument 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). Note that California exempts actions relating to the supervision of a fiduciary from enforcement of a no contest clause. Prob. Code § 21305(b)(6)-(8), (12).

21. See “Use of Forced Election to Avoid Property 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,²² 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.²³

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.

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.²⁴

21 Florida’s prohibition was added in 1974 as part of a general adoption of the
22 Uniform Probate Code.²⁵ 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.²⁶ 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.²⁷

28 Indiana’s statutory prohibition on the enforcement of a no contest clause dates
29 back to at least 1917.²⁸

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). Note that the 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,²⁹ which has been adopted in 17
6 states.³⁰ 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.³¹

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.”³²

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.³³

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:³⁴

21 *Construction and Reformation of Instrument.* To effectuate the transferor’s true
22 intentions, it may be necessary to seek judicial construction of an ambiguous

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. Las 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 (1963) (good faith also required) (Kansas); *Md. Estates and Trusts Code Ann. § 4-413* (Maryland); *Hannam v. Brown*, 114 Nev. 350, 357 (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 (1923) (Washington); *Dutterer v. Logan*, 103 W. Va. 216, 221 (1927) (West Virginia); *In re Keenan’s Will*, 188 Wis. 163, 179 (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 provision or the modification, reformation, or termination of an instrument that
2 has become incompatible with the transferor’s intentions. The need to determine
3 the transferor’s actual intentions may trump the transferor’s desire to avoid
4 litigation.

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

11 A statutory exception for construction of an instrument exists in Arkansas, Iowa,
12 and New York.³⁶

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

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

22 However, other jurisdictions, including California,³⁹ allow a no contest clause to
23 condition a forfeiture of a beneficiary’s interest on the actions of another person.⁴⁰

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

27 *Procedural Exceptions.* New York provides a number of exceptions for
28 specified actions relating to estate administration. A no contest clause does not
29 apply to an objection to the jurisdiction of the court in which a will is offered for

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 probate,⁴² the preliminary examination of witnesses,⁴³ a beneficiary’s disclosure, to
2 a court or otherwise, of information that is relevant to a probate proceeding,⁴⁴ or a
3 failure to join in, consent to, or waive notice of a probate proceeding.⁴⁵

Strict Construction

4 In addition to substantive limitations on the enforcement of a no contest clause,
5 many states, including California, provide that a no contest clause must be strictly
6 construed.⁴⁶ “Strict construction is consistent with the public policy to avoid a
7 forfeiture.”⁴⁷

8 SUMMARY OF CALIFORNIA LAW

9 California law on the enforcement of a no contest clause combines a number of
10 different rules, as summarized below:

- 11 • A no contest clause is generally enforceable, subject to the exceptions
12 described below.⁴⁸
- 13 • Some types of “direct contests”⁴⁹ are subject to a probable cause (or
14 “reasonable cause”) exception.⁵⁰

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 (1962) (Michigan); *Matter of Alexander*, 90 Misc. 2d 482, 486 (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.

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).

- 1 • An extensive list of “indirect contests”⁵¹ 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.⁵² 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.⁵³
- 10 • A declaratory relief procedure is available to determine whether a pleading
11 would violate a no contest clause.⁵⁴ 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.⁵⁵

15 PROBLEMS UNDER EXISTING LAW

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

25 In February 2006, the Commission conducted a survey of the members of the
26 Trusts and Estate Section of the State Bar of California and the members of the
27 California chapters of the National Academy of Elder Law Attorneys.⁵⁸ The

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 CLRC Memorandum 2006-42, Exhibit p. 4 (Oct. 25, 2006) (available at www.clrc.ca.gov).

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

1 survey was designed to answer two questions: (1) Do practitioners believe that
2 there are problems with existing law that are serious enough to justify a significant
3 change in the law? (2) Which of the problems identified in the survey is most
4 problematic?

5 Most survey respondents agreed that problems with existing law are serious
6 enough to justify a significant change in the law.⁵⁹

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

8 **Uncertain Application**

9 The most common and serious problem reported by practitioners is uncertainty
10 as to whether a particular no contest clause would apply to an intended action.⁶⁰

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

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

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

23 The Legislature has narrowed the scope of that problem by exempting many
24 types of indirect contests from the operation of a no contest clause.⁶⁴ However,
25 any attempt to list all pleadings that should be exempt as a matter of policy will

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.”).

