

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revision of No Contest Clause Statute

January 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
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*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

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January 17, 2008

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

A no contest clause is a provision in a will, trust, or other estate planning instrument to the effect that a beneficiary who contests the instrument forfeits any gift made by the instrument. Such a clause is intended to reduce litigation by disappointed beneficiaries.

This recommendation would address two problems with existing law on the enforcement of no contest clauses.

(1) Enforcement of a no contest clause is subject to a complex set of statutory and common law exceptions. The complexity of existing law can create uncertainty as to the scope of application of a no contest clause. That uncertainty leads to widespread use of declaratory relief to construe the application of no contest clauses, adding an additional layer of litigation that does nothing to resolve the substance of any underlying issues.

The Law Revision Commission recommends that the existing statute be substantially simplified, so as to eliminate most sources of uncertainty as to the application of a no contest clause. The proposed simplification would result in

minor substantive changes to the law governing the application of a no contest clause. Those changes would be consistent with and strengthen the general policies underlying the existing statute.

(2) A no contest clause can be used to shield fraud or undue influence from judicial review. A person who procures a testamentary gift through fraud or undue influence can use a no contest clause to deter other beneficiaries from challenging the gift to that person.

The Law Revision Commission recommends the creation of a probable cause exception for a contest that challenges a gift on the grounds of menace, duress, fraud, or undue influence. A beneficiary who brings such a contest with probable cause would not be subject to forfeiture under a no contest clause. This would allow a beneficiary who has good cause to believe that a gift was procured improperly to contest the gift without fear of disinheritance.

Existing law already provides a probable cause exception for many types of direct contests, including a contest grounded on a statutory presumption of fraud or undue influence. The proposed law would generalize the probable exception so that it applies to all direct contests.

This recommendation was prepared pursuant to Resolution Chapter 122 of the Statutes of 2005.

Respectfully submitted,

Sidney Greathouse
Chairperson

REVISION OF NO CONTEST CLAUSE STATUTE

BACKGROUND

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is intended to reduce litigation by beneficiaries whose expectations are frustrated by the donative scheme of the instrument.¹

The Legislature has directed the Law Revision Commission to prepare a report weighing the advantages and disadvantages of enforcing a no contest clause in a will, trust, or other estate planning instrument.² In preparing the report, the Commission is to do the following:

Review the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.³

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.*

This report discusses the arguments for and against the enforcement of a no contest clause, the approach to enforcement taken in California and in other states, and problems that have arisen under the California statute. It concludes with a recommendation for changes to the existing statute.

POLICIES FAVORING ENFORCEMENT

The longstanding general rule in California is that a no contest clause will be enforced: “No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.”⁴ Policies supporting that general rule are discussed below.

Effectuating Transferor’s Intent

The law should respect a person’s ability to control the use and disposition of the person’s own property. That includes the ability to make a gift, either during life or on death. An owner may place a condition on a gift, so long as the condition imposed is not illegal or otherwise against public policy:

[The] testatrix was at full liberty to dispose of her property as she saw fit and upon whatever condition she desired to impose, so long as the condition was not prohibited by some law or opposed to public policy. The testatrix could give or refrain from giving; and could attach to her gift any lawful condition which her reason or caprice might dictate. She was but dealing with her own property

4. *Burch v. George*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

and the beneficiary claiming thereunder must take the gift, if at all, upon the terms offered.⁵

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

Avoiding Litigation

There are a number of good reasons why a transferor would want to avoid litigation contesting the transferor's estate plan:

Cost and Delay. The cost of litigation depletes assets that were intended to go to the transferor's beneficiaries. That is generally undesirable, but it can also have unexpected effects on the relative value of the gifts given to different beneficiaries. For example, where one beneficiary is given a specifically identified asset and the other beneficiary takes the residue of the estate, litigation costs will disproportionately affect the second beneficiary.⁷

By deterring contest litigation, a no contest clause preserves the corpus of the estate and the transferor's dispositional plan.

Discord Between Beneficiaries. A dispute over the proper disposition of a transferor's estate can pit family members and friends against one another. The dispute may be protracted, emotional, and destructive of important personal relationships.

