



## IT'S TIME TO EXEMPT NO-CONTEST CLAUSE ENFORCEMENT PROCEEDINGS FROM THE REACH OF THE ANTI-SLAPP STATUTE

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### I. INTRODUCTION

Consider the following scenario: A beneficiary has filed a will contest alleging undue influence and lack of capacity. The will contains a no-contest clause. The proposed executor files a petition to disinherit the beneficiary because, the proposed executor claims, the beneficiary lacked probable cause to bring the contest. The beneficiary responds to the petition to disinherit by filing a special motion to strike under California's anti-SLAPP statute. Given the definition of a strategic lawsuit against public participation ("SLAPP"), the petition to disinherit will almost certainly be deemed a SLAPP.

As explained in detail below, the proposed executor faces the unenviable task of demonstrating that the beneficiary lacked probable cause when he or she filed the contest. Depending on the timing of the petition to disinherit, the proposed executor may be forced to make this showing without being allowed to take *any* discovery. Should the proposed executor lose the motion to strike his pleading, the question of disinheritance will be determined in favor of the beneficiary. There will *never* be a disinheritance, no matter how weak the beneficiary's claims turn out to be. Further, irrespective of who wins, appellate rights are immediate: the parties could face a possible appeal—and corresponding delay—before any discovery occurs on the contest.

This situation applies not only to executors, but to any party to a will or trust contest who seeks to disinherit a beneficiary for filing a direct contest without probable cause. The authors believe that disinheriting petitions should be exempted from the anti-SLAPP statute because applying the anti-SLAPP statute in this context:

- Fails to further the legislative purpose of the anti-SLAPP statute;
- Thwarts the purpose of no-contest clauses;
- Undermines legislative efforts to reduce excessive pre-contest litigation, which is why the Legislature

abolished Probate Code section 21320 "safe harbor" procedures; and

- Creates perverse incentives for the contesting beneficiary to file an anti-SLAPP motion because it will procedurally disadvantage the disinheriting petitioner.

Because the California Supreme Court has granted great deference to the Legislature's instruction to construe the anti-SLAPP statute broadly, courts will not exempt actions from the anti-SLAPP statute absent direct instructions from the Legislature. Accordingly, the authors believe that legislative action is necessary to prevent the inequities that result from applying the anti-SLAPP statute to no-contest clause enforcement proceedings.

### II. CALIFORNIA'S ANTI-SLAPP STATUTE

#### A. Periodic Revisions are Necessary To Ensure the Statute Serves its Purpose

1. *Legislators Intended the Statute To Restore Fairness Between Adversaries in Litigation and To Reduce Excessive, Unnecessary, and Expensive Litigation*

When legislators enacted California's anti-SLAPP statute—Code of Civil Procedure section 425.16 (hereinafter, "Section 425.16" or the "anti-SLAPP statute")—they did so with worthy intentions. Deep-pocketed individuals and entities had been suppressing constitutionally-protected speech and petitioning activities by filing meritless lawsuits as strategic maneuvers, expecting that the substantial cost of a legal defense would force their critics to abandon their criticism or adversarial actions. For example, a large corporation might have sued a small newspaper for libel, hoping that the publication would choose to withdraw and discredit its story rather than face the expense of defending a lawsuit and risking bankruptcy. Such suits frequently accomplished their goal of intimidating critics into silence, despite a lack of legal merit, because "the little guy" often could not afford to stay in the fight long enough for the court to make a determination on the merits.

In 1992, the California Legislature enacted Section 425.16 with the intent to put an end to such lawsuits, which by then had earned the name "Strategic Lawsuits Against Public Participation," or "SLAPPs."<sup>2</sup> The language of the statute's preamble states:

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily



to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process . . . .<sup>3</sup>

When applicable, the anti-SLAPP statute allows the party facing a SLAPP to respond with a “special motion to strike,” which, if successful, results in the dismissal of the SLAPP. In this way, the Legislature sought to combat SLAPPs by providing “David” parties with a procedural tool to fight back early and effectively, before deep-pocketed “Goliath” opponents could use the litigation to drain their resources and intimidate them into abandoning their constitutionally protected opposition or criticism. Thus, the Legislature sought to restore a measure of fairness to litigation between parties of disparate economic circumstances, and to promote and protect the rights of free speech and petition by removing the deterrent effect SLAPPs otherwise would have on critics’ willingness to speak out against well-funded adversaries.

Critics question whether the anti-SLAPP statute accomplishes its objective of reducing costly litigation. Since there are strategic benefits to filing an anti-SLAPP motion in certain contexts and thousands of anti-SLAPP suits have been filed in California<sup>4</sup> since the statute became effective on January 1, 1993,<sup>5</sup> some question if the statute has increased litigation. However, the anti-SLAPP statute has, in large part, had its intended effect: deep-pocketed parties are no longer able to blithely use litigation as a means to beat less affluent opponents into submission without consequence.

2. *The Scope of a SLAPP: The Anti-SLAPP Statute Was Purposely Crafted To Be Construed Broadly*

A SLAPP is a malicious or frivolous cause of action where the alleged harm arises from the valid exercise of First Amendment rights, specifically the right to petition the courts or the right of free speech. As previously noted, the archetypical SLAPP is a meritless action brought by a deep-pocketed litigant to deter less-affluent parties from exercising their political or legal rights or to punish them for doing so.<sup>6</sup>

A SLAPP typically arises in the context of civil tort claims such as libel, defamation, nuisance, or interference with prospective economic advantage. However, the language of California’s anti-SLAPP statute permits a party to bring a

special motion to strike any cause of action “arising from” the exercise of free speech or the right to petition:

A cause of action against a person *arising from* any act of that person *in furtherance of the person’s right of petition* or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.<sup>7</sup>

Crucially, Section 425.16 was amended in 1997 to explicitly declare that the statute “shall be construed broadly.”<sup>8</sup> The Legislature enacted this new language in response to concerns that courts were applying the statute too narrowly.<sup>9</sup> Courts have since relied on this language to apply the statute in ways that a plain reading of its language might not otherwise allow.

For example, even though the statute appears to require that the exