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## Chapter 174: Devising a New Statutory Scheme for California's No Contest Clauses

Kara Rosenberg Cain

### Code Sections Affected

Probate Code §§ 21310, 21311, 21312, 21313, 21314, 21315 (new), §§ 21300, 21301, 21302, 21303, 21304, 21305, 21306, 21307, 21308, 21320 (repealed).

SB 1264 (Harman); 2008 STAT. Ch. 174

*Say not you know another entirely till you have divided an inheritance with him.*<sup>1</sup>

### I. INTRODUCTION

When Oscar Ferber died, his son James became the estate's personal representative.<sup>2</sup> Sadly, Oscar's estate remained open for seventeen years due to numerous family disputes, including a lawsuit against James.<sup>3</sup> This state of affairs caused James much angst and negatively impacted his health and quality of life.<sup>4</sup> When it came time to have his own will prepared, James "directed his attorneys to prepare the strongest possible no contest clause," which forces a beneficiary who contests the validity of the instrument to forfeit or take a reduced share of his or her gift under the estate plan.<sup>5</sup> In doing so, James sought to spare his own executor—his brother Richard—from enduring similar hardships and attacks.<sup>6</sup>

When James died in March of 1987, he left an estate valued at about \$4.6 million.<sup>7</sup> Sandra Plumleigh, a friend who was to receive \$250,000 under the will,

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1. JOHANN CASPAR LAVATER, APHORISMS ON MAN 59 (Henry Fuseli, trans., 3d ed., 1794).

2. Estate of Ferber, 66 Cal. App. 4th 244, 247, 77 Cal. Rptr. 2d 774, 775 (4th Dist. 1998).

3. *Id.*

4. *Id.*

5. Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If so, Can You Avoid Post-Death Litigation with Pre-Death Procedures?*, 2 NAELA J. 349, 350-51 (2006); see also CAL. PROB. CODE § 21310(c) (enacted by Chapter 174) (stating that a beneficiary would be penalized for challenging a valid instrument). James Ferber's no contest clause read in relevant part:

If any devisee, legatee or beneficiary under this Will . . . (a) contests this Will or, in any manner, attacks or seeks to impair or invalidate any of its provisions[,] . . . (d) objects in any manner to any action taken or proposed to be taken by my Executor, . . . (e) objects to any construction or interpretation of my Will, . . . (f) unsuccessfully requests the removal of any person acting as an executor, . . . then in that event I specifically disinherit each such person . . .

*Estate of Ferber*, 66 Cal. App. 4th at 248, 77 Cal. Rptr. 2d at 776; see also *In re Fuller's Estate*, 143 Cal. App. 2d 820, 822, 300 P.2d 342, 343 (2d Dist. 1956) (showing that the no contest clause provided that any legatee who contested the will would be bequeathed only \$1.00).

6. *Id.*

7. *Estate of Ferber*, 66 Cal. App. 4th at 248, 77 Cal. Rptr. 2d at 776.

wanted to remove Richard as executor and objected to his accounting.<sup>8</sup> Because the law allows a beneficiary to seek an advance determination of whether a proposed action would be considered a “contest,”<sup>9</sup> Sandra petitioned the court to determine whether her proposed actions would penalize her inheritance.<sup>10</sup> In 1998, a California Court of Appeals held that “the clause was valid insofar as it prohibited frivolous attempts to oust Richard . . . [and] frivolous objections to the accounting.”<sup>11</sup> Despite James’ precautions, it took Richard over ten years to close the estate.<sup>12</sup>

This case highlights one of the main problems with existing law regarding no contest clauses. The law’s complexity creates uncertainty as to the validity of the clause and the extent to which various actions will violate it. This uncertainty “leads to widespread use of declaratory relief[,] . . . adding an additional layer of litigation that does nothing to resolve substance of any underlying issues.”<sup>13</sup> To counter this problem, the Legislature enacted Chapter 174, which simplifies and clarifies the law relating to no contest clauses.<sup>14</sup>

## II. LEGAL BACKGROUND

### A. Existing Law

In 1990, California codified its long-standing, judicially-upheld rule that allows for the enforcement of no contest clauses.<sup>15</sup> The definition of a “contest”—an “attack in a proceeding on an instrument or on a provision in an instrument”<sup>16</sup>—is notably open-ended and thus the language in the clause determines the scope of its application.<sup>17</sup> The existing Probate Code provisions

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8. *Id.* at 248-49, 77 Cal. Rptr. 2d at 776-77.