A transferor may execute a no contest clause in order to avoid just that sort of discord. For example, in *Estate of Ferber*,⁸ the transferor had served as the personal representative of his father's estate, which was open for 17

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

6. See discussion of "Public Policy Exceptions" *infra*.

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

8. 66 Cal. App. 4th 244, 77 Cal. Rptr. 2d 774 (1998).

years. He did not want his own representative to go through the same difficulties: “Due to his angst over this state of affairs and its negative impact on his health and quality of life, ... he directed his attorneys to prepare the strongest possible no contest clause.”⁹

Privacy. A contest proceeding may bring to light “matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial...”¹⁰ Unless a no contest clause is given effect, the resulting squabbles between disappointed beneficiaries could lead to “disgraceful family exposures,” as a result of which “the family skeleton will have been made to dance.”¹¹

An effective no contest clause can prevent that sort of public airing of private matters.

Avoiding Settlement Pressure

A disappointed beneficiary may attempt to extract a larger gift from the estate by threatening to file a contest. So long as the amount demanded is less than the cost to defend against the contest, there will be pressure to accede to the demand, regardless of its merits.

A no contest clause can be used to avoid that result. The potential contestant’s bargaining position is much reduced if filing a nuisance suit would forfeit the gift made to that person under the estate plan.

9. *Id.* at 247.

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, 61 (1963) (citations omitted).

Use of Forced Election to Avoid Ownership Disputes

In some cases, the proper disposition of a transferor's property may be complicated by difficult property characterization issues.

For example:

A decedent is survived by his wife of many years. It was a second marriage for both spouses, each of whom had significant separate property assets of their own. Over the years of their marriage it became increasingly difficult to characterize ownership of their assets as separate or community property: gifts were made (or implied), accounts were mingled, community property contributions were made to separate property business interests, etc. Rather than put his beneficiaries to the expense and delay that would be required for a thorough property characterization, the transferor uses a no contest clause to avoid the issue.

The transferor claims that all of the disputed assets are his separate property, gives a gift to his surviving wife that is clearly greater than the amount she would recover if she were to contest the property characterization, and includes a no contest clause. This forces the surviving spouse to make a choice between acquiescing in the decedent's estate plan and taking the amount offered under that plan, or forfeiting that amount in order to pursue her independent rights under community property law.

If the offer made in the estate plan is fair to the surviving spouse, she can save the estate money and time by accepting the gift offered (thereby effectively waiving any community property claim to purported estate assets).

Similar facts were at issue in a recent case involving a forced election:

[Estate] planning for many married couples now entails allocating a lifetime of community and separate assets between the current spouse and children from a previous marriage. The difficulties inherent in ascertaining community interests in otherwise separate property pose a

significant challenge to the testator or testatrix. If the testator or testatrix errs in identifying or calculating the community interests in his or her property, costly and divisive litigation may ensue and testamentary distributions in favor of one or more beneficiaries might unexpectedly be extinguished. As both the Legislature and courts have long recognized, no contest clauses serve an important public policy in these situations by reducing the threat of litigation and uncertainty.¹²

There are other situations, besides the disposition of marital property, that may give rise to a forced election of the type described above. For example, business partners may have mingled assets in a way that would make proper division difficult, or there may be a disputed debt owed by the decedent to a beneficiary. In such cases, a no contest clause and a sufficiently generous gift can resolve the matter without litigation.

Continuity of Law

Many existing estate plans have been drafted in reliance on existing law. Any significant substantive change in the law governing the enforcement of a no contest clause could result in transitional costs, as transferors would be required to review their estate plans and make whatever changes make sense under the new law. If a transferor were to die before adjustments could be made, the estate plan could operate in an unintended way. Those concerns weigh in favor of continuing the substance of existing law.

12. *Burch v. George*, 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

POLICIES FAVORING NON-ENFORCEMENT

It is true that a transferor generally has the right to dispose of property on death as the transferor sees fit. The law does not require that an estate plan be wise or fair.

