

Memorandum 2009-2

**Revision of No Contest Clause Statute:
Conforming Revisions (Draft Recommendation)**

In 2007, the Commission completed its recommendation on *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007). The recommendation proposed that most of the substance of former law be continued, but that the organization of the law be changed to make the law easier to understand. The existing statute would be repealed and replaced with a new statute.

That recommendation was introduced in 2008 as SB 1264 (Harman). In the Assembly, the bill was amended to eliminate the existing declaratory relief procedure. Under that procedure, a beneficiary of an instrument containing a no contest clause could petition the court for a determination of whether a contemplated action would constitute a violation of the no contest clause. See Prob. Code § 21320. As so amended, the bill was enacted into law. See 2008 Cal. Stat. ch. 174.

As it turns out, there are a handful of provisions that include cross-references to the declaratory relief provisions. If those cross-references are not adjusted before SB 1264 becomes operative on January 1, 2010, they will be defective, due to the repeal of the declaratory relief provisions.

The staff worked with the Legislative Counsel's office to develop language to correct those cross-references. The drafting involved is complicated by the limited retroactivity of the new statute. See the attached draft for an explanation of the problem.

Because of the technical drafting complexities involved, the Commission directed the staff to prepare a draft recommendation for consideration at the February meeting, which would set out and explain the proposed technical amendments. See Minutes (Dec. 2008), p. 3. The recommendation would give guidance to the Legislature, courts, and practitioners on the proper interpretation

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of the corrected provisions. More generally, it would help to clarify the law governing older instruments.

A draft recommendation is attached for the Commission's review. **The Commission needs to decide whether to approve the draft as a final recommendation (as is, or with revisions), for printing and introduction in the Legislature.**

Respectfully submitted,

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Executive Secretary

#L-637

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Revision of No Contest Clause Statute:
Conforming Revisions

February 2009

California Law Revision Commission
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1 REVISION OF NO CONTEST CLAUSE STATUTE:
2 CONFORMING REVISIONS

3 Senate Bill 1264 (Harman) was introduced in 2008 to implement a Law
4 Revision Commission recommendation on the enforcement of no contest clauses.¹
5 The bill was amended in the Assembly to make a substantive change in the law
6 that was not included in the Commission's recommendation: The sections
7 providing for declaratory relief² were repealed.

8 The bill was enacted as so amended.³ The new legislation will become operative
9 on January 1, 2010.⁴

10 Before the legislation becomes operative, a small number of technical
11 amendments need to be made to conform to the substantive change made in the
12 Assembly. Those conforming revisions are explained below.

13 **Need for Conforming Revisions**

14 There are four code sections that make specific reference to the repealed statute,
15 in connection with the declaratory relief procedure. Two of the sections provide
16 that the court's determination in a declaratory relief proceeding is appealable.⁵
17 Two provide that the statute of limitations is tolled during a declaratory relief
18 proceeding.⁶

19 Those sections need to be amended in order to correct the cross-references to
20 repealed provisions.

21 **Nature of Conforming Revisions**

22 Ordinarily, a cross-reference to a repealed provision of law could simply be
23 deleted. That approach is not possible in this instance, because of a complication
24 involving the transition from former law to the new law.

25 By its terms, the new law has a limited retroactive effect. It applies to any
26 instrument containing a no contest clause that becomes irrevocable on or after

1. *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007). A no contest clause is a provision in a will, trust, or other instrument, which states that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share.

2. Former Prob. Code §§ 21320-21322. Under the repealed provisions, a beneficiary of an instrument containing a no contest clause could petition the court for a determination of whether a contemplated action would violate the no contest clause.

3. 2008 Cal. Stat. ch. 174.

4. 2008 Cal. Stat. ch. 174, § 3.

5. Prob. Code §§ 1303, 1304.

6. Code Civ. Proc. § 366.2, 366.3. See also former Prob. Code § 21308 (tolling of statute of limitations during declaratory relief).

1 January 1, 2001.⁷ The new law does *not* apply to an instrument that became
2 irrevocable before 2001.⁸

3 Pursuant to the general transitional rule governing the Probate Code, an
4 instrument that is not governed by a new law is instead governed by the former
5 law, notwithstanding the repeal of the former law.⁹

6 Consequently, an instrument that became irrevocable before 2001 remains
7 subject to the former law, including the former sections that provided for
8 declaratory relief. For that reason, a beneficiary of such an instrument could still
9 petition for declaratory relief under former Probate Code Section 21320, despite
10 the enactment of the new law.

11 Existing law governing appeals and the tolling of the statute of limitations
12 should continue to apply to such proceedings.

13 **Recommendation**

14 The Commission recommends that the sections containing cross-references to
15 the former statute be amended to make clear that they continue to apply to a
16 declaratory relief proceeding conducted pursuant to former Probate Code Section
17 21320. This would preserve the status quo as to instruments that became
18 irrevocable before January 1, 2001, and are therefore governed by former law.

7. See Prob. Code § 21315.

8. *Id.*

9. See Prob. Code § 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”).

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 366.2 (amended). Limitations period for surviving action**

2 SECTION 1. Section 366.2 of the Code of Civil Procedure is amended to read:

3 366.2. (a) If a person against whom an action may be brought on a liability of
4 the person, whether arising in contract, tort, or otherwise, and whether accrued or
5 not accrued, dies before the expiration of the applicable limitations period, and the
6 cause of action survives, an action may be commenced within one year after the
7 date of death, and the limitations period that would have been applicable does not
8 apply.

9 (b) The limitations period provided in this section for commencement of an
10 action shall not be tolled or extended for any reason except as provided in any of
11 the following, where applicable:

12 (1) Sections 12, 12a, and 12b of this code.

13 (2) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code
14 (creditor claims in administration of estates of decedents).

