THE DEAD HAND WRITES – AND, HAVING WRIT, MOVES ON: THE INCREASING PREVALENCE OF NO CONTEST LITIGATION IN CALIFORNIA

By John A. Hartog, Esq. and Charles P. Wolff, Esq.***

I. INTRODUCTION

Human beings naturally seek to influence the behavior of close relatives and friends. These same human beings, often being propertied, also naturally expect that their loved ones will observe a simple request when receiving a substantial legacy: "Just don't fight with your brother (or "my accountant" or "your step-mother" or "my caregiver of three weeks") after I'm gone." Thus, the logic of encouraging "good" behavior, or discouraging "bad" behavior, seems irresistible to these beneficent, generous donors.

That rationale is the simple genesis of *in terrorem*, or "no contest," clauses in wills and trusts. Not only do "no contest" clauses often embody the legitimate intent of the donor, they are also seen as deterring litigation and making administration of estates less cumbersome, time-consuming and expensive.

At the same time, however, the law abhors forfeiture, and the legal system does not want to deter meritorious lawsuits. This tension has generated California's ever-developing and increasingly arcane world of "no contest" litigation. The balance of this article will explore California's efforts to reconcile these conflicting goals – efforts that all too often have resulted in the paradox of estate and trust administration becoming more cumbersome, more time-consuming and more costly.

A no contest clause is a provision in a testamentary instrument[1] that provides for a reduction or forfeiture of the gift to a beneficiary who takes an action forbidden by the instrument concerning the administration of the estate. In its pristine form, that action is usually a contest, directly challenging the validity of the instrument. Some jurisdictions bar enforcement of no contest clauses.[2] Many other states recognize the validity of no contest clauses, but limit their effect by excusing unsuccessful contests that are made in good faith or with probable cause.[3] Certain states also distinguish between the application of no contest clauses if the contests are by minors or the minor's legal representative.[4] In such cases, the no contest clause is not given effect.

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 reaffirm the validity of no contest clauses and to supplement and clarify then-existing case law. Symptomatic of the confusion in this area, these sections of the Probate Code have been amended on five different occasions in the less than fifteen years since their enactment.

Despite the volume of authority (or perhaps because of it), a noticeable lack of certainty exists as to whether a particular proposed action would constitute a "contest" of the instrument in question. This uncertainty and the resultant caution among practitioners has led to the increased use of the statutory mechanism under Probate Code § 21320. Parties can learn in advance whether they risk forfeiture under a particular no contest clause.[5] The declaratory relief available6 is intended to provide beneficiaries with a "safe harbor" procedure. Unfortunately, this "safe harbor" has spawned a remarkable increase in probate proceedings addressing "no contest" disputes. The end result – an expensive, unpredictable process – is exactly what California sought to avoid when it first enacted its "no contest" scheme.

II. SOME THOUGHTS FOR PLANNERS

Before delving into the world of no contest litigation, estate planning practitioners should consider how their judicious use of no contest clauses can deter litigation after their client has died, and conversely how their misuse of these tools can increase disputes among their client's survivors. Perhaps the most important concept for a practitioner to remember and to stress to the client is that a no contest clause is only effective against the beneficiaries named in the instrument. "Non-beneficiaries" under the instrument have nothing to lose by contesting the instrument. In fact, if a "non-beneficiary" attacks an instrument, the presence of a no contest clause applicable to all beneficiaries may limit the range of responses available to named beneficiaries in defending their interests.

If a person would take as a pretermitted spouse or child, a no contest clause will not prevent that person from asserting her or his statutory right to inherit. A testator can avoid this result by use of a disinheritance clause.

A no contest clause is intended to deter certain acts; therefore the potential forfeiture must be sufficiently severe to serve as a disincentive to its intended targets. The bequest to the potential challenger must be sufficiently substantial to make the challenge not worth the risk of forfeiting the bequest. In many situations, the same factors that cause a testator/settlor concern about the litigiousness of the possible challenger also cause the testator/settlor to be reluctant to make a bequest to the potential challenger large enough to make the no contest clause effective.

Other questions for the practitioner to consider regarding a no contest clause include the following:

- Is a no contest clause necessary? When it is unlikely that there will be a challenge to the dispositive plan in a trust or will, there may be no need to insert a no contest clause. Similarly, estate planning clients should be advised of the inhibiting consequences of a broad no contest clause. Do they really want to prevent their beneficiaries from having the ability to monitor their fiduciary's conduct and bring questionable activities to the attention of the court?
- Who should be penalized when a beneficiary challenges the instrument? One option is simply to penalize the contestant; another option is to penalize the contestant and his or her issue. If the beneficiary is kindred to the donor, anti-lapse statutes may apply and the beneficiary's issue may take in the beneficiary's place if the beneficiary is treated as predeceasing the donor. If that is not what the donor desires, the instrument should provide for an alternate disposition.
- Which beneficiaries worry the testator? If most of the beneficiaries are not viewed as potential "troublemakers," it appears unduly punitive to subject them to a universally applicable no contest clause. In fact, if the settlor is favoring one or more beneficiaries over others similarly situated and is concerned about the possible reaction of the disfavored beneficiary, a no contest clause applicable to all beneficiaries may have more drastic consequences for the favored beneficiaries. These persons may not be the intended focus of the forfeiture provision, but will have more to lose if the clause applies equally to them. In these situations, consideration should be given to drafting a no contest clause limited to the beneficiary who is likely to challenge the estate plan.
- What actions should trigger the no contest clause? The provisions describing the disfavored action should be tailored to each specific situation, clearly reflecting the donor's intentions regarding what actions should act as triggers for revoking the gifts to the beneficiary. Again, before including a broadly worded no contest clause in an estate planning instrument, an attorney should counsel the client on the possible adverse consequences of effectively dissuading all beneficiaries from exercising their right to access to the probate court to control the excesses of fiduciaries and other beneficiaries.

III. BASIC CONCEPTS

A. Determination of Donor's Intent

Intuitively, the applicability of any particular no contest clause should depend upon the decedent-donor's intent. In determining the donor's intent, California follows its general rule that the "intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."[7] This rule, and its inherent limitation to intent "as expressed in the instrument" has been regularly recognized by the courts.[8] Counterintuitively, however, California law is quite liberal in admitting extrinsic evidence to determine the donor's intent.[9] The parol evidence rule also is often relied upon to provide for the admission of extrinsic evidence for issues regarding mistake or imperfection of the writing.[10]

In the landmark 1994 case of *Burch v. George*[11] the Supreme Court admonished that a no contest clause is to be strictly construed so as not to extend a forfeiture beyond "what was plainly the testator's intent." A practitioner may plausibly expect, therefore, that extrinsic evidence would be inadmissible to prove that an otherwise ambiguous no contest provision should be interpreted to impose a forfeiture. After all, if extrinsic evidence is needed, then how "plainly" was the testator's intent stated? This argument was rejected, over Justice Kennard's vigorous dissent, in *Burch v. George* itself. In consequence, extrinsic evidence is always potentially admissible in these actions and may be proffered by any party in a proceeding under the Probate Code, including a Probate Code § 21320 proceeding.

B. Public Policy Considerations In Applying No Contest Clauses

Independent of determining the decedent's intent are the overarching policy considerations that California law seeks to enforce. Two public policy considerations, which do battle each time the issue is raised, were concisely summarized by the California Supreme Court in *Burch v. George*:

> 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.... Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator's intent .. ."[12]

The conflict between favoring enforcement of no contest provisions as a means of discouraging litigation and strictly construing no contest provisions to avoid forfeitures is also directly reflected in the statutory scheme. Under Probate Code § 21303, a no contest clause generally is enforceable. Under Probate Code § 21304, a no contest clause "shall be strictly construed."

The juxtaposition of these conflicting policy considerations has often resulted in litigation. The relaxed standards for admissibility of extrinsic evidence, coupled with the concepts of the "forced election" and the "integrated estate plan" (both of which are discussed below), have expanded the scope of litigation in recent years by increasing the range of actions potentially subject to forfeiture provisions.

C. Current Statutory Structure and Definitions

No contest clauses are governed by Probate Code §§ 21300-21322.13 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.[14] These statutes apply regardless of any contrary provision in the instrument.[15]

Probate Code § 21300 defines the terms used in the statutory scheme:

> "Contest" means any action identified in a "no contest clause" as a violation of the clause. The term includes both direct and indirect contests.[16]
>
> "Direct contest" of an instrument 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: revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery.[17]
>
> "Indirect contest" means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in subdivision (b) [definition of direct contest], and that does not contain any of those grounds.[18]
>
> "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court.[19]

IV. HISTORICAL DEVELOPMENT

A. Case Law Prior to *Burch v. George*

The complexity of the current status of "no contest" law is best understood in light of the historical development of the law. Any overview of the case law is divided between the case law pre- and post- *Burch v. George*. As a matter of gross generalization, the early twentieth century cases were more likely to find a particular action as violating a no contest clause. The later cases, at least until *Burch v. George*, tended to find against forfeiture.