However, it has long been held that public policy concerns can trump a transferor's intention to create a no contest clause.¹³ Specific policy concerns are discussed below.

Access to Justice

As a general matter, a person should have access to the courts to remedy a wrong or protect important rights. A no contest clause works against that policy, by threatening a significant loss to a beneficiary who files an action in court. In one of the earliest decisions holding that a no contest clause is unenforceable, the court based its holding on the importance of access to justice:

[It] is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.¹⁴

Forfeiture Disfavored

Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy. Accordingly, a no contest clause should be applied conservatively, so as not to extend the scope of

13. Estate of Kitchen, 192 Cal. 384, 388, 220 P. 301 (1923) (no contest clause enforceable "so long as the condition was not prohibited by some law or opposed to public policy.").

14. Mallet v. Smith, 6 Rich. Eq. 12 (S.C. App. Eq. Dec. 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.

application beyond what was intended: “Because a no contest clause results in a forfeiture ... a court is required to strictly construe it and may not extend it beyond what was plainly the testator’s intent.”¹⁵

Judicial Action Required to Determine or Implement Transferor’s Intentions

In order to effectuate a transferor’s intentions, it is necessary to ascertain those intentions. In some situations, a judicial proceeding may be required to do so. In those cases, a no contest clause could work against the effectuation of the transferor’s intentions, by deterring action that is necessary to determine or preserve those intentions. Areas of specific concern are discussed below.

Capacity and Freedom of Choice. An instrument should only be enforced if it expresses the free choice of a transferor who has the legally required mental capacity to understand the choice being made. An instrument that is the product of menace, duress, fraud, or undue influence is not an expression of the transferor’s free will and should not be enforced.¹⁶ An instrument executed by a transferor who lacks the requisite mental capacity is also not a reliable expression of the transferor’s wishes and is invalid.¹⁷ For obvious reasons, a forgery is not given effect.

If a no contest clause deters a beneficiary from challenging an instrument on any of those grounds, it may work against

15. *Burch v. George*, 7 Cal. 4th at 254. See also Prob. Code § 21304 (no contest clause to be strictly construed).

16. See Prob. Code § 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).

the transferor's actual intentions, by protecting an instrument that should not be given effect.

Ambiguity. If a provision of a donative instrument is ambiguous, it may be difficult to determine the transferor's intentions. Different beneficiaries may argue for different meanings. Judicial construction of the instrument may be necessary to resolve the matter.¹⁸

To the extent that a no contest clause would deter the beneficiaries from seeking judicial construction of an ambiguous provision, it works against the policy of effectuating the transferor's intentions.

Reformation or Modification of Instrument. There may be instances where the meaning of a donative instrument is clear, but there is an unanticipated change in circumstances that would make the instrument ineffective to implement the transferor's purpose. In such a case, it may be appropriate to seek judicial modification of the instrument.

For example, a court may modify or terminate a trust, on the petition of a trustee or a beneficiary, "if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust."¹⁹

In such a case, a no contest clause could deter beneficiaries from seeking a judicial modification of an instrument that is

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).

necessary in order to effectuate the transferor's actual intentions.

Judicial Supervision of Fiduciary

Important public policies are served by judicial supervision of an executor, trustee, or other fiduciary, and such supervision should not be impeded by the operation of a no contest clause: "No contest clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision."²⁰

Misuse of Forced Election

As discussed above,²¹ a no contest clause may be used to force a beneficiary to either take whatever is offered under the transferor's estate plan or forfeit that gift in order to assert an independent interest in the estate assets (e.g., by filing a creditor's claim or disputing ownership or dispositive control of marital property).

Such a forced election may be entirely fair, where the amount offered to the beneficiary is sufficiently large to justify acquiescence in the estate plan. Costly litigation will be avoided and the details of the transferor's estate plan can be implemented as intended.

However, there are reasons for concern about the use of a no contest clause to force an election:

- (1) *The beneficiary may settle for less than what is due.* Suppose that a surviving spouse has good reason to believe that the transferor's estate plan would transfer \$100,000 of property that is actually owned by the

20. Estate of Ferber, 66 Cal. App. 4th 244, 253, 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 discussion of "Use of Forced Election to Avoid Ownership Disputes" *supra*.

surviving spouse. If it would cost \$30,000 to adjudicate the matter, the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the inconvenience, risk, and delay of litigation are significant detriments, the surviving spouse might accept even less.

- (2) *The estate plan may be inconsistent with the beneficiary's own dispositional preferences.* For example, a surviving spouse would have liked her share of a family business to pass to her children from a former marriage. Under community property law, she should be free to make that disposition of her own interest in the property. Instead, the transferor's estate plan transfers the entire business to his children from a former marriage. A no contest clause may coerce the surviving spouse into accepting that result, even though it is contrary to her own preferences as to the disposition of property that is by law under her control.
- (3) *Unilateral disposition of community property violates public policy.* California law provides that one spouse may not make a gift of community property without the written consent of the other spouse,²² but a forced election may, as a practical matter, have that effect. The surviving spouse has not given advance written consent. Any acquiescence in the result may well be the result of coercion. That may be especially true for an elderly surviving spouse.

These problems result from the “take it or leave it” nature of a forced election. The transferor is given unilateral control to frame the choice, without an opportunity for negotiation. The choice may be framed benevolently, so as to benefit everyone concerned, or it may be framed cynically or

22. Fam. Code §§ 1100-1102.

carelessly, offering a choice between two undesirable results.²³

The benefits of a forced election could often be achieved through advance consultation and joint estate planning. If spouses cannot agree during life on the characterization or disposition of estate property, allowing one spouse to make unilateral decisions on death might be especially problematic.

TREATMENT OF NO CONTEST CLAUSES IN OTHER JURISDICTIONS

In all but two states, a no contest clause is generally enforceable. However, enforcement may be subject to a number of restrictions:

- In most states, a no contest clause will not be enforced if there is probable cause to bring the contest.
- In a few states, a probable cause exception applies to some, but not all, types of contests.
- In general, a no contest clause will not be enforced if enforcement would conflict with an important public policy. This has led to a number of specific public policy exceptions to enforcement. Some derive from court holdings, while others have been enacted by statute. California law includes several express public policy exceptions.
- Many states provide special rules of construction that limit or clarify the application of a no contest clause.

The differing approaches to the enforcement of a no contest clause are discussed more fully below.

23. See also *Burch v. George*, 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).

No Contest Clause Unenforceable

In Florida and Indiana the enforcement of a no contest clause is prohibited by statute.²⁴

Florida's prohibition was added in 1974 as part of a general adoption of the Uniform Probate Code.²⁵ It is not clear why Florida chose to diverge from the Uniform Probate Code approach of enforcing a no contest clause in the absence of probable cause to bring a contest.²⁶ Prior to enactment of the 1974 statute, the Florida courts would enforce a no contest clause unless the contest was brought in good faith and with probable cause, or was brought to "settle doubtful rights" and not for the purpose of destroying the will.²⁷

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

General Probable Cause Exception

The majority approach in the United States is to provide a probable cause exception to the enforcement of a no contest clause. A no contest clause will only be enforced if the contestant lacks probable cause to bring the contest. That is the approach taken in the Uniform Probate Code,²⁹ which has

24. See Fla. Stat. Ann. §§ 732.517 (wills), 737.207 (trusts); Ind. Code Ann. § 29-1-6-2.

25. Fenn & Koren, *The 1974 Florida Probate Code — A Marriage of Convenience*, 27 U. Fla. L. Rev. 1 (1974). Note that the parallel provision governing trusts was added in 1993. See 1993 Fla. Laws ch. 257, § 12. The trust provision was recodified in 2006. See 2006 Fla. Laws 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." Fenn & Koren, *supra* note 25, at 43.