64. Prob. Code § 21305(b).

1 inevitably be incomplete. Over time, new circumstances will arise that had not
2 previously been considered.⁶⁵

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

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

11 (1) There are two separate sections that provide for a probable (or reasonable)
12 cause exception for certain types of direct contests.⁶⁷ The sections overlap in their
13 application; both apply to an attempt to invalidate a gift to a person who drafts or
14 transcribes the instrument making the gift.⁶⁸ The overlap is problematic because
15 each of the sections uses different language in defining the exception that it
16 provides. Section 21306 provides an exception for a contest brought with
17 “reasonable cause,” which is expressly defined. Section 21307 provides an
18 exception for a contest brought with “probable cause,” which is left undefined.
19 One court case has held, in dicta, that the terms were synonymous, but the
20 question has not been decisively settled.⁶⁹

21 (2) The limitations and exceptions that apply to indirect contests are governed
22 by a complex set of application provisions. The limitation on forced elections only
23 applies to instruments executed on or after January 1, 2001.⁷⁰ A codicil or
24 amendment is governed by a different rule, which is drafted in very confusing

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 (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. *Cf.* Prob. Code §§ 21306(a)(3) and 21307(a)-(b).

69. *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).

70. Prob. Code § 21305(a).

1 language.⁷¹ Certain public policy exceptions only apply if the transferor dies or the
2 instrument becomes irrevocable after January 1, 2001.⁷² The remainder apply if
3 the transferor dies or the instrument becomes irrevocable after January 1, 2003.⁷³

4 In addition, certain specified exceptions do not apply if the contest is actually a
5 “direct contest.”⁷⁴ There is no explanation of how the actions described in the
6 specified exceptions might actually be direct contests. Nor is there any clear
7 reason why certain exceptions have been singled out as posing that risk, while the
8 remainder have not.

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

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

16 A major concern with the application of existing California law is that a
17 beneficiary cannot predict with any consistency when an activity will be held to
18 fall within the proscription of a particular no contest clause. To increase
19 predictability, the proposed law recognizes that a no contest clause is to be strictly
20 construed in determining the donor’s intent. This is consistent with the public
21 policy to avoid a forfeiture absent the donor’s clear intent.⁷⁵

22 Some practitioners believe that the courts have strayed from the rule of strict
23 construction, by considering extrinsic evidence in construing the application of a
24 no contest clause.⁷⁶ If extrinsic evidence is considered in construing a no contest
25 clause, then a beneficiary cannot simply read the instrument to determine the
26 meaning of the no contest clause. That creates a risk of unanticipated application
27 and forfeiture.

28 **Over-Reliance on Declaratory Relief**

29 The uncertainty that exists under current law can sometimes be resolved by
30 declaratory relief pursuant to Probate Code Section 21320. That provision
31 authorizes a beneficiary to seek judicial interpretation of a no contest clause to
32 determine whether it would apply to a particular pleading. If the court finds that it

71. Prob. Code § 21305(c).

72. Prob. Code § 21305(d).

73. *Id.*

74. Prob. Code § 21305(e).

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

76. Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at
10.

1 does not apply, the beneficiary may proceed with the pleading without risk of
2 forfeiture. The declaratory relief provides a safe harbor.

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

5 Prudent practitioners now routinely file petitions for declaratory relief under
6 Probate Code § 21320. Californians now expect to have two levels of litigation
7 when instruments contain a no contest clause: file a Probate Code § 21320
8 petition and litigate the declaratory relief, and then litigate the substantive issues
9 in another, separate proceeding.⁷⁷

10 In fact, there may be a need for more than one declaratory relief proceeding in
11 connection with a contest. If, in the course of litigation a contestant discovers new
12 facts that could affect the nature of the contest, a “prudent practitioner will advise
13 her client to file a new petition for declaratory relief. ... Indeed, in any complex
14 proceeding with discovery producing evidence of new potential claims, a second
15 or third filing pursuant to Probate Code § 21320 is likely.”⁷⁸

16 That additional source of litigation adds costs to estates, beneficiaries, and the
17 courts.⁷⁹

18 Respondents to the Commission’s survey ranked the cost and delay associated
19 with declaratory relief proceedings as the second most common and serious of the
20 problems identified in the survey.⁸⁰

77. *Id.*

78. *Id.*

79. 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
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 CLRC Memorandum 2006-42 (Oct. 10, 2006), Exhibit pp. 7, 9-10 (available at www.clrc.ca.gov).

80. 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.