9. A “contest” is “an attack in a proceeding on an instrument or on a provision in an instrument.” CAL. PROB. CODE § 21300(a) (West 1991). Among other benefits, a no contest clause helps ensure the fulfillment of the donor’s expressed intentions, discourages litigation, protects the testator’s privacy, and prevents discord between beneficiaries. Gerry W. Beyer, Rob G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 229 (1998).

10. *Estate of Ferber*, 66 Cal. App. 4th at 248, 77 Cal. Rptr. 2d at 776.

11. *Id.* at 255, 77 Cal. Rptr. 2d at 780. Whether the challenges were frivolous was not decided. *Id.*

12. *Id.* at 248, 77 Cal. Rptr. 2d at 776 (noting that James died in 1987 and that the case was finally decided in 1998).

13. *Recommendation: Revision of No Contest Clause Statute*, 37 CAL. L. REVISION COMM’N 359, 361 (2007), available at <http://www.clrc.ca.gov/pub/Printed-Reports/REC-L637-NoContestClause.pdf> [hereinafter CLRC] (on file with the *McGeorge Law Review*).

14. *Id.* at 361-62.

15. CAL. PROB. CODE §§ 21300-21307. “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.” *Id.* § 21301; see also *In re Estate of Hite*, 155 Cal. 436, 101 P. 443 (1909) (upholding the common law rule against a beneficiary who filed a Contest of Codicil); *In re Estate of Miller*, 156 Cal. 119, 103 P. 842 (1909) (upholding the common law rule against a widow who contested the will).

16. CAL. PROB. CODE § 21300(a).

17. CLRC, *supra* note 13, at 382-83.

distinguish between direct and indirect contests.<sup>18</sup> A direct contest is one that generally attacks the validity of a decedent's instrument based on one or more of the following: "(1) revocation; (2) lack of capacity; (3) fraud; (4) misrepresentation; (5) menace; (6) duress; (7) undue influence; (8) mistake; (9) lack of due execution; [and] (10) forgery."<sup>19</sup> An indirect contest does not directly challenge the validity of an instrument and includes other actions or proceedings that are not listed as direct contests.<sup>20</sup>

The Legislature amended the Probate Code several times and added to the list of exceptions to the general rule.<sup>21</sup> A no contest clause is unenforceable against a beneficiary who brings a direct contest with "reasonable cause" alleging forgery, revocation, or invalidity of a transfer.<sup>22</sup> Reasonable cause is satisfied if the contesting party possesses facts that would cause a reasonable person to believe the allegations may be proven or are likely to be proven after the opportunity for further investigation.<sup>23</sup>

Existing law requires certain indirect contests to be expressly identified as a violation in the no contest clause.<sup>24</sup> However, the law also permits an extensive number of indirect contests, regardless of any expressly contrary clause, as a matter of public policy.<sup>25</sup> Furthermore, no contest clauses are unenforceable against a beneficiary who, with probable cause (a term interpreted to include reasonable suspicion of influence or fraud<sup>26</sup>) contests a provision benefiting a person who either drafted or transcribed the instrument or gave directions to the drafter concerning the inclusion of the clause.<sup>27</sup>

Finally, the law's safe-harbor provision allows a beneficiary to test the waters—to see if a contest will result in forfeiture<sup>28</sup>—before jumping into an

18. CAL. PROB. CODE § 21300 (West Supp. 2008).

19. *Id.* § 21300(b) (punctuation modified).