27. See *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946).

28. See *Doyle v. Paul*, 86 N.E.2d 98, 101 (Ind. App. 1949) (quoting Acts of 1917, ch. 46, § 1, Burns' 1933, § 7-501).

29. See Unif. Prob. Code §§ 2-517, 3-905 (1990).

been adopted in 17 states.³⁰ Another 11 states have adopted a probable cause exception that is not derived from the Uniform Probate Code. In some of those states, good faith is also expressly required.³¹

No state has expressly defined the meaning of “probable cause” to bring a contest. However, the Restatement (Third) of Property states that probable cause exists if, at the time of instituting a proceeding, there is evidence that “would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.”³²

30. See Alaska Stat. §§ 13.12.517, 13.16.555 (Alaska), Ariz. Rev. Stat. § 14-2517 (Arizona), Colo. Rev. Stat. § 15-12-905 (Colorado), Haw. Rev. Stat. § 560:3-905 (Hawaii), Idaho Code Ann. § 15-3-905 (Idaho), Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (Maine), Mich. Comp. Laws 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. Cons. Stat. Ann. § 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*, 376 P.2d 784, 786 (1963) (good faith also required) (Kansas); Md. Code Ann., Est. & Trusts § 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 & Other Donative Transfers § 8.5 cmt. (2003).

Selective Probable Cause Exception

In New York and Oregon, there is a probable cause exception to enforcement of a no contest clause, but only if the contest is based on a claim of forgery or revocation.³³

Public Policy Exceptions

In states that enforce a no contest clause, there are a number of specific exceptions that are based on public policy:³⁴

Construction and Reformation of Instrument. To effectuate the transferor's true intentions, it may be necessary to seek judicial construction of an ambiguous provision or the modification, reformation, or termination of an instrument that has become incompatible with the transferor's intentions. The need to determine the transferor's actual intentions may trump the transferor's desire to avoid litigation.

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

New York has a statutory exception for an action to construe an instrument.³⁶

33. New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); Or. Rev. Stat. § 112.272(2) (1997). California has a similar rule. See Prob. Code § 21306.

34. California has the most extensive list of public policy exceptions. See Prob. Code § 21305(b).

35. Estate of Miller, 230 Cal. App. 2d 888, 903, 41 Cal. Rptr. 410 (1964).

36. New York Est. Powers & Trusts § 3-3.5(b)(3)(E) (McKinney 2006).

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

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

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

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

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

37. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); Or. Rev. Stat. § 112.272(3) (1997).

38. Succession of Kern, 252 So. 2d 507, 510 (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 & Other Donative Transfers § 8.5, cmt. (2003).

41. Ga. Code Ann. § 53-4-68(b) (1996).

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

Strict Construction

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

SUMMARY OF CALIFORNIA LAW

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

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

42. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006).

43. *Id.* § 3-3.5(b)(3)(D) (McKinney 2006).

44. *Id.* § 3-3.5(b)(3)(B) (McKinney 2006).

45. *Id.* § 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 Pepller*, 971 P.2d 694, 696 (Colo. Ct. App. 1998) (Colorado); *Estate of Wojtalewicz*, 418 N.E.2d 418, 420 (Ill. App. Ct. 1981) (Illinois); *Saier v. Saier*, 115 N.W.2d 279, 281 (1962) (Michigan); *Estate of Alexander*, 395 N.Y.S.2d 598, 601 (Sur. Ct. 1977) (New York); *Estate of Westfahl*, 674 P.2d 21, 24 (Okla. 1983) (Oklahoma); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. App. 1986) (Texas).

47. Prob. Code § 21304 Comment.

48. Prob. Code § 21303.

- An extensive list of “indirect contests”⁵¹ are exempt from the enforcement of a no contest clause on public policy grounds.
- An indirect contest based on a creditor claim or property ownership claim is subject to a no contest clause, but only if the no contest clause specifically provides for that application.⁵² Application of a no contest clause to such claims creates a “forced election.”
- A no contest clause may apply to an instrument other than the instrument that contains the no contest clause, but only if the no contest clause specifically provides for that application.⁵³

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, 1305, 126 Cal. Rptr. 2d 332 (2002).

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).