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

2 An unscrupulous person may use a no contest clause to deter inquiry into
3 whether a gift in an estate planning instrument was procured through duress,
4 menace, fraud, or undue influence. “Experienced practitioners are well aware that
5 the no contest clause is a favorite device of undue influencers and those who use
6 duress to become the (unnatural) object of a decedent’s bounty.”⁸¹

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

11 Most Commission survey respondents indicate that the use of a no contest clause
12 to shield elder financial abuse is a serious problem, but not a common one.⁸²

13 **Problematic Forced Election**

14 As discussed, a no contest clause can be used to create a forced election; the
15 beneficiary is then forced to choose between taking the gift offered under the
16 estate plan or forfeiting that gift in order to assert an independent legal right (such
17 as a creditor claim or a claim of a community property interest in purported estate
18 assets). A forced election can be used in a way that benefits all parties by making a
19 generous gift to the beneficiary and thereby avoiding costly litigation.⁸³ A forced
20 election can also be used in an unfair way, with the transferor claiming property
21 that belongs to the beneficiary and offering a choice between the lesser of two
22 evils: acquiesce in my disposition of your property or face forfeiture and the cost,
23 delay, and uncertainty of litigation to secure your rights.⁸⁴

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

81. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 11.

82. 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. CLRC Memorandum 2007-7 (Feb. 21, 2007) (available at www.clrc.ca.gov).

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

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

1 Respondents rated the deterrence of reasonable property ownership claims to be
2 the least common and serious of the problems described in the survey; most
3 respondents found the problem to be rare or uncommon.⁸⁵

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

9 **FEE SHIFTING ALTERNATIVE**

10 The Trusts and Estates Section of the State Bar has proposed that all no contest
11 clauses be made unenforceable. The deterrence of contest litigation would instead
12 be achieved through an award of costs and fees against a person who brings an
13 unsuccessful direct contest without reasonable cause.⁸⁶

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

15 **Transferor Intention Disregarded**

16 The rationale for enforcement of a no contest clause is based primarily on
17 deference to a transferor's intentions and the transferor's fundamental right to
18 place a lawful condition on a gift of the transferor's property.

19 A statutory rule providing for an award of costs and fees against any
20 unsuccessful contestant who lacks reasonable cause to bring a contest cannot be
21 justified by reference to a transferor's intentions. Absent that intention, it is not
22 clear that a beneficiary should be sanctioned for bringing an unsuccessful contest.
23 The law already sanctions frivolous actions.⁸⁷

24 **Deterrence Undermined**

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

29 To deter those harms, forfeiture of a gift under a no contest clause is triggered
30 by the mere filing of a pleading.⁸⁸ This creates a clear choice for a contestant. The
31 only way to avoid forfeiture is to take no court action at all.

85. 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. CLRC Memorandum 2007-7 (Feb. 21, 2007) (available at www.clrc.ca.gov).

86. See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004, at 7-8.

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

88. See Prob. Code §§ 21300, 21303.

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

11 RECOMMENDATIONS

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

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

- 19 • The statute should be simplified and clarified.
- 20 • The probable cause exception that applies to many direct contests should be
21 extended to all direct contests and to unanticipated creditor claims.
- 22 • The scope of declaratory relief should be narrowed.

23 Those recommendations are discussed below.

24 **Statutory Simplification and Clarification**

25 The uncertainty that arises under existing law is largely a result of the open-
26 ended definition of "contest," combined with a complex and lengthy set of
27 exceptions. Because any pleading relating to an estate could be governed by a no
28 contest clause, every such pleading must be examined to determine whether it
29 would, in fact, trigger a no contest clause. That analysis requires interpretation of
30 the language used in the no contest clause and the interpretation and application of
31 the statutory exemption scheme.

32 A simpler approach would be to limit the enforcement of a no contest clause to a
33 list of specified contest types. Under that approach, any pleading that is not one of
34 the expressly covered types would not be governed by a no contest clause. No
35 further analysis would be required. That would eliminate both the open-ended
36 definition of "contest" as well as the lengthy (and inevitably incomplete) list of
37 statutory exceptions.

1 That is the approach taken in the proposed law.⁸⁹ A no contest clause could only
2 be enforced in response to three types of contests: (1) a direct contest, (2) a
3 creditor claim, or (3) a property ownership dispute.

4 *Direct Contest.* A direct contest is an attempt to invalidate an instrument on one
5 or more of the following grounds: forgery; lack of due execution; lack of capacity;
6 menace, duress, fraud, or undue influence; revocation of the instrument; or
7 disqualification of a beneficiary under Section 6112 or 21350.⁹⁰ No other
8 pleadings would constitute a direct contest. There should be no ambiguity about
9 whether a contest is a direct contest. The grounds for a direct contest would be
10 limited and clear.