20. *Id.* § 21300(c); *see, e.g.*, *Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92 (1994) (holding that the wife's proposed action to enforce community property rights in a trust estate and pension would violate no-contest clause); *Genger v. Delsol*, 56 Cal. App. 4th 1410, 66 Cal. Rptr. 2d 527 (1st Dist. 1997) (challenging a stock redemption agreement in an integrated estate plan that would violate the no-contest clause).

21. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1264, at 2-3 (Apr. 8, 2008).

22. CAL. PROB. CODE § 21306(a).

23. *Id.* § 21306(b).

24. *Id.* § 21305(a) (listing the actions requiring express identification as including the filing of a creditor's claim, a proceeding to determine the character, title, or ownership of property, and a challenge to the validity of an instrument other than the instrument containing the no contest clause); *see generally* Vartuhi Torounian, *Recent Statute, Chapter 17: An Attempt to Improve Existing Probate Law*, 32 MCGEORGE L. REV. 681, 683-84 (2001) (discussing enactment of section 21305 and the history and conflict of the rule of strict construction and judicial interpretation of no contest clauses).

25. CAL. PROB. CODE § 21305(b).

26. *See* *Estate of Peterson*, 72 Cal. App. 4th 431, 436, 85 Cal. Rptr. 2d 110, 113 (4th Dist. 1999) ("Section 21307 relieves the beneficiary of a will from the penalty of a no contest provision if the person against whom the contest is directed is one who could improperly influence or control the testator.").

27. CAL. PROB. CODE § 21307 (West 1991).

28. *See* BLACK'S LAW DICTIONARY 677 (8th ed. 2004) (defining "forfeiture" as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty"); Sharon J. Ormond, *No Contest Clauses in California Wills and Trusts: How Lucky Do You Feel Playing the Wheel of Fortune?*, 18

action, as long as the proceeding does not pursue a determination on the merits.<sup>29</sup> Indeed, existing law requires courts to strictly construe no contest clauses to avoid forfeiture.<sup>30</sup>

### B. *The Need for Reform*

The California Law Revision Commission (CLRC) and the State Bar's Trusts and Estates Section identified several problems with existing law.<sup>31</sup> First, the law's complexity leads to uncertainty in the application of a no contest clause to a particular action.<sup>32</sup> Because the definition of a "contest" is open-ended, the scope of a no contest clause generally requires judicial analysis and determination.<sup>33</sup> To aid in this interpretation, some courts are forced to consider evidence outside of the instrument.<sup>34</sup> Some practitioners argue that consideration of this extrinsic evidence violates the rule of strict construction of no contest clauses and leads to more uncertainty because beneficiaries "cannot simply read the instrument to determine the meaning of the no contest clause."<sup>35</sup>

Second, there is also concern about an over-reliance on declaratory relief.<sup>36</sup> Prudent practitioners routinely file petitions for declaratory relief, not only to protect against forfeiture, but also to protect against attorney malpractice.<sup>37</sup> This additional litigation "adds costs to estates, beneficiaries, and the courts."<sup>38</sup>

Third, some practitioners, including many elder law specialists, argue that existing law "shield[s] fraud or undue influence from judicial review."<sup>39</sup> A person who uses fraud or undue influence to procure a testamentary gift may use a no contest clause to deter other beneficiaries from challenging the gift.<sup>40</sup> Only successful contests will invalidate an instrument, and without complete certainty of prevailing, a beneficiary might not risk forfeiture and might leave the abuses unchallenged.<sup>41</sup>

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WHITTIER L. REV. 613, 614 (1997) (stating examples of a forfeiture as a "complete loss of the gift, or reduction of the gift to a nominal amount, such as one dollar").

29. CAL. PROB. CODE § 21320 (West 1991 & Supp. 2008).

30. *Id.* § 21304 (West 1991).

31. CLRC, *supra* note 13, at 381-90.

32. *Id.* at 382.

33. *Id.* at 382-83.

34. *Id.* at 386.