- A declaratory relief procedure is available to determine whether a pleading would violate a no contest clause.⁵⁴ The court may not provide declaratory relief if doing so would require determination of the merits of the contemplated action.
- A no contest clause is to be strictly construed.⁵⁵

PROBLEMS UNDER EXISTING LAW

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

In February 2006, the Commission conducted a survey of the members of the Trusts and Estate Section of the State Bar of California and the members of the California chapters of

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 Commission Staff Memorandum 2006-42 (Oct. 25, 2006), Exhibit p. 4 (available from the Commission, www.clrc.ca.gov).

the National Academy of Elder Law Attorneys.⁵⁸ The survey was designed to answer two questions: (1) Do practitioners believe that there are problems with existing law that are serious enough to justify a significant change in the law? (2) Which of the problems identified in the survey is most problematic?

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

The problems identified by practitioners are discussed more fully below.

Uncertain Application

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

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

Definition of “Contest.” Under existing law, the concept of what constitutes a “contest” is open-ended. It can include any pleading in any proceeding in any court that “challenges the

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

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. *Id.* at 6.

validity of an instrument or one or more of its terms.”⁶¹ This means that any court pleading that affects estate assets or the operation of an instrument could potentially be governed by a no contest clause.⁶²

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

The Legislature has narrowed the scope of that problem by exempting many types of indirect contests from the operation of a no contest clause.⁶⁴ However, any attempt to list all pleadings that should be exempt as a matter of policy will inevitably be incomplete. Over time, new circumstances will arise that had not previously been considered.⁶⁵

61. Prob. Code § 21300(a)-(c).

62. See, e.g., *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, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (action to determine whether purported estate asset is community property); *Hermanson v. Hermanson*, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 (2003) (petition to remove trustee).

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).

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 (UPIA) (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

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

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

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

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), 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).

(2) The limitations and exceptions that apply to indirect contests are governed by a complex set of application provisions. The limitation on forced elections only applies to instruments executed on or after January 1, 2001.⁷⁰ A codicil or amendment is governed by a different rule, which is drafted in very confusing language.⁷¹ Certain public policy exceptions only apply if the transferor dies or the instrument becomes irrevocable after January 1, 2001.⁷² The remainder apply if the transferor dies or the instrument becomes irrevocable after January 1, 2003.⁷³

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

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

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

A major concern with the application of existing California law is that a beneficiary cannot predict with any consistency when an activity will be held to fall within the proscription of a particular no contest clause. To increase

70. Prob. Code § 21305(a).

71. Prob. Code § 21305(c).

72. Prob. Code § 21305(d).

73. *Id.*

74. Prob. Code § 21305(e).

predictability, the proposed law recognizes that a no contest clause is to be strictly construed in determining the donor's intent. This is consistent with the public policy to avoid a forfeiture absent the donor's clear intent.⁷⁵

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

Over-Reliance on Declaratory Relief

The uncertainty that exists under current law can sometimes be resolved by declaratory relief pursuant to Probate Code Section 21320. That provision authorizes a beneficiary to seek judicial interpretation of a no contest clause to determine whether it would apply to a particular pleading. If the court finds that it does not apply, the beneficiary may proceed with the pleading without risk of forfeiture. The declaratory relief provides a safe harbor.

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

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

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.

77. *Id.*

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

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

Respondents to the Commission’s survey ranked the cost and delay associated with declaratory relief proceedings as

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 Commission Staff Memorandum 2006-42 (Oct. 10, 2007), Exhibit pp. 7, 9-10, (available from the Commission, www.clrc.ca.gov).

the second most common and serious of the problems identified in the survey.⁸⁰

Fraud and Undue Influence Shielded From Review

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

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

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

80. Of those who expressed an opinion (excluding survey participants who had no opinion on this point), 61% believe that this problem is common or very common; 63% found the problem to be of moderate or serious severity. See Commission Staff Memorandum 2007-7 (Feb. 21, 2007), at Exhibit pp. 1-3.

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. Commission Staff Memorandum 2007-7 (Feb. 21, 2007), pp. 7-8 (available from the Commission, www.clrc.ca.gov).