In one case a creditor's claim was filed for over $500,000, an amount equaling nearly 75% of the decedent's estate. The claimant-beneficiary alleged that this sum was the reasonable value of the claimant's services to decedent's business. Even though the claim would deplete the estate the court held that the creditor's claim was not a contest.[20] The theory of this case appeared to have been that an action based on a "source of right independent of the will" regarding the disposition of the decedent's property would not be a contest.[21] Similarly, an action by the beneficiary to enforce a pre-existing agreement was held not to violate the no contest clause of the decedent's will.[22]

Cases involving the character of property were troublesome and inconsistent. Perhaps because of this history, this area has been a particularly hotly litigated topic in the arena of Probate Code § 21320 petitions under current law. In the year prior to *Burch v. George*, the Court of Appeal in *Estate of Richter* found that a petition to determine the character of property was not a will contest when the will did not specify the character of estate property.[23] In *Richter*, the court observed that the testator referred to "my estate" in general terms and thus he appeared to be referring to that property owned by him which he had a right to dispose of, unlike the situation where the testator declares that all the property is his separate property, clearly indicating a belief that he is disposing of the entire estate, thereby requiring an election (between taking under the will or asserting one's independent ownership interests). This decision appeared to be contrary to *Estate of Kazian*, a 1976 case, in which an action to determine ownership was held to be a contest because the will specifically declared that all property in which the decedent had an interest was her separate property.[24] Eight years after *Kazian*, however, the court found that a similar action was not a contest, because the decedent only expressed an intent to dispose of property he had the right to dispose of by will.[25] In a case that foreshadowed *Burch v. George*, an action by a wife to assert joint tenancy rights to an automobile and to obtain property through spousal set-aside was held not to violate the no contest clause of the husband's will.[26]

Similarly, case law before *Burch v. George* generally found that an action seeking the interpretation or construction of a testamentary instrument would not be treated as a contest. This rule continues to be followed by many states. "[A]n interpretation of a will does not in and of itself constitute an attempt to thwart the will of a testator."[27] Even earlier the court had ruled:

> 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.[28]

Similar decisions were reached in cases involving a family allowance,[29] the good faith probate of an ineffective will,[30] a challenge to the appointment of a fiduciary,[31] a petition for a fiduciary's removal,[32] and a petition for heirship.[33]

B. WATERSHED: The 1994 Supreme Court Decision in *Burch v. George*

Frank Burch was a successful car dealer from Oxnard. He married Marlene, his fifth wife, in 1985. In 1988, he consulted an attorney about estate planning and subsequently executed a revocable trust estate plan. Frank funded the trust with various assets, including stock in his automobile dealership. He also made the revocable trust the beneficiary of his interest in the dealership's qualified pension plan.

Frank died in 1989, survived by Marlene and various relatives, including his mother, two children from a previous marriage, a grandson, a nephew and two nieces. At the time of his death the value of Frank's assets exceeded $7 million.

Marlene received $800,000 in joint tenancy property and was the designated beneficiary of $200,000 in life insurance benefits. In addition, the provisions of the revocable trust entitled her to receive outright a Mercedes-Benz automobile, a 53-foot yacht, a $1 million beach house still under construction, life insurance proceeds of $60,000, and an income interest in a QTIP trust that paid her approximately $6,000 per month. The trust instrument contained a no contest clause that read:

> *No Contest. In the event that any beneficiary under this Trust, singly or in conjunction with any other person or persons, contests in any court the validity of this Trust or of Trustor's last will, or seeks to obtain in any proceeding in any court an adjudication that this Trust or that such Will or any of its provisions is void, or seeks otherwise to void, nullify or set aside this Trust or any of its provisions, then the right of that person to take any interest given to him or her by this Trust shall be determined as it would have been determined had such person predeceased the execution of this trust instrument without issue.*

After Frank's death, Marlene claimed entitlement to all death benefits payable under the pension plan. She also claimed community property interests in qualified plan assets titled in the name of the trust. To avoid violating the no contest clause, Marlene filed a petition under former Probate Code § 21305 [now Probate Code § 21320] seeking an advance determination that her proposed assertion of her claimed rights in the qualified plan and trust assets would not be deemed a contest of the trust.