11 *Creditor Claim.* Under existing law, a transferor can draft a no contest clause
12 that would apply to any creditor claim, including a claim for debts that have not
13 yet arisen and that are not anticipated by the transferor. Such broad application
14 serves to deter baseless claims that may be raised for the first time after the
15 transferor's death.

16 However, such open-ended application to all creditor claims can also result in
17 unintended consequences, by applying the no contest clause to a creditor claim
18 that the transferor did not anticipate and would not have intended to be subject to
19 the no contest clause.

20 For example, suppose a transferor executes an estate plan with a no contest
21 clause that applies, by its terms, to all creditor claims. The estate plan makes a gift
22 of \$50,000 to each of the transferor's four grandchildren. Ten years later, one of
23 the grandchildren contracts to build an addition to the transferor's home, for
24 \$25,000. The work is performed, but before the debt is paid, the transferor dies. If
25 the no contest clause applies to the creditor claim, the beneficiary must choose
26 between claiming the \$25,000 contractual debt (thereby forfeiting the \$50,000
27 inheritance) or waiving the debt in order to receive the \$50,000 gift. Under those
28 facts, it seems unlikely that the transferor would have intended the no contest
29 clause to apply to the later-arising contractual debt.

30 Other unanticipated "creditor claims" might include a petition for a statutory
31 family allowance, a claim for reimbursement of the expenses of the transferor's
32 last illness, or a claim for reimbursement of the transferor's funeral expenses.⁹¹ It
33 is unlikely that a transferor would intentionally condition a gift on the waiver of
34 such claims. Furthermore, enforcement of a no contest clause against such claims
35 would seem to violate public policy.

36 In order to avoid the unintended application of a no contest clause to
37 unanticipated creditor claims, the proposed law would differentiate between a

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

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

91. See Prob. Code § 11421.

1 creditor claim for an existing debt that is specifically identified in a no contest
2 clause (a “specified debt”),⁹² and a debt that arises after execution of the no contest
3 clause or is not specifically identified as being subject to the clause (an
4 “unspecified debt”).⁹³

5 As under existing law, there would be no limitation on the enforcement of a no
6 contest clause against a beneficiary who brings a creditor claim for a specified
7 debt.⁹⁴ That would continue the ability of a transferor to use a no contest clause to
8 create a forced election with respect to such debts.

9 However, the proposed law would create a probable cause defense for a
10 beneficiary who brings a creditor claim for an unspecified debt.⁹⁵ So long as the
11 beneficiary has probable cause to bring the creditor claim, doing so would not
12 cause a forfeiture under the no contest clause. In the hypothetical above, the
13 grandchild could claim the contractual debt without forfeiting the gift made by the
14 estate plan. Similarly, a beneficiary could claim a family allowance or
15 compensation for funeral expenses, without forfeiting the gift made by the estate
16 plan, so long as the claim is brought with probable cause.

17 The transferor could still use a properly framed no contest clause to deter any
18 baseless creditor claims that might arise after the execution of the no contest
19 clause.

20 *Property Ownership Dispute.* Existing law provides for the application of a no
21 contest clause to an “action or proceeding to determine the character, title, or
22 ownership of property.”⁹⁶

23 That language allows a transferor to create a forced election, such that a
24 beneficiary who contests the transferor’s ownership of purported estate assets
25 forfeits any gift to that beneficiary made by the estate plan.

26 The existing statutory language appears to be overbroad for that purpose. Any
27 action that would determine a beneficiary’s right to a gift under an estate plan
28 could be characterized as an action to determine the “ownership of property.”⁹⁷
29 Under that reading, a no contest clause could be enforced against any pleading that
30 would determine the distribution of property under the transferor’s estate.

31 The proposed law would restate the existing provision, so as to continue its
32 substance while preventing overbroad interpretation. Under the proposed law, a no

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

93. See proposed Prob. Code § 21310(g) *infra*.

94. See proposed Prob. Code § 21311(a)(3) *infra*.

95. See proposed Prob. Code § 21311(a)(4) *infra*.

96. Prob. Code § 21305(a)(2).

97. 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).

1 contest clause could be enforced against: “A pleading to challenge a transfer of
2 property on the grounds that it was not the transferor’s property at the time of the
3 transfer....”⁹⁸

4 The proposed law would continue the ability of a transferor to use a no contest
5 clause to create a forced election with respect to such disputes.