Problematic Forced Election

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

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

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

The survey results are consistent with the Commission’s general impression of opinion within the estate planning

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

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

85. Of those who responded, 55% felt that the problem was uncommon or rare, and 44% described the severity of the problem as minor or insignificant. Commission Staff Memorandum 2007-7 (Feb. 21, 2007), p. 8 (available from the Commission, www.clrc.ca.gov).

community. Opinion appears to be significantly divided on whether forced elections should be preserved as a useful planning tool, or prohibited as potentially unfair. There is no consensus that significant reform of the forced election is needed.

FEE SHIFTING ALTERNATIVE

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

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

Transferor Intention Disregarded

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

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

86. See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, 10 Cal. Tr. & Est. Q., Fall 2004, at 7-8.

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

Deterrence Undermined

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

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

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

RECOMMENDATIONS

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

88. See Prob. Code §§ 21300, 21303.

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

- The statute should be simplified and clarified.
- The probable cause exception that applies to many direct contests should be extended to all direct contests.
- The scope of declaratory relief should be narrowed.

Those recommendations are discussed below.

Statutory Simplification and Clarification

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

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

That is the approach taken in the proposed law.⁸⁹ A no contest clause could only be enforced in response to three

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

types of contests: (1) a direct contest, (2) a creditor claim, or (3) a property ownership dispute.

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

Creditor Claim. A creditor claim would be defined using language from existing law.⁹¹ The Commission investigated whether the existing language could be refined so as to preclude unintended application of a no contest clause to a creditor claim. The principal concern is that a no contest clause will be applied to a debt that the transferor did not have in mind at the time of executing the no contest clause and never intended to be governed by the no contest clause.

That risk could be eliminated by requiring that a no contest clause specifically identify the debts that it is intended to govern, or by providing that a no contest clause only applies to debts that pre-date the execution of a no contest clause.

However, such restrictions would also narrow the utility of a no contest clause. A transferor may intend that a no contest clause apply to all creditor claims, whether identifiable at the time of execution of the clause or not, in order to deter beneficiaries from bringing fabricated claims after the transferor's death. The restrictions described above would prevent such use of a no contest clause.

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

91. See Prob. Code § 21305(a)(1).

The Commission did not find sufficient support within the legal community for a substantive narrowing of the creditor claim provision.

Property Ownership Dispute. 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.”⁹²

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.

The existing statutory language appears to be overbroad for that purpose. 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 “ownership of property.”⁹³ 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 existing provision, so as to continue its substance while preventing overbroad interpretation. Under the proposed law, a no contest clause could be enforced against: “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....”⁹⁴

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

92. Prob. Code § 21305(a)(2).

93. 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).

94. See proposed Prob. Code § 21311(a)(2) *infra*.

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

The substantive effect of that change would be relatively modest. Existing law already exempts nearly all types of indirect contests from the operation of a no contest clause (other than forced elections).⁹⁵ The policy implication of that trend is clear. A beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of an estate plan. Such actions serve the public policy of facilitating the fair and efficient administration of estates and help to effectuate the transferor's intentions, which might otherwise be undone by mistake, ambiguity, or changed circumstances.

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

Terminology. The proposed law would also define and use the term "protected instrument" to provide a clear rule as to which instruments are governed by a no contest clause.⁹⁶ Other minor terminological clarifications would also be made.⁹⁷

95. 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 and accompanying text.

96. See proposed Prob. Code § 21310(e) *infra*.

97. See proposed Prob. Code § 21310(a) ("contest"), (c) ("no contest clause"), (d) ("pleading") *infra*.

Declaratory Relief Narrowed

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

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

However, there could still be some uncertainty as to whether a no contest clause would apply to a creditor claim or property ownership dispute. The existing declaratory relief procedure would be retained for those issues only.⁹⁸

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

Expansion of Probable Cause Exception

Existing law already provides a probable cause exception for a contest based on the following grounds:⁹⁹

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

98. See proposed amendment to Prob. Code § 21320 *infra*.

99. Prob. Code §§ 21306-21307.

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

The existing probable cause exception does not apply to a direct contest brought on the following grounds: incapacity, menace, duress, or lack of due execution. The Commission sees no policy justification for that distinction. The proposed law would extend the existing probable cause exception to all types of direct contests.¹⁰⁰

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

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

[Probable] cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.¹⁰¹

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

(1) Existing law focuses only on the likelihood that the contestant’s “factual contentions” will be proven. The proposed law would require a likelihood that the requested relief will be granted.¹⁰² That question depends not only on the proof of facts, but on the proof of facts that are sufficient to establish a legally sufficient ground for the requested relief.