The trial court ruled against Marlene, finding that each of the proposed actions would violate the no contest clause. The Court of Appeal affirmed, and further rejected her argument that the application of California's no contest law would improperly interfere with Marlene's rights under federal ERISA law.

The California Supreme Court affirmed. The Court found it "reasonably clear" that Frank as trustor intended that all property transferred to the trust to be subject to the distribution plan established by the instrument, and noted that the instrument declared that the property subject to the trust was separate property.[34] According to the Court, by claiming a right in conflict with Frank's "separate property" declaration, Marlene's proposed actions would "thwart" Frank's intent[35] and thus constitute a contest of the instrument.

The Court rejected the contention that the federal ERISA laws preempted California's no contest clause statute. The Court stated that Marlene had not lost any ERISA rights and was free to enforce them. Enforcement of these rights would cause loss of her benefits under the revocable trust, but the court did not consider this result analogous to a forfeiture. A no contest clause operates to condition a beneficiary's right to take a gift provided under the instrument on the beneficiary's agreement to acquiesce to its terms. According to the Court, the application of the no contest law merely enforces the conditional nature of a private testamentary gift to which the beneficiary is not otherwise entitled.[36]

Burch v. George remains good law, despite its susceptibility to criticism. Among the lingering questions is the Court's reliance on the proposition that Frank had indicated his intent to force Marlene to elect between her rights under the trust and her community

property rights by identifying all the property subject to disposition as his separate property on Schedule A. As the Court itself noted, no "Schedule A" of Frank's separate property was ever prepared.[37] Thus, Frank's intent to force Marlene to elect between competing rights might not have been quite so clear as the Court concluded. Secondly, the Court's conclusion that Frank could condition his gift to Marlene upon her abandonment of her ERISA rights might well allow state law to intrude impermissibly in areas reserved to federal law. While Marlene could indeed choose between her rights as beneficiary and her ERISA rights under federal law, what forced her to that choice was the application of California's law in the form of its no contest statute.

V. LEGAL EVOLUTION FOLLOWING *BURCH V. GEORGE*

Burch v. George's ringing affirmation of the general enforceability of no contest clauses led the Courts of Appeal to expand significantly the range of actions potentially triggering forfeiture provisions, including "paper contests."38 These cases in turn have been followed by legislative efforts to identify certain types of actions that will *not* trigger forfeiture provisions in testamentary instruments – legislative efforts dating back to the passage of Probate Code §§ 21306 and 21307 in 1989. These efforts have continued in recent years.39 Probate Code §§ 21305, 21306 and 21307 now codify an increasing number of exceptions to the general enforceability of no contest clauses, a trend that may well continue into the future.

A. The Appellate Court Response

In *Genger v. Delsol*[40] the husband died survived by his second wife and an only child from his prior marriage. The decedent operated a very profitable business with his son-in-law, to whom he was emotionally tied. His second wife was an immigrant for whom English was a second language. The decedent's estate plan consisted of a revocable trust, a will and a corporate stock redemption agreement with the son-in-law. The parties did not dispute that the redemption price was a bargain sale. The widow filed two petitions for declaratory relief pursuant to Probate Code § 21320: one seeking a determination that challenging the redemption agreement would not constitute a contest of the trust and will; another seeking a determination that challenging the valuation under the redemption agreement also would not be a contest of the trust or will. The trial court ruled against the petitioning widow. The Court of Appeal affirmed, holding that either proposed action would be a contest within the purview of the no contest clause. The corporate stock redemption agreement was "the cornerstone" of the decedent's "integrated estate plan." The spouse's attack on the corporate stock redemption agreement would be an attack on the trust and would entirely frustrate the decedent's intentions. The court stated that a "contest" includes not only a direct attack on a will or trust, but also "a separate legal proceeding which is designed to thwart the testator's expressed wishes."[41]

