



California

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AND NOW THE BEST OF THE STORY: NO CONTEST CLAUSES UNDER THE NEW RULES OF SECTION 21305

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I. INTRODUCTION

There is science, logic, reason; there is thought verified by experience. And then there is California. – Edward Abbey

“No contest” clauses often embody the legitimate intent of the donor and are also seen as deterring litigation and making administration of estates less cumbersome, time-consuming and expensive. Conversely, however, the law abhors forfeiture, and our legal system does not want to deter meritorious lawsuits. This tension has generated California’s ever-changing world of “no contest” law.

California is in the minority in its broad enforcement of no contest clauses. The application of California’s rule over the years has led to a comprehensive, although complex, statutory scheme and a wealth of reported decisions. California enacted its current set of no contest statutes (then Probate Code §§ 21300-21307) in 1989, operative January 1, 1990, to re-affirm the validity of no contest clauses and to supplement and clarify then-existing case law.

II. LEGISLATIVE DEVELOPMENTS

To address the problems created by this tension, the California legislature recently attempted to “reform” the enforcement of no contest clauses. Probate Code §§ 21305, 21306, and 21307 codify an increasing number of exceptions to the general enforceability of no contest clauses.

Beginning in 2000, the statutory regime required more certainty that the testator intended a no contest clause to apply to particular proposed actions. The legislative intent was also to remove, on public policy grounds, other types of proposed actions from the ambit of any no contest clause. Unfortunately, this well-intentioned reform has done little, and likely will continue to do little, to reduce litigation over the meaning and scope of no contest clauses.

Subdivision (a) of § 21305¹ identifies three actions that do not constitute a contest, unless “expressly identified” in the no contest clause as a violation of the clause, for instruments executed on or after January 1, 2001. These actions are the filing of

a creditor’s claim or prosecution of an action based upon it;² an action or proceeding to determine the character, title or ownership of property;³ or a challenge to the validity of an instrument, contract, agreement, beneficiary designation, or other document, other than the instrument containing the no contest clause.⁴ The apparent goal of § 21305(a) is to require greater certainty that a testator intended to trigger the no contest clause with respect to the three categories of actions. The legislative history implies that the underlying purpose of the section was to restrict the application of the theory of the “integrated estate plan” enunciated in *Burch v. George*⁵ and *Genger v. Densol*.⁶

This legislative response had no apparent effect on the volume of no contest litigation. The Executive Committee of the Trusts and Estates Section, with the approval of the Board of Governors of the State Bar of California, therefore submitted proposed legislation that would abolish the enforcement of no contest clauses for donative instruments in California. Consistent with its repeal of no contest clause enforcement, the proposed legislation would also repeal the provisions that allow a beneficiary under a donative instrument to obtain declaratory relief as to whether a proposed action would cause forfeiture.

The Section’s proposal was instantly controversial among legislative staff. To avoid a premature defeat based upon inadequate consideration, the Section’s Executive Committee, with the assistance of the Bar’s legislative counsel, Larry Doyle, agreed to refer the proposal to the California Law Revision Commission for further study. For the moment, therefore, legislative activity affecting the enforceability of no contest clauses is unlikely to occur. Practitioners may find it challenging to draft an effective no contest clause under the current regime.

III. OVERVIEW OF LEGISLATION AND CASE LAW

A. In General

No contest clauses are governed by §§ 21300 through 21322.⁷ There are two general types of “contest” defined by the Probate Code – a “direct contest” as defined in § 21300(a) and an “indirect contest” as defined in § 21300(b). Each type is subject to statutory and common law limitations. These statutes are not intended as a complete codification of the law regarding no contest clauses, and common law governs when these statutes do not apply.⁸ These statutes apply regardless of any contrary provision in the no contest clause.¹⁰ Probate Code § 21300 defines the terms used in the statutory scheme.

B. Direct Contest

The term “direct contest” is a statutory creation. Section 21300(a) defines a “direct contest” as follows:

(b) “Direct contest” in an instrument or in this chapter means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on one or more of the following grounds: