



## **California Wills & Trusts December 2009 Update**

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### **Legal Developments**

#### **New Probate Code Sections 21310 to 21315 Effective January 1, 2010 Governing the Enforcement of “No Contest” Clauses**

The “no contest” clause has been revised to comply with the requirements of new Probate Code Sections 21310 to 21315, governing the enforcement of “no contest” clauses. New Probate Code Sections 21310 to 21315 replace former Probate Code Sections 21300 to 21322. The new law also repeals Section 21320, providing for actions for declaratory relief with respect to the enforcement of a no contest clause, but does not bar declaratory relief under other sections

The new law is effective January 1, 2010. In general, the new law applies to any instrument, whenever executed, except an instrument that became irrevocable before January 1, 2001. Restated, the new law is intended to apply to instruments that became irrevocable on or after January 1, 2001, subject to the limitations described in Probate Code Section 3. See CLRC, *infra*, p. 399. The superseded or repealed Probate Code sections were also effective as of January 1, 2001.

Although the new law has an effective date of January 1, 2010, in nearly all cases where you decide to include a no contest clause, you should use the new no contest clause.

The new law continues to permit the enforcement of forfeiture under no contest clauses as an appropriate means to discourage litigation by disappointed beneficiaries. As under prior law, in determining the intent of the transferor, a no contest clause shall be strictly construed. Probate Code Section 21312.

Under the prior law, “contests” were permitted, but were not expressly defined. From time to time, new sections were added, and new opinions were rendered, describing the types of contests that would be permitted for public policy reasons, without forfeiture, despite the presence of an otherwise applicable no contest clause. These sections and judicial exceptions created increased complexity and resulting uncertainty. To address the uncertainty as to what constituted a “contest,” a declaratory relief procedure was made available to determine whether or not a proceeding constituted a contest.

Under the new law, "contests" are defined and categorized. Under Probate Code Section 21311(b), a no contest clause can only be enforced against three specific types of contests: (1) a direct contest that alleges the invalidity of a protected instrument based on one or more of six specific statutory grounds (forgery; lack of due execution; lack of capacity; menace, duress, fraud, or undue influence; revocation; or disqualification of a beneficiary) and 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 (provided the no contest clause expressly provides for such application); and (3) a creditor's claim or prosecution of an action based on it (provided the no contest clause expressly provides for that application). Only contests, as defined, can result in forfeiture upon enforcement of a no contest clause. This change is intended to promote simplification of the statutes, avoiding the need for the lengthy list of exceptions to enforcement of a no contest clause.

For more background on the new law you can review the California Law Revision Commission's Recommendation on No Contest Clauses by selecting the **CLRC - Revision of No Contest Clause Statute** link under the **Other Resources** link in **Resources** under the **HELP** menu in the Lawgic program.

*For more detailed Law & Strategy commentary by the legal editor, see Law & Strategy at Question 727 (Disinheritance) and New Questions 728 (No Contest) and 729 (No Contest Options).*

## Updated Product Features

### Disinheritance and No Contest Options Revised

The Disinheritance and No Contest questions and provisions are now separate to provide more flexibility. Old Question 727 (Disinheritance and No Contest) has been revised to include only the Disinheritance question with a separate Disinheritance article. A new Question 728 (No Contest) has been added as well as a separate No Contest article. In addition, new Question 729 (No Contest Options) enables the drafter to further specify whether the no contest provision should apply to disputes relating to property ownership and creditor claims.

*Question 727 (Disinheritance), New Questions 728 (No Contest) and 729 (No Contest Options).*

### Rev. Proc. Charitable Remainder Trusts Title Revised to Include IRS Sample Forms

The separate title, "Rev. Proc. Charitable Remainder Trusts," has been updated to reflect IRS changes made to the sample inter vivos charitable remainder unitrust and annuity trust instruments. Trusts generated under the Rev. Proc. title will mirror the sample forms found in IRS Revenue Procedures 2003-53, 2003-55, 2003-56, 2005-52, 2005-54, and 2005-55. Links to the full text of each procedure are also available under the Revenue Rulings and Procedures link in Resources from the HELP menu within the Lawgic program.

## Software Upgrades

### New Tool Tips Describing Template Files Added to Template File Names

As an alternative to clicking the "Description..." button on the Open Template screen, you can now hold your cursor over the name of a template file and a tool tip appears containing the description of the file. Template files are accessed by clicking the Templates button at the Select Title/File screen when you open the Lawgic program.

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To view those questions that are new in this update, or where **Law & Strategy**, choices, or default answers have changed, use the "Up\_Dec09" flag file. From inside Lawgic, open any existing answer file; on the **Flags** menu, click **Open Flags**, select the appropriate Title (click **OK**), and next select the "Up\_Dec09" flag file (and click **OK**). To view all flagged questions, click **Expand All** on the **Answers** menu and scroll the Navigator. Flagged questions will be indicated with **bold text**.

***Please continue to send us your suggestions on existing or new products. Contact our Technical Support Department at 1-877-2-LAWGIC (252-9442) or e-mail us at support@lawgic.com.***