Some planners and their clients sought to use the reasoning of *Burch v. George* to articulate the broadest possible forfeiture provisions in their testamentary instruments.[42] *Estate of Ferber* addressed the public policy limits of no contest clauses. Having suffered through seventeen years of probate administration of his father's will, James Ferber wanted to preclude litigation regarding his own estate. He gave his attorney explicit instructions: "[I]nclude . . . a no contest clause that went as far as it could go to avoid any litigation at all involving his estate," and "make the . . . clause as expansive as possible, but . . . make it enforceable."[43] Ferber's attorneys took his instructions to heart, drafting a no contest clause that was "the most detailed [clause] in James's will."[44] It imposed a forfeiture on any beneficiary who, *inter alia*, "objects in any manner to any action taken or proposed to be taken by my Executor . . .," "objects to any construction or interpretation of my Will . . . adopted or proposed by my Executor," "unsuccessfully requests the removal of . . . an executor," "voluntarily assists anyone attempting to do any of these things," or "refuses a request of my Executor to assist in the defense of any such proceeding."[45] A beneficiary filed a Probate Code § 21320 petition to determine whether a proposed petition to remove the executor, a proposed petition to interpret the will, and proposed objections to the executor's accounting would trigger the no contest clause. The Court of Appeal held that such a no contest clause is enforceable for "frivolous" objections against the account or "frivolous" attempts to remove the executor, but not for valid objections to an account or valid attempts to remove the executor because the court must be able to oversee errors or misconduct by the fiduciary.[46]

The Court of Appeal refused to allow settlors, testators and their attorneys the unrestricted right to impose onerous forfeiture provisions on beneficiaries. The court protected the rights of beneficiaries to challenge certain actions of fiduciaries without fear of triggering a forfeiture.

Nevertheless, this protection is not unrestricted. *Ferber*'s public policy limitations on forfeitures were themselves sometimes limited by a requirement that the actions by the

beneficiaries not be "frivolous." As "frivolousness" cannot be determined in a Probate Code § 21320 proceeding, a potential petitioner will be denied a safe harbor determination on certain types of proposed actions. Subsequently, Probate Code § 21305(b) was enacted in response to *Estate of Ferber*. The subsection enumerates actions protected from forfeiture under public policy[47] and is discussed below.

B. Probate Code § 21305(a): What Actions Are Not Contests, Unless Expressly Identified

Subsection (a) of Probate Code § 21305 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:

- The filing of a creditor's claim or prosecution of an action based upon it;
- An action or proceeding to determine the character, title or ownership of property; 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.48

Probate Code § 21305(a) applies only to instruments executed on or after January 1, 2001. This limitation was included to avoid defeating the expectation of testators who created estate plans that were effective before January 1, 2001. Because instruments executed before January 1, 2001 will become or remain operative well into the future and are not subject to § 21305(a), the case law applicable before the effective date of the statute remains relevant.

Probate Code § 21305(a) does not apply to a codicil or amendment executed on or after January 1, 2001, unless the codicil or amendment adds a no contest clause or amends a no contest clause contained in an instrument executed before January 1, 2001.[49] The purpose of Probate Code § 21305(c) is to avoid inadvertent application of the rule of Probate Code § 21305(a) by simply executing a codicil or amendment to a pre-existing instrument. The effect of § 21305(c) on an amended and restated trust instrument that restates but does not amend a pre-existing no contest clause is not clear.

C. Probate Code § 21305(b): What Are Not Contests as a Matter of Public Policy

In response to the issues addressed by the Court of Appeal in *Estate of Ferber*, Probate Code § 21305(b) was enacted in 2000 to identify twelve specific actions that cannot trigger forfeitures as a matter of public policy. These actions are denominated in the statute as "proceedings," and do not violate a no contest clause as a matter of public policy, notwithstanding any contrary provision in the instrument:

A pleading seeking relief under Probate Code §§ 15400-15414 (modification and termination of trusts);[50]

- A pleading under Probate Code §§ 1800-1969 (conservatorships);[51]
- A pleading under Probate Code §§ 4100-4310 (powers of attorney generally);[52]
- A pleading regarding an order annulling a marriage of the person who executed the instrument containing the no contest clause;[53]
- A pleading pursuant to Probate Code § 2403 (petition for instruction or confirmation of acts);[54]
- A pleading challenging the exercise of a fiduciary power;[55]
- A pleading regarding the appointment of a fiduciary or the removal of a fiduciary;[56]
- A pleading regarding an accounting or report of a fiduciary;[5]
- A pleading regarding the interpretation of the instrument containing the no contest clause or an instrument or other document expressly identified in the no contest clause;[58]
- A pleading regarding the approval of a settlement or compromise whether or not it affects the terms of an instrument;[59]
- A pleading regarding the reformation of an instrument to carry out the intention of the person creating the instrument;[60] and
- A petition to compel a fiduciary's accounting or report, if that accounting or report is not waived by the instrument. If the instrument waives an accounting or report of a fiduciary, a petition to determine if subdivision (a) of Probate Code § 16064 (waiver of reporting and accounting requirement) applies does not constitute a violation of a no contest clause.[61]