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

10 The substantive effect of that change would be relatively modest. Existing law
11 already exempts nearly all types of indirect contests from the operation of a no
12 contest clause (other than forced elections).⁹⁹ The policy implication of that trend
13 is clear. A beneficiary should not be punished for bringing an action to ensure the
14 proper interpretation, reformation, or administration of an estate plan. Such actions
15 serve the public policy of facilitating the fair and efficient administration of estates
16 and help to effectuate the transferor’s intentions, which might otherwise be undone
17 by mistake, ambiguity, or changed circumstances.

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

20 *Terminology.* The proposed law would also define and use the term “protected
21 instrument” to provide a clear rule as to which instruments are governed by a no
22 contest clause.¹⁰⁰ Other minor terminological clarifications would also be made.¹⁰¹

23 **Declaratory Relief Narrowed**

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

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

30 However, there could still be some uncertainty as to whether a no contest clause
31 would apply to a creditor claim or property ownership dispute. The existing
32 declaratory relief procedure would be retained for those issues only.¹⁰²

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

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 66.

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*.

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

4 **Expansion of Probable Cause Exception**

5 Existing law already provides a probable cause exception for a contest based on
6 the following grounds:¹⁰³

- 7 • Forgery.
- 8 • Revocation.
- 9 • The beneficiary is disqualified under Probate Code Section 21350.
- 10 • The beneficiary drafted or transcribed the instrument.
- 11 • The beneficiary directed the drafter of the instrument (unless the transferor
12 affirmatively instructed the drafter regarding the same provision).
- 13 • The beneficiary is a witness to the instrument.

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

17 The existing probable cause exception does not apply to a direct contest brought
18 on the following grounds: incapacity, menace, duress, or lack of due execution.
19 The Commission sees no policy justification for that distinction. The proposed law
20 would extend the existing probable cause exception to all types of direct
21 contests.¹⁰⁴

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

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

26 [Probable] cause exists if, at the time of filing a contest, the facts known to the
27 contestant would cause a reasonable person to believe that there is a reasonable
28 likelihood that the requested relief will be granted after an opportunity for further
29 investigation or discovery.¹⁰⁵

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

32 (1) Existing law focuses only on the likelihood that the contestant’s “factual
33 contentions” will be proven. The proposed law would require a likelihood that the

103. Prob. Code §§ 21306-21307.

104. See proposed Prob. Code § 21311(a) *infra*. As noted, *supra*, the probable cause exception would also be applied to a creditor claim based on an unspecified debt. See proposed Prob. Code §§ 21310(g), 21311(a)(4).

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

1 requested relief will be granted.¹⁰⁶ That question depends not only on the proof of
2 facts, but on the proof of facts that are sufficient to establish a legally sufficient
3 ground for the requested relief. That is a more complete expression of the concept
4 of probable cause.

5 (2) Existing law requires only that it be “likely” that the contestant will prevail.
6 That degree of probability has been equated with the standard that governs
7 malicious prosecution cases, requiring only that the contest be “legally tenable.”¹⁰⁷
8 The Commission believes that such a standard is too forgiving. A no contest
9 clause should deter more than just a frivolous contest. General law already
10 provides sanctions for frivolous actions.¹⁰⁸

11 Instead, the proposed law would require a “reasonable likelihood” of being
12 granted relief.¹⁰⁹ That standard has been interpreted as requiring more than a mere
13 possibility, but less than a likelihood that is “more probable than not.”¹¹⁰

14 **Grace Period**

15 The proposed law would have a one-year deferred operation date.¹¹¹ That would
16 provide a grace period for those who wish to revise their estate plans before the
17 new law takes effect.

18 Once the proposed law becomes operative, its application would be governed by
19 Probate Section 3. That section provides for the application of new law to
20 instruments executed before the operative date of the new law, with specific
21 exceptions to preserve the effect of certain completed acts and orders.¹¹² Section 3
22 also provides a general exception that allows a court to apply prior law if it
23 determines that retroactive application of the new law would substantially interfere
24 with the rights of interested persons.¹¹³

106. See proposed Prob. Code § 21311(b) *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 Probate Code Section 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).

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

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

110. See *Alvarez v. Superior Ct.*, 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 law *infra*.

112. Prob. Code § 3(c)-(f).

113. Prob. Code § 3(h).

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PROPOSED LEGISLATION

Prob. Code §§ 21300-21308 (repealed). No contest clauses

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

Prob. Code §§ 21310-21314 (added). No contest clauses

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

CHAPTER 1. GENERAL PROVISIONS

§ 21310. Definitions

21310. As used in this part:

(a) “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.

