

## First Supplement to Memorandum 2008-5

### 2008 Legislative Program: Status of Bills

---

The Commission has received a letter from the California Judges Association (“CJA”), commenting on the recommendation on *Revision of No Contest Clause Statute* (Jan. 2008). The letter is attached as an Exhibit.

CJA believes that the proposed law would be an improvement over existing law, but has some substantive concerns and technical suggestions.

#### Substantive Concerns

CJA argues for the following substantive changes to the proposed law:

- The proposed law should be fully retroactive (rather than retroactive to January 1, 2001 as the Commission has recommended). See Exhibit p. 1. Full retroactivity would greatly simplify the law, by eliminating the need to retain and apply former law to instruments that became irrevocable before January 1, 2001.
- The application of a no contest clause to a community property dispute should be limited. The no contest clause should only apply to a person who is specifically named and with respect to property that is specifically identified as being protected by the clause. See Exhibit pp. 1-2.
- Declaratory relief should be eliminated. See Exhibit p. 2.

#### Technical Suggestions

CJA makes two technical suggestions, which are discussed below.

##### *Disqualified Beneficiaries and Probable Cause*

It should be made clear that probable cause to challenge a gift under Section 21350 requires only that there be probable cause to believe that the person is a “disqualified person.” See Exhibit p. 2. Under Sections 21350-21351, there is a presumption that a gift to a disqualified person was the product of menace, duress, fraud, or undue influence. The beneficiary then bears the burden of proving the contrary.

---

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

The staff agrees with the substance of CJA’s suggestion. A beneficiary with probable cause to believe that a person is a “disqualified person” should not forfeit under a no contest clause.

The staff also agrees with CJA’s specific suggestion, that clarifying language be added to the Comment to proposed Probate Code Section 21311.

However, the staff would go one small step farther. The added Comment language should also make the same point with respect to a contest based on Probate Code Section 6112, which is functionally similar to Section 21350. Both sections establish a presumption of menace, duress, fraud, or undue influence for certain types of beneficiaries. Both would constitute grounds for a direct contest under the proposed law. See proposed Prob. Code § 21310(b)(6).

**The staff recommends revising the Comment to proposed Section 21311 as follows:**

**Comment.** Section 21311 is new.

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

For a direct contest based on Section 6112 or 21350, the probable cause exception requires only that the contestant show probable cause that a beneficiary is a witness described in Section 6112(c) or a “disqualified person” under Section 21350.5.

...

#### *Scope of Declaratory Relief*

CJA also points out that the proposed amendment of Probate Code Section 21320 would slightly expand the scope of declaratory relief under that section. Under the existing section, a petitioner can only seek review of whether a particular pleading, *by the petitioner*, would violate a no contest clause. The proposed law does not properly preserve that existing limitation. It would allow a person to petition for declaratory relief as to whether a pleading *by a third party* would violate a no contest clause.

That change was inadvertent and should be corrected. **The staff recommends that the proposed amendment of Section 21320 be revised to add the language indicated in bold below:**

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether **a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7, Part 8**

~~(commencing with Section 19000) of Division 9, an action pursuant to Section 21305, and an action under Part 7 (commencing with Section 21700) of Division 11, would be a contest within the terms of the no contest clause and whether the no contest clause could be enforced against a particular pleading **by the beneficiary, under paragraph (2) or (3) of subdivision (a) of Section 21311.** The court shall not make a determination under this section if the determination would depend on the merits of the proposed pleading.~~

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

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

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

Because the recommendation is not yet in print, the changes proposed above could be made and incorporated into the recommendation prior to publication.

Respectfully submitted,

Brian Hebert  
Executive Secretary



# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

88 KEARNY STREET  
SUITE 1850  
SAN FRANCISCO, CA 94108-5523  
PHONE: 415-263-4600  
TOLL FREE: 1-866-432-1CJA  
FAX: 415-263-4605  
WEB: WWW.CALJUDGES.ORG

## EXECUTIVE BOARD

HON. IRA R. KAUFMAN  
*PRESIDENT*

HON. DAN THOMAS OKI  
*VICE PRESIDENT*

HON. RAMONA G. SEE  
*VICE PRESIDENT*

HON. LINDA L. LOFTHUS  
*SECRETARY - TREASURER*

HON. SCOTT L. KAYS  
*IMMEDIATE PAST PRESIDENT*

HON. SUE ALEXANDER

HON. JEFFREY B. BARTON

HON. E. JEFFREY BURKE

HON. THOMAS H. CAHRAMAN

HON. THIERRY PATRICK COLAW

HON. PETER C. DEDDEH

HON. TIMOTHY L. FALL

HON. BARRETT J. FOERSTER

HON. GEOFFREY T. GLASS

HON. LOIS HAIGHT

HON. RICHARD J. HANSCOM (RET.)

