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T&E – 2005 -01

To: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

From: Randolph Godshall, Chair, Executive Committee,
Neil F. Horton, Member, Executive Committee and Chair, Litigation Section
Trusts and Estates Section, State Bar of California

Re: NO-CONTEST CLAUSES: REPEAL AND REPLACEMENT OF STATUTE
(Project No. 2004-3)

Proposes to repeal Part 3 of Division 11 of the Probate Code (Sections 21300 through 21322) effective December 31, 2006, and enact in their place a new Part 3 of Division 11 of the Probate Code (Sections 21300 through 21304), effective January 1, 2007.

Date of Approval: July 24, 2004

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Digest:

The proposed legislation repeals the enforcement of no-contest clauses (also called *in terrorem* clauses) and other forfeitures in donative instruments. Consistent with its repeal of no-contest clause enforcement, the proposed legislation also repeals the provisions that allow a beneficiary under a donative instrument to obtain declaratory relief as to whether a proposed action would cause a forfeiture.

In order to deter litigation over the validity of instruments, the proposed statute authorizes the court in its discretion to award attorney's fees against an unsuccessful party who, without reasonable cause, seeks to invalidate an instrument on grounds of revocation, lack of capacity, fraud, misrepresentation, menace, undue influence, mistake, lack of due execution, or forgery. The court has discretion to award attorney's fees whether or not the instrument contains an attorney's fees provision or a no-contest clause.

In order to give attorneys and their clients greater predictability regarding the non-enforceability of *in terrorem* clauses, the proposed statute applies to all instruments, whenever executed, of persons dying on or after the effective date or of instruments that become irrevocable on or after the effective date. The effective date is January 1, 2007, to provide attorneys ample time to counsel their clients about this proposed change.

PURPOSE (PROBLEMS OF CURRENT LAW):

The legislature enacted the genesis of today's no-contest statute in 1989. California's stated public policy was to avoid a forfeiture absent the donor's clear intent.¹ The California Supreme Court has declared that no-contest clauses "are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator."²

Judged by the public policies that enforcement of no-contest clauses purports to promote, the enforcement of no-contest clauses in California today is a failure.

1). Increased Litigation Over No-contest Clauses:

Enforcement of no-contest clauses has increased, rather than diminished, litigation.

The 1989 no-contest statute sought greater predictability as to "when an activity will be held to fall within the proscription of a particular no-contest clause."³ The current statute accordingly allows a beneficiary to petition for declaratory relief in order to determine whether a particular activity will violate a no-contest clause.⁴

But as a result of *Burch v. George*,⁵ courts pay only lip service to the statutory policy of strictly construing no-contest clauses.⁶ Courts now apply no-contest clauses to actions that "frustrate" or "thwart" the settlor's entire, integrated estate plan.⁷ With the court-

¹ 20 Cal. Law Revision Com. Rep. (Jan. 1989) p. 12, cited in *Genger v. Delsol* (1997) 56 Cal. App. 4th 1410, 1419.

² *Burch v. George* (1994) 7 Cal. 4th 246, 254.

³ 20 Cal. Law Revision Com. Rep. 12.

⁴ 20 Cal. Law Revision Com. Rep. 12; Section 21320(b).

⁵ 7 Cal. 4th 246.

⁶ Section 21304.

⁷ For example, *Burch, supra*, and *Genger v. Delsol* (1997) 56 Cal. App. 4th 1410, 1416.

sanctioned use of extrinsic evidence to explain a settlor's intent,⁸ litigators now can expand the scope of the clause's reach far beyond its plain meaning.

The widespread and often indiscriminate use of no-contest clauses by practitioners, the availability of declaratory relief to determine whether a contemplated action will trigger a forfeiture, and the courts' failure to strictly construe forfeiture clauses have combined to increase litigation regarding the enforcement of forfeiture clauses.

Attorneys today seek declaratory relief for even seemingly innocuous acts.⁹ The reasons are apparent. Enforcement of an *in terrorem* clause leads to a drastic consequence to the client. And an attorney counseling a potential litigant is not able to know what all the extrinsic evidence will reveal about a testator's intent. The prudent course is to seek declaratory relief.