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

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

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

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

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

(e) “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, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

(f) “Specified debt” means a debt or liability that satisfies both of the following conditions:

1 (1) The debt or liability is expressly identified in a no contest clause, either
2 individually or as part of an identifiable class of debts or liabilities, as being
3 subject to the no contest clause.

4 (2) The debt or liability arose before the execution of the no contest clause that
5 identifies it.

6 (g) “Unspecified debt” means a debt or liability that is not a specified debt.

7 **Comment.** Section 21310 is new. Subdivision (a) continues part of the substance of former
8 Section 21300(b).

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

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

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

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

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

18 Subdivision (f) is new.

19 Subdivision (g) is new.

20 **§ 21311. Enforcement of no contest clause**

21 21311. (a) A no contest clause shall only be enforced against the following types
22 of contests:

23 (1) A direct contest that is brought without probable cause.

24 (2) A pleading to challenge a transfer of property on the grounds that it was not
25 the transferor’s property at the time of the transfer. A no contest clause shall only
26 be enforced under this paragraph if the no contest clause expressly provides for
27 that application.

28 (3) The filing of a creditor’s claim or prosecution of an action based on it, for a
29 specified debt.

30 (4) The filing of a creditor’s claim or prosecution of an action based on it,
31 without probable cause, for an unspecified debt. A no contest clause shall only be
32 enforced under this paragraph if the no contest clause expressly provides for that
33 application.

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

38 **Comment.** Section 21311 is new.

39 Subdivision (a)(1) generalizes the probable cause exception provided in former Sections 21306
40 and 21307, so that it applies to all direct contests.

41 Subdivision (a)(2) is similar to former Section 21305(a)(2). It provides for enforcement of a no
42 contest clause in response to a pleading that contests a transfer or property on the ground that the
43 property was not subject to the transferor’s dispositional control at the time of the transfer.
44 Probable cause is not a defense to the enforcement of a no contest clause under this provision.

45 Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change, except
46 that a debt or liability must pre-date a no contest clause in order to be subject to the no contest

1 clause under this provision. See Section 21310(f) (“specified debt”). Probable cause is not a
2 defense to the enforcement of a no contest clause under this provision.

3 Subdivision (a)(4) is new. It provides for limited enforcement of a no contest clause against a
4 creditor claim based on a debt or liability that arises after the execution of the no contest clause or
5 that is not expressly identified in the no contest clause as being subject to the no contest clause.
6 See Section 21310(g) (“unspecified debt”). The no contest clause must expressly provide for such
7 application. Probable cause is a defense to the enforcement of a no contest clause under this
8 provision.

9 Subdivision (b) restates the reasonable cause exception provided in former Sections 21306,
10 with two exceptions:

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

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

23 **§ 21312. Construction of no contest clause**

24 21312. In determining the intent of the transferor, a no contest clause shall be
25 strictly construed.

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

27 **§ 21313. Application of common law.**

28 21313. This part is not intended as a complete codification of the law governing
29 enforcement of a no contest clause. The common law governs enforcement of a no
30 contest clause to the extent this part does not apply.

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

32 **§ 21314. Effect of contrary instrument**

33 21314. This part applies notwithstanding a contrary provision in the instrument.

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

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

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

37 21320. (a) If an instrument containing a no contest clause is or has become
38 irrevocable, a beneficiary may apply to the court for a determination of whether a
39 ~~particular motion, petition, or other act by the beneficiary, including, but not~~
40 ~~limited to, creditor claims under Part 4 (commencing with Section 9000) of~~
41 ~~Division 7, Part 8 (commencing with Section 19000) of Division 9, an action~~
42 ~~pursuant to Section 21305, and an action under Part 7 (commencing with Section~~
43 ~~21700) of Division 11, would be a contest within the terms of the no contest clause~~

1 ~~and whether the no contest clause could be enforced against a particular pleading~~
2 ~~under paragraph (2) or (3) of subdivision (a) of Section 21311. The court shall not~~
3 ~~make a determination under this section if the determination would depend on the~~
4 ~~merits of the proposed pleading.~~

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

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

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

14 **Comment.** Section 21320 is amended to limit its scope of application. The procedure provided
15 in the section may only be used to determine whether a no contest clause could be enforced under
16 Section 21333(a)(2) or (3).

17 **Operative Date (uncodified)**

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