HON. JOHN F. HERLIHY

HON. ANN I. JONES

HON. CLIFFORD L. KLEIN

HON. WILLIAM F. McDONALD (RET.)

HON. ROBERT H. OLIVER

HON. PATRICIA M. SCHNEGG

HON. MICHAEL P. VICENCIA

HON. JAMES D. WARD (RET.)

HON. REBECCA A. WISEMAN

HON. MARY E. WISS

STANLEY S. BISSEY  
*EXECUTIVE DIRECTOR*

February 5, 2008

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

## RE: Study L-637, Revision of No Contest Clause Statute

Dear Mr. Hebert:

I write to you on behalf of the California Judges Association (CJA) regarding the current California Law Revision Commission study of no contest clauses.

CJA commends the Commission on its effort to simplify the law on no contest provisions. The proposal attempts to strike a balance of the competing interests; however, CJA believes adjustment of the balance is required on several points.

We wrote in October of 2006, copy enclosed, of our interest in both simplifying this complex subject and in eliminating the harsh result of enforcement of in terrorem clauses. This remains our position. However, we acknowledge that the proposal would improve the law as currently revised. We have several substantive issues and technical corrections to offer.

This study was intended to eliminate the existing maze of statutory law on this subject. Unfortunately, without full retroactivity the proposal will retain existing law and add another layer. Trusts created before enactment will be at issue for many years under the prior law. Thus, only some subsequent generation of judges and interested parties will have the full benefit of a simplified statutory scheme.

The proposal continues the enforcement of in terrorem clauses for pleadings challenging ownership of property, although more narrowly than currently done under section 21311(a)(2). Enforcement would be limited to challenges of ownership at the time of transfer and require that the clause expressly provide for it. However, widow's elections are harsh and punitive provisions, rarely used in modern society. As the law of no contest clauses has been integrated into ordinary living trusts, any time a surviving spouse asserts any community property interest he or she faces the risk that

he or she claimed a penny too much and therefore tried to defeat the trust. There is no reason to believe that this draconian defense was intended by most surviving spouses.

If the forced election is to continue, CJA has concern that the statutory limitation, that the clause to “expressly” provide for it, is insufficient to accomplish what is intended. Without requiring that the particular person who is the subject of the requirement be specifically named, a divorce and subsequent happy remarriage would carry over the widow's election provisions to the new spouse who was never intended by the decedent to face this eventuality. The clause should also be required to identify specifically the property or properties as to which the surviving spouse can assert no ownership or face total disinheritance.

Both proposed sections 21311(a)(2) and 21311(a)(3) use the term “expressly” intending that the application will be evident on its face, thus, obviating a beneficiary’s need for declaratory relief. CJA agrees with this intent. However, without further legislation that will not be the effect of this proposal and will generate 21320 petitions so long as any form of 21320 remains in the Probate Code. First, the common law of *Burch v George*<sup>1</sup> permits extrinsic evidence to interpret, and potentially expand, a no contest clause which is unambiguous on its face. Once the terms have been interpreted to include the unanticipated scope, those terms are “express” and subject the beneficiary to unforeseeable disinheritance. Second, the statutes require notice of the trust and this notice starts the statute of limitations for a contest. However, the contestant may not know of the no contest clause because, for example, it is in an amendment to the trust. Amendments can be found in unlikely places, such as the trustor's will. In each case, a claimant/contestant would have a strong incentive to petition for declaratory relief to uncover the extrinsic evidence and trust amendments.

CJA has two drafting issues. First, contests attacking benefits to drafters and care providers would be a direct contest and there would be no enforcement where the contest was brought upon probable cause. The proposal should specify that the required probable cause is met with probable cause of the challenged beneficiary’s status. If probable cause of undue influence is required the statutory shifting of the burden of proof, section 21351(d), would be reversed. Perhaps, this could be accomplished in the Commission’s comment to 21311. Second, the January 8th change to proposed section 21320(a) could be read as broadening the use of declaratory relief, contrary to the Commission’s intent. The amendment eliminates the requirement that a beneficiary test his or her own proposed pleading. In line 39 on page 27 of the revised draft the phrase “by the beneficiary” is removed. The phrase should be returned to the section at the end of line 1 of page 28.

While we favor ending enforcement of no contest clause, if it is going to continue to be enforced CJA would favor ending declaratory relief under Probate Code section 21320. Although the recommendation of the Commission narrows its use, the no contest clause can be better understood by being interpreted on its face. Additionally if the harsh effects can be tempered by permitting the challenge not to be enforced through probable cause for the contest, then there is no need for declaratory relief.

Thank you for permitting the California Judges Association to express our concerns in this attempt to simplify California law. We look forward to continuing to work with the Commission throughout this study.

Sincerely,



Kate Kalstein  
Legislative Counsel

---

<sup>1</sup> *Burch v. George* (1994) 7 Cal. 4<sup>th</sup> 246.