35. *Id.* But see Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 658-59 (1994) ("The rule of construction providing that technical words in a will drafted by an attorney should be given their technical legal meaning is no more than a presumption. . . . [T]he presumption is used as an aid in ascertaining intent, not as a tool to frustrate the testator's objectives.").

36. CLRC, *supra* note 13, at 386-88.

37. *Id.*

38. *Id.* at 387.

39. *Id.* at 388.

40. *Id.*

41. *Id.* at 392.

### III. CHAPTER 174

Chapter 174 seeks to clarify and simplify the law regarding the enforcement of no contest clauses by repealing some existing provisions in the Probate Code and adding a new statutory scheme.<sup>42</sup>

Chapter 174 uses the new phrase, “protected instrument,” to refer to an instrument that contains a no contest clause,<sup>43</sup> and defines a no contest clause as “a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.”<sup>44</sup> Moreover, Chapter 174 limits the enforcement of no contest clauses to three situations: (1) direct contests brought without probable cause, (2) creditor claims, and (3) property ownership disputes.<sup>45</sup>

Chapter 174 continues to permit a transferor to create a forced election situation where the beneficiary must choose between bringing an action (successfully or unsuccessfully) and accepting the inheritance under the instrument’s terms.<sup>46</sup> While existing law allows an individual to enforce a no contest clause against any “action or proceeding to determine the character, title, or ownership of property,”<sup>47</sup> Chapter 174 narrows the scope to pleadings challenging whether the property was the transferor’s at the time of the transfer.<sup>48</sup> Chapter 174 eliminates the ability of a beneficiary to seek declaratory relief.<sup>49</sup>

Finally, Chapter 174 only applies to instruments that became irrevocable on or after January 1, 2001.<sup>50</sup> The new law will take effect after January 1, 2010, allowing a one-year grace period for individuals to revise their donative instruments.<sup>51</sup>

### IV. ANALYSIS OF CHAPTER 174

Chapter 174 makes only minor substantive changes to the law, but aims to significantly reduce litigation related to declaratory relief and associated costs.<sup>52</sup> Whereas existing law provides that any pleading may violate a no contest clause

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42. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1264, at 1-2 (June 17, 2008).

43. CAL. PROB. CODE § 21310(e) (enacted by Chapter 174). This includes an instrument that references another instrument that contains a no contest clause. *Id.* § 21310(e)(2) (enacted by Chapter 174).

44. *Id.* § 21310(c) (enacted by Chapter 174). “‘Pleading’ means a petition, complaint, cross-complaint, objection, answer, response, or claim.” *Id.* § 21310(d) (enacted by Chapter 174).

45. *Id.* § 21311 (enacted by Chapter 174).

46. CLRC, *supra* note 13, at 394 (“[A] beneficiary who contests the transferor’s ownership of purported estate assets forfeits any gift to that beneficiary made by the estate plan.”).

47. CAL. PROB. CODE § 21305(a)(2) (West Supp. 2008).

48. CLRC, *supra* note 13, at 393-94.

49. CAL. PROB. CODE § 21320(a) (repealed by Chapter 174).

50. *Id.* § 21315(a) (enacted by Chapter 174).

51. See CLRC, *supra* note 13, at 398-99.

52. *Id.* at 396 (“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.”).

unless listed as one of the specified exceptions,<sup>53</sup> Chapter 174 lists only three situations in which the clauses may be enforced.<sup>54</sup> Any other action is exempt.<sup>55</sup> This reversal of the statutory scheme clarifies which contests violate a protected instrument and reduces the need to examine the no contest clause's actual language to interpret its scope.<sup>56</sup> Furthermore, Chapter 174 completely eliminates the pre-contest declaratory relief provision.<sup>57</sup>