Symptomatic of the morass that this subject area is becoming, three exceptions to these twelve protected actions still exist.[62] Any one exception may constitute a contest *if* filing of the pleading would be a "direct contest" under Probate Code § 21300(b).[63] Curiously, there is no express provision that establishes a procedure for the court to determine whether such a proposed action is a "direct contest" of an instrument under Probate Code § 21305(e). The limitations of Probate Code § 21305(b) apply only to instruments of decedents dying on or after January 1, 2001 and

to documents that become irrevocable on or after January 1, 2001.[64]

The practitioner should remember that there may be other policy exceptions that are not listed in Probate Code § 21305(b) but for which an argument may be made under case law. The potentially adverse consequence of relying exclusively on Probate Code § 21305(b) and ignoring general public policy arguments is illustrated in *Hermanson v. Hermanson*.[65] In *Hermanson* petitioners sought a determination that a proposed petition to remove trustees for malfeasance would not violate an extremely broad no contest clause, which explicitly included as a "contest" any "lawsuit, petition or other legal proceeding that seeks to remove any individual Trustee." Petitioners argued that this provision of the no contest clause was unenforceable under Probate Code § 21305(b)(6) and (7), which provide that pleadings challenging the exercise of a fiduciary power or seeking the appointment or removal of a fiduciary "do not violate a no contest clause as a matter of public policy."

The Court of Appeal held that Probate Code § 21305(b)(6) and (7) did not apply to the trust in question because the trust became irrevocable when the settlor died in December 2000, while the statute only applied to instruments of decedents dying on or after January 1, 2001 or that became irrevocable on or after that date. The court noted that the petitioners could have requested a determination under Probate Code § 21320 that the trust's no contest provision violated public policy based on the case law in effect before § 21305(b) became effective, much as the petitioners in *Estate of Ferber* had done. While unstated, the implicit conclusion was that such an argument would have been successful, as the public policy before January 1, 2001 was presumably the same as the public policy after that date. Nevertheless, as the petitioners had failed to raise this argument, the Court of Appeal declined to consider those public policy issues on its own.

D. Probate Code § 21306: Defining the "Reasonable Cause" Exception

Probate Code § 21306 provides that a no contest clause shall not be enforceable against a beneficiary to the extent that the beneficiary, with "reasonable cause," files a contest that is limited to certain grounds: forgery, revocation or an action to establish the invalidity of any transfer described in Probate Code § 21350 (generally, a transfer to a drafter or fiduciary or anyone related to either, or to a care custodian).

"Reasonable cause" is defined for the purposes of this section to mean that the party filing the action, proceeding, contest or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter 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.

In *Estate of Gonzales*,[66] the court held that a son who obtained a subsequent will by undue influence did not have "reasonable cause" to believe that the prior will was revoked. He thus violated the no contest clause of the prior will by offering the subsequent will for probate. The court noted that simply proffering a subsequent will does not necessarily trigger the no contest clause of a prior will. Under different facts, it would be possible for a beneficiary to be found to have procured a subsequent will by undue influence but still escape the application of the no contest clause of the prior will. However, in this case, given the son's knowledge of the circumstances under which the subsequent will was executed, the court concluded that he lacked the "reasonable cause" required under Probate Code § 21306 to offer the subsequent will for probate. Consequently, the son violated the no contest clause of the prior will and lost the gift that otherwise would have passed to him under that will.

E. Probate Code § 21307: Defining the "Probable Cause" Exception

Probate Code § 21307 relieves the beneficiary of suffering the penalty of a no contest provision if the beneficiary, with "probable cause," contests a provision in the instrument that benefits someone (drafter, transcriber, witness or person who gave directions to drafter) who could have improperly influenced or controlled the settlor or the testator. The use of two arguably different standards in neighboring statutory provisions – "reasonable cause" in Probate Code § 21306 and "probable cause" in Probate Code § 21307 – is unexplained.