Hartog and Wolff conclude that litigation over no-contest clauses is burgeoning. They point to the fact that, over the last three years alone, more than 20 reported and unreported decisions cite *Burch v. George* on the subject of no-contest clauses and surmise that, considering the number of declaratory relief petitions that are not appealed, the number of such petitions is staggering.¹⁰

2). Unpredictability of No-contest Clauses

After *Burch v. George*, courts greatly expanded the reach of *in terrorem* clauses. In response, the legislature exempted twelve actions from *in terrorem* clauses as a matter of public policy and other actions as exempt unless the clause specifically identifies the action as a violation.¹¹ The two sections have different effective dates.¹²

As a result of courts' expansion of no-contest clauses and the complex legislative response, a careful attorney preparing an estate plan containing a no-contest clause cannot reasonably predict whether or how a court will enforce it.

EFFECT OF PROPOSED LEGISLATION

One consequence of the proposed legislation is to end litigation over whether a proposed action violates an instrument's no-contest clause. Instead, the statute uses the court's ability to shift fees to discourage litigation.

⁸ *Burch*, at 258, n. 8.

⁹ Hartog and Wolff, "The Dead Hand Writes - And, Having Writ, Moves On: The Increasing Prevalence of No-contest Litigation in California," p. 30 of manuscript to be published in *California Trusts & Estates Quarterly*.

¹⁰ *Ibid.*

¹¹ Probate Code Section 21305(a) and (b); Stats. 2000. c. 17 (A.B. 1491), § 5. Amended by Stats. 2002. c. 150 (S.B. 1878), § 2.

¹² Probate Code Section 21305(d).

The fee-shifting sanction has several advantages over a regime that combines the enforcement of forfeiture clauses over some actions but not others with the availability of declaratory relief to determine whether or not a proposed action is legislatively exempt from enforcement and, if not, whether the instrument forbids it.

First, the fee-shifting sanction in the proposed statute is simpler to administer. It applies only to a narrow category of actions, that is, actions alleging an instrument's invalidity on the grounds of revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution or forgery.

Next, the results are more likely to be just. Under the current regime, the courts cannot determine declaratory relief petitions that will require determining the merits of the underlying action.¹³ Thus, the evidence before the court often is not fully developed. And the focus of the court's inquiry in the declaratory relief action is not on the underlying grievance but on whether the decedent sought to bar judicial relief. The result has been decisions that appear to be harsh¹⁴ or just but inadequately reasoned.¹⁵ Under the proposed statute, the court will decide whether to impose the sanction of fee-shifting after the litigation ends, when the court has greater knowledge of the facts, and will focus its inquiry on the reasonableness of the litigants' actions in bringing or defending the suit.

Finally, the proposed statute will facilitate settlements. Probate disputes are often acrimonious because they often involve family members fighting over property. For that reason, probate disputes also are suitable to mediation and to settlement. Focusing the settlement negotiations on the underlying grievance, without the added issue of forfeiture, will lower the stakes and emphasize the issues and interests on which the parties need to compromise.

Application:

The bill will repeal the enforcement of no-contest clauses and other forfeitures in California. It will allow attorney-fee shifting in a narrow range of contested matters: (1) where the action is based on revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery; and (2) where the court determines that the unsuccessful party asserted or opposed those grounds without reasonable cause.

ILLUSTRATIONS:

In the two illustrations below, the decedent's testamentary instrument provides as follows:

“If any beneficiary seeks to obtain in any proceeding in any court an adjudication that

¹³ Probate Code Section 21320(c).

¹⁴ *E.g.*, *Estate of Pittman* (1998) 63 Cal. App. 290 and *Estate of Kalia* (2001) 94 Cal. App. 4th 1122.

¹⁵ *E.g.*, *Jacobs-Zorne v. Superior Court* (1996) 46 Cal. App. 4th 1064.

this instrument or any of its provisions is void, or seeks otherwise to void, nullify or set aside this instrument or any of its provisions, then the right of that person to take any interest given to him or her by this instrument shall be determined as it would have been determined had such person predeceased the execution of this instrument without issue.”

Illustration No. 1:

The beneficiary is the decedent’s widow. She seeks to enforce her community property rights against the estate and her rights to the decedent’s pension plan under the federal law.

Under existing law, her actions will cause her to forfeit her rights under the testamentary instrument if, looking at the decedent’s estate plan as a whole, including benefits that pass outside the testamentary instrument, and considering extrinsic evidence about the decedent’s intent in creating the no-contest clause, her actions would frustrate or thwart the purposes that the decedent sought to attain by the provisions of his testamentary instrument.

In *Burch v. George*, the California Supreme Court held that the widow’s attempt to enforce such rights would frustrate the decedent’s intention to preclude her from enforcing her community property and federally created rights and would result in her forfeiting her rights under the testamentary instrument.

Under the proposed bill, the courts could not enforce the decedent’s no-contest clause as a matter of public policy and she would be entitled to take the benefits provided under the testamentary instrument. In addition, the court could not impose attorney’s fees against the widow under the proposed bill because her actions to enforce her rights are not actions that allege the invalidity of the decedent’s testamentary instrument on grounds of revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery.

Illustration No. 2:

The widow in illustration number one files an action attacking the decedent’s testamentary instrument on grounds of the decedent’s lack of capacity and the undue influence of the decedent’s children.

Under existing law, a court very likely will hold that her action will violate the decedent’s no-contest clause and will cause her to forfeit her benefits under the testamentary instrument. If the widow succeeds in invalidating the entire testamentary instrument, however, the court will invalidate the no-contest clause along with the rest of the instrument.

Under the proposed bill, the court will not be able to enforce the no-contest clause against her. After determining the widow's challenge to the decedent's testamentary instrument, the court may award reasonable attorney's fees either against the widow or against the party opposing her action if the court determines that the unsuccessful party asserted or opposed one or more of the grounds without reasonable cause.

DOCUMENTATION:

The long and troubled history of enforcement of no-contest clauses in California is amply illustrated by the many articles on the subject. The articles include Garb, *The In Terrorem Clause: Challenging California Wills*, 6 Orange County Bar J. 259 (1979); Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments* 15 Hastings L. J. 45 (1963); Selvin, *Comment: Terror in Probate*, 16 Stan. L. Rev. 355 (1964); *No-contest Clauses in California Wills and Trusts: How Lucky Do You Feel Playing the Wheel of Fortune?* 18 Whittier L. Rev. 613; Kovar, *Updating the No-Contest Clause*, 5 Calif. Trusts & Estates Quarterly 24 (Fall 1999); Kovar, *California Legislature Speaks Out on the No-contest Clause*, 6 Calif. Trusts & Estates Quarterly 17 (Fall 2000); Hartog and Wolff, *The Dead Hand Writes – And, Having Writ, Moves On: The Increasing Prevalence of No-contest Litigation in California*, 9 California Trusts and Estates Quarterly, Issue 4, 18 (Winter 2003).

HISTORY:

The legislature, with the participation of the State Bar of California, has long struggled with fashioning a regime of no-contest clause enforcement that will result in fairness and predictability. The courts in California first announced the enforcement of no-contest clauses in *Estate of Hite* (1909) 155 Cal. 436. The legislature approved the enforcement of no-contest clauses and enacted the declaratory relief procedure in Stats. 1990, c. 79 (A.B. 759), § 14. It thereafter amended its work by Stats. 1992, c. 871 (A.B. 2975), § 21; Stats. 1994, c. 40 (A.B. 797), § 3; Stats. 1995, c. 730 (A.B. 1466), § 11; Stats. 2000, c. 17 (A.B. 1491), §§ 5 - 7; and Stats. 2002, c. 150 (A.B. 1878), §§ 1 - 3.

FISCAL IMPACT:

The legislation is expected to reduce the number of court filings, thereby reducing court expenses.

