

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revision of No Contest Clause Statute: Conforming Revisions

February 2009

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Revision of No Contest Clause Statute: Conforming Revisions*, 38 Cal. L. Revision Comm'n Reports 203 (2008). This is part of publication #232.

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February 19, 2009

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

Senate Bill 1264 (Harman) was introduced in 2008 to implement a California Law Revision Commission recommendation on the enforcement of no contest clauses. That bill repeals the existing no contest clause statute and replaces it with a new statute.

There are a few related statutory provisions that cross-refer to the repealed statute. Those cross-references are now technically inaccurate and need to be corrected.

The Commission recommends that the cross-references be amended to properly reflect the recent change in the law.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

Respectfully submitted,

Pamela L. Hemminger
Chairperson

REVISION OF NO CONTEST CLAUSE STATUTE: CONFORMING REVISIONS

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the law that was not included in the Commission's recommendation: The sections providing for declaratory relief² were repealed.

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

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

Need for Conforming Revisions

There are four code sections that make specific reference to the repealed statute, in connection with the declaratory relief procedure. Two of the sections provide that the court's determination in a declaratory relief proceeding is

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.

appealable.⁵ Two provide that the statute of limitations is tolled during a declaratory relief proceeding.⁶

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

Nature of Conforming Revisions

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

By its terms, the new law has a limited retroactive effect. It applies to any instrument containing a no contest clause that becomes irrevocable on or after January 1, 2001.⁷ The new law does *not* apply to an instrument that became irrevocable before 2001.⁸

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

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

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).

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.”).

appeals and the tolling of the statute of limitations should continue to apply to such proceedings.

Recommendation

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

PROPOSED LEGISLATION

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

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

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

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

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

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

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

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

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

Comment. Section 366.2 is amended to reflect the repeal of former Part 3 (commencing with Section 21300) of Division 11 of the Probate

Code. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. 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.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308 (limitations period tolled during declaratory relief proceedings).

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

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

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

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

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

Comment. Section 366.3 is amended to reflect the repeal of former Part 3 (commencing with Section 21300) of Division 11 of the Probate Code. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to

January 1, 2001, notwithstanding the repeal of the former law. 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.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308 (limitations period tolled during declaratory relief proceedings).

Prob. Code § 1303 (amended). Appealable orders

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

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

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

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

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

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

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

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

(g) Directing distribution of property.

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

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

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

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

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

Comment. Section 1303 is amended to reflect the repeal of former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. See Sections 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.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001).

Prob. Code § 1304 (amended). Appealable orders

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

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

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

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

(2) Accepting the resignation of the trustee.

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

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

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

Comment. Section 1304 is amended to reflect the repeal of former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained

because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. See Sections 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.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001).