To be protected by Probate Code § 21307, the contestant need not prove that the person who benefitted from the instrument being challenged is actually someone described in § 21307 but only that the contestant had probable cause to believe that the person benefitting was someone described in § 21307. In *Estate of Peterson*,[67] McKenna, a daughter of the decedent, filed a will contest naming as the defendant another daughter of the decedent, O'Dell, who was serving as the executor. The contest was unsuccessful. The trial court then granted the executor's motion to enforce the no contest clause in the decedent's will. McKenna appealed the enforcement of the no contest clause on the basis that

Probate Code § 21307 exempted her from its effect. The sole issue on appeal was whether McKenna had to prove that the defendant/executor was a person described by Probate Code § 21307, i.e., someone who drafted or transcribed the instrument, gave directions to the drafter or acted as a witness, or only that McKenna had probable cause to believe that the defendant was such a person. The Court of Appeal reversed, holding that McKenna's action satisfied the requirements of Probate Code § 21307 because, though unsuccessful, she had probable cause to believe that O'Dell was a person described in § 21307.

VI. DECLARATORY RELIEF UNDER PROBATE CODE §§ 21320-21322

To protect against the unintentional triggering of a no contest provision, Probate Code § 21320 allows a beneficiary to apply for an advance ruling solely to determine whether a proposed action (such as the filing of a motion, petition or creditor's claim) would fall within the terms of the particular no contest clause. As the inadvertent triggering of a forfeiture provision may have drastic consequences, parties routinely file for declaratory relief before taking actions that might violate no contest clauses, and currently most no contest disputes begin as Probate Code § 21320 petitions. The continuing uncertainty over what constitutes a "contest" under any particular *in terrorem* clause has compelled beneficiaries under instruments containing no contest clauses to file petitions as a matter of course for determinations that even seemingly innocuous acts will not trigger forfeitures. The explosion of litigation over the application of no contest clauses has effectively delayed, and in some cases prevented, the substantive adjudication of the merits of many cases.

A. Safe Harbor Provisions

Probate Code § 21320 authorizes a particularized form of declaratory relief proceeding. For example, in *Nairne v. Jessop-Humblet*[68] a son filed a Probate Code § 21320 application requesting a determination of whether his proposed complaint against his mother for breach of oral contract would violate the no contest clause of the trust created by his mother and his stepfather. The son's proposed complaint alleged that his mother and stepfather had agreed to give him certain property upon the stepfather's death and that therefore the property should not continue to be held in the trust but should be given to him. The court rejected the son's argument that his proposed complaint would not violate the trust's no contest clause because his claim was based on an independent right. Instead, it held that the proposed complaint would violate the no contest clause because it would be an attempt to obtain property specified as trust property under the terms of the trust. Consequently, if the son pursued his complaint he would lose his interest in the trust.

B. Prohibition Against Determining the Merits in a Probate Code § 21320 Proceeding

A factual inquiry into the merits of a proposed action is not permitted in a Probate Code § 21320 proceeding. "Whether [the beneficiary's] challenge was frivolous involves a factual determination that would be improper for a § 21320 proceeding."[69] This principle was codified in former Probate Code § 21320(b). If an application under § 21320 necessitates a determination on the merits, the application must be denied without any determination as to whether the proposed action would trigger a forfeiture. As a practical matter, this may deter certain beneficiaries from pursuing claims if they cannot eliminate the prospect of losing their inheritance.

Due to an ambiguity in former Probate Code § 21320(b), one appellate court concluded that it was bound to determine the merits of the "safe harbor" application before it *even if* that determination required a determination on the merits.[70] As such, a beneficiary could trigger a forfeiture by filing an application to determine whether the proposed action would trigger a forfeiture.

In 2002, the legislature amended the statute to correct the ambiguity and avoid the consequence of the decision in *Estate of Kaila*.[71] The language of Probate Code § 21320(b) and (c) was modified to clarify that there is indeed a "safe harbor" procedure by which beneficiaries can safely ask the court to review whether a proposed action would violate the applicable no contest clause.

Probate Code § 21320(b) and (c) now reads:

> (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.[72]

"Safe harbor" determinations are not always available to beneficiaries who are contemplating challenges in probate and trust proceedings. Because § 21320 proceedings cannot involve determinations on the merits of a proposed claim, one cannot