LIKELY SUPPORT:

The State Bar of California Trusts and Estates Section will support this legislation.

GERMANENESS:

The Trusts and Estates Section of the State Bar of California has long studied the problems inherent in the enforcement of no-contest clauses and other forfeitures. The subject matter of the legislation comes within the scope of the section's interests and knowledge.

TEXT AND COMMENTS:

SECTION 1. Part 3 of Division 11 of the Probate Code (commencing with Section 21300), relating to No-contest Clauses, is repealed effective December 31, 2006.

SEC. 2. Part 3 (commencing with Section 21300) is added to Division 11 of the Probate Code, to read:

PART 3 NO-CONTEST CLAUSES AND OTHER FORFEITURES NOT ENFORCED

21300. A provision in an instrument rescinding a donative transfer or otherwise penalizing a person for initiating, responding to, or otherwise participating in any legal proceeding, including filing a creditor's claim, whether in a court of law, a mediation, an arbitration, an administrative hearing, or otherwise, is unenforceable. Nothing contained in this section is intended to prohibit conditional gifts under an instrument except as this section specifically sets forth.

Comment: This section is adapted partly from the description of a no-contest clause in the Restatement of the Law of Property ("A provision in a donative document purporting to rescind a donative transfer to ... any person....")¹⁶ and partly from Florida's statute, Title 42, section 737.207 ("A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable.") The section's last sentence and the references to provisions that rescind or penalize donative transfers seek to distinguish forfeiture clauses from conditional gifts, including forced elections.

Although the words "initiating, responding to, or otherwise participating in any legal proceeding" are intended to encompass every type of act that a person may take with regard to judicial or quasi-judicial proceedings, courts have held in some circumstances that a no-contest clause applies to acts that included the filing of a creditor's claim.¹⁷ The inclusion of a reference to a specific act, namely, filing a creditor's claim, is not intended to limit the breadth of the more general words.

¹⁶ The Restatement Third of Property: Wills and Other Donative Transfers section 8.5.

¹⁷ *In re Kitchen* (1923) 192 Cal. 384.

21301. Whether or not the instrument contains a provision described in section 21300, a court may award reasonable attorney's fees and costs against the unsuccessful party and in favor of the prevailing party if (a) the proceeding in question involves the alleged invalidity of an instrument or one or more of its terms based on one or more of the following grounds: revocation; lack of capacity; fraud; misrepresentation; menace; duress; undue influence; mistake; lack of due execution; forgery; and (b) the court determines that the unsuccessful party asserted or opposed one or more of such grounds without reasonable cause.

***Comment:** The purpose of the introductory clause in the first sentence is to clarify that the fee-shifting provision applies whether or not the instrument in question contains a no-contest clause or other forfeiture provision.*

The first condition limits the application of the fee-shifting provision to a fairly narrow range of actions that under the current law could possibly be deemed "contests." Limiting fee-shifting to what current Probate Code section 21300 identifies as "direct contests" should discourage "strike suits," where a disappointed beneficiary attacks the instrument directly in order to extract a settlement.

The court may award fees not just against the party who initiates the litigation. The bill applies equally to one who opposes a proceeding.

By allowing an award of attorney's fees against an unsuccessful party who acts without reasonable cause only where an instrument's invalidity is at issue under a limited number of well-defined grounds, the bill seeks both to deter unwarranted litigation and to limit the number of instances in which the successful party will be able to collect attorney's fees from an opponent.

It is assumed that, in most all cases, the court that has heard the underlying action will be the court that will determine whether to award or deny attorney's fees.

21302. "Reasonable cause" for purposes of section 21301 means that the unsuccessful party has knowledge of facts that would cause a reasonable person to believe that the factual allegations and other contentions made by that party and filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery.

***Comment:** Adapted from current Probate Code Section 21306(b).*

21303. This part applies to all instruments, whenever executed, of persons dying on or after the effective date and to instruments that become irrevocable on or after the effective date.

21304. This part shall take effect January 1, 2007.