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

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

102. *Id.*

That is a more complete expression of the concept of probable cause.

(2) Existing law requires only that it be “likely” that the contestant will prevail. That degree of probability has been equated with the standard that governs malicious prosecution cases, requiring only that the contest be “legally tenable.”¹⁰³ The Commission believes that such a standard is too forgiving. A no contest clause should deter more than just a frivolous contest. General law already provides sanctions for frivolous actions.¹⁰⁴

Instead, the proposed law would require a “reasonable likelihood” of being granted relief.¹⁰⁵ That standard has been interpreted as requiring more than a mere possibility, but less than a likelihood that is “more probable than not.”¹⁰⁶

Grace Period

The proposed law would have a one-year deferred operation date.¹⁰⁷ That would provide a grace period for those who wish to revise their estate plans before the new law takes effect.

Once the proposed law becomes operative, it would apply to any instrument, whenever executed, with one exception. It would not apply to an instrument that became irrevocable

103. 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 & Olier*, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (discussing malicious prosecution and frivolous appeal standards).

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

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

106. See *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033); *Alvarez v. Superior Ct.*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1).

107. See Section 4 (uncodified) of the proposed law *infra*.

before January 1, 2001.¹⁰⁸ That would preserve existing law as to instruments that became irrevocable before the enactment of the existing scheme of statutory exceptions to the enforcement of a no contest clause.

The proposed law would apply to an instrument that became irrevocable on or after January 1, 2001. For the most part, that would be consistent with the application of existing Probate Code Section 21305. Where there are differences in the effect of the proposed law and existing Section 21305, the retroactive application of the proposed law to January 1, 2001, would be limited by the exceptions provided in Probate Code Section 3. That section provides a default rule of retroactive application for changes in the Probate Code, with specific exceptions to preserve the effect of certain completed acts and orders.¹⁰⁹ Section 3 also provides a general exception that allows a court to apply prior law if it determines that retroactive application of the new law would substantially interfere with the rights of interested persons.¹¹⁰

108. See proposed Prob. Code § 21315 *infra*.

109. Prob. Code § 3(c)-(f).

110. Prob. Code § 3(h).

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 §§ 21310-21315 (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.

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

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

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

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

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

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

§ 21311. Enforcement of no contest clause

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

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

(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 be enforced under this paragraph only if the no contest clause expressly provides for that application.

(3) The filing of a creditor’s claim or prosecution of an action based on it. A no contest clause shall be enforced

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

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

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.

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

Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

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

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

(2) The former standard required only that success be “likely.” One court interpreted that standard as requiring only that a contest be “legally tenable.” In re Estate of Gonzalez, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard. There must be a “reasonable likelihood” that the requested relief will be granted. The term “reasonable likelihood” has been interpreted to mean more than merely possible, but less than “more probable than not.” 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). See Section 21310(b) (“direct contest” defined).

§ 21312. Construction of no contest clause

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

Comment. Section 21312 continues former Section 21304 without change.

§ 21313. Application of common law.

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

Comment. Section 21313 continues former Section 21301 without change.

§ 21314. Effect of contrary instrument

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

Comment. Section 21314 continues former Section 21302 without change.

§ 21315. Transitional provision

21315. (a) Except as provided in Section 3, this chapter applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.

(b) This chapter does not apply to an instrument that became irrevocable before January 1, 2001.

Comment. Section 21315 is new. It is similar in effect to the application date provisions of former Section 21305. Section 3 may further limit the application of this chapter to an instrument that became irrevocable prior to the operative date of the chapter. See Section 3(d)-(f), (h). An instrument that is not governed by this chapter would be governed by the law that applied to the instrument prior to the operative date of this chapter. See Section 3(g).

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

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

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~~ *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.~~

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

Operative Date (uncodified)

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