15 (3) Part 8 (commencing with Section 19000) of Division 9 of the Probate Code
16 (payment of claims, debts, and expenses from revocable trust of deceased settlor).

17 (4) Former Part 3 (commencing with Section 21300) of Division 11 of the
18 Probate Code (no contest clauses), as that part read prior to its repeal by Chapter
19 174 of the Statutes of 2008.

20 (c) This section applies to actions brought on liabilities of persons dying on or
21 after January 1, 1993.

22 **Comment.** Section 366.2 is amended to reflect the repeal of former Part 3 (commencing with
23 Section 21300) of Division 11 of the Probate Code. See 2008 Cal. Stat. ch. 174. The reference to
24 the former law is retained because the former law continues to apply to the enforcement of a no
25 contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding
26 the repeal of the former law. See Prob. Code §§ 3(g) (“If the new law does not apply to a matter
27 that occurred before the operative date, the old law continues to govern the matter
28 notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to
29 instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308
30 (limitations period tolled during declaratory relief proceedings).

31 **Code Civ. Proc. § 366.3 (amended). Limitations period for action to enforce claim to**
32 **distribution**

33 SEC. 2. Section 366.3 of the Code of Civil Procedure is amended to read:

34 366.3. (a) If a person has a claim that arises from a promise or agreement with a
35 decedent to distribution from an estate or trust or under another instrument,
36 whether the promise or agreement was made orally or in writing, an action to
37 enforce the claim to distribution may be commenced within one year after the date
38 of death, and the limitations period that would have been applicable does not
39 apply.

1 (b) The limitations period provided in this section for commencement of an
2 action shall not be tolled or extended for any reason except as provided in Sections
3 12, 12a, and 12b of this code, and former Part 3 (commencing with Section 21300)
4 of Division 11 of the Probate Code, as that part read prior to its repeal by Chapter
5 174 of the Statutes of 2008.

6 (c) This section applies to actions brought on claims concerning persons dying
7 on or after the effective date of this section.

8 **Comment.** Section 366.3 is amended to reflect the repeal of former Part 3 (commencing with
9 Section 21300) of Division 11 of the Probate Code. See 2008 Cal. Stat. ch. 174. The reference to
10 the former law is retained because the former law continues to apply to the enforcement of a no
11 contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding
12 the repeal of the former law. See Prob. Code §§ 3(g) (“If the new law does not apply to a matter
13 that occurred before the operative date, the old law continues to govern the matter
14 notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to
15 instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308
16 (limitations period tolled during declaratory relief proceedings).

17 **Prob. Code § 1303 (amended). Appealable orders**

18 SEC. 3. Section 1303 of the Probate Code is amended to read:

19 1303. With respect to a decedent's estate, the grant or refusal to grant the
20 following orders is appealable:

21 (a) Granting or revoking letters to a personal representative, except letters of
22 special administration or letters of special administration with general powers.

23 (b) Admitting a will to probate or revoking the probate of a will.

24 (c) Setting aside a small estate under Section 6609.

25 (d) Setting apart a probate homestead or property claimed to be exempt from
26 enforcement of a money judgment.

27 (e) Granting, modifying, or terminating a family allowance.

28 (f) Determining heirship, succession, entitlement, or the persons to whom
29 distribution should be made.

30 (g) Directing distribution of property.

31 (h) Determining that property passes to, or confirming that property belongs to,
32 the surviving spouse under Section 13656.

33 (i) Authorizing a personal representative to invest or reinvest surplus money
34 under Section 9732.

35 (j) Determining whether an action constitutes a contest under former Chapter 2
36 (commencing with Section 21320) of Part 3 of Division 11, as it read prior to its
37 repeal by Chapter 174 of the Statutes of 2008.

38 (k) Determining the priority of debts under Chapter 3 (commencing with Section
39 11440) of Part 9 of Division 7.

40 (l) Any final order under Chapter 1 (commencing with Section 20100) or
41 Chapter 2 (commencing with Section 20200) of Division 10.

42 **Comment.** Section 1303 is amended to reflect the repeal of former Chapter 2 (commencing
43 with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the
44 former law is retained because the former law continues to apply to the enforcement of a no

1 contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding
2 the repeal of the former law. See Sections 3(g) (“If the new law does not apply to a matter that
3 occurred before the operative date, the old law continues to govern the matter notwithstanding its
4 amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that
5 became irrevocable prior to January 1, 2001).

6 **Prob. Code § 1304 (amended). Appealable orders**

7 SEC. 4. Section 1304 of the Probate Code is amended to read:

8 1304. With respect to a trust, the grant or denial of the following orders is
9 appealable:

10 (a) Any final order under Chapter 3 (commencing with Section 17200) of Part 5
11 of Division 9, except the following:

12 (1) Compelling the trustee to submit an account or report acts as trustee.

13 (2) Accepting the resignation of the trustee.

14 (b) Any final order under Chapter 2 (commencing with Section 19020) of Part 8
15 of Division 9.

16 (c) Any final order under Part 1 (commencing with Section 20100) and Part 2
17 (commencing with Section 20200) of Division 10.

18 (d) Determining whether an action constitutes a contest under former Chapter 2
19 (commencing with Section 21320) of Part 3 of Division 11, as it read prior to its
20 repeal by Chapter 174 of the Statutes of 2008.

21 **Comment.** Section 1304 is amended to reflect the repeal of former Chapter 2 (commencing
22 with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the
23 former law is retained because the former law continues to apply to the enforcement of a no
24 contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding
25 the repeal of the former law. See Sections 3(g) (“If the new law does not apply to a matter that
26 occurred before the operative date, the old law continues to govern the matter notwithstanding its
27 amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that
28 became irrevocable prior to January 1, 2001).