Existing law allows reasonable and probable cause exceptions to protect against no contest clauses created through fraud or undue influence.<sup>58</sup> However, other direct contests based on incapacity, menace, duress, or lack of due execution are inexplicably excluded.<sup>59</sup> Moreover, the courts and legislature never definitively settled whether the terms "reasonable" and "probable" are synonymous.<sup>60</sup> This difference in the language has been a source of confusion.<sup>61</sup> Because Chapter 174 extends the probable cause exception to all direct contests, this simplifies the law and further upholds the policy that "[a] beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of an estate plan."<sup>62</sup>

Also, whereas the previous definition of probable cause was objective and required that it was "likely that the contestant would prevail," the new definition imposes a slightly higher standard that requires "reasonable likelihood that the requested relief will be granted."<sup>63</sup>

Although the CLRC supports Chapter 174, at one time, the commission advocated a repeal that would make no contest clauses completely unenforceable.<sup>64</sup> The policies in favor of eliminating no contest clauses include upholding the right to seek remedy in court, avoiding forfeiture, and determining the transferor's actual intentions by allowing judicial action.<sup>65</sup> Additionally, allowing contests (by not

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53. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1264, at 3 (June 24, 2008) (listing eighteen types of pleadings that a beneficiary may file without violating a no contest clause. Mainly, these include some types of direct contests with reasonable cause and indirect contests based on public policy).

54. CAL. PROB. CODE § 21311(a) (enacted by Chapter 174).

55. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1264, at 7 (June 17, 2008).

56. CLRC, *supra* note 13, at 392-93.

57. CAL. PROB. CODE § 21320(a) (repealed by Chapter 174).

58. *Id.* §§ 21306-21307 (West 1991 & Supp. 2008).

59. CLRC, *supra* note 13, at 396-97.

60. *Id.* at 384 (citing Estate of Gonzalez, 102 Cal. App. 4th 1296, 1305, 126 Cal. Rptr. 2d 332, 338 (6th Dist. 2002)).

61. *Id.*

62. *Id.* at 395-97.

63. CAL. PROB. CODE § 21311(b) (enacted by Chapter 174); *see also* CLRC, *supra* note 13, at 397-98 (explaining that the new "reasonable likelihood" standard has been "interpreted as requiring more than a mere possibility but less than a likelihood that is 'more probable than not'").

64. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1264, at 3 (Apr. 8, 2008); *see also* SB 296, 2005 Leg., 2004-2005 Sess. (Cal. 2006) (as introduced on Feb. 16, 2005, but not enacted).

65. CLRC, *supra* note 13, at 369-70.

enforcing a no contest clause) provides greater supervision of executors and other fiduciaries that might otherwise be insulated from scrutiny.<sup>66</sup>

The State Bar's Trusts and Estates Section also recommended non-enforcement of no contest clauses and proposed a fee-shifting alternative to deter litigation.<sup>67</sup> Under this approach, a person who unsuccessfully brings a contest without reasonable cause would be ordered to pay the costs and fees to the other party.<sup>68</sup>

Chapter 174 did not contain a fee shifting alternative because the law permits sanctions for frivolous actions under the California Code of Civil Procedure.<sup>69</sup> Additionally, allowing enforcement of no contest clauses may better deter non-monetary harms, such as reputational harm or discord amongst beneficiaries, because these harms often occur at the early stages of a contest.<sup>70</sup> Because a no contest clause "is triggered by the mere filing of a pleading," this creates a "bright line choice" to either forgo an action or risk forfeiture.<sup>71</sup>

## V. CONCLUSION

Some commentators describe the history of judicial interpretation of no contest clauses as "somewhat schizophrenic," and there is no question that settling an estate can be a lengthy process.<sup>72</sup> Chapter 174 is a move toward a more stable and predictable scheme and will help reduce some of the delay and cost of litigation.

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66. *Id.* at 372.

67. *Id.* at 390.

68. *Id.*; *see generally* CAL. CIV. PRO. CODE §§ 128.5-128.7 (West 2006) (providing for the award of fees and costs for frivolous actions).

69. CLRC, *supra* note 13, at 390.

70. *Id.* at 391.

71. *Id.*

72. Ormond, *supra* note 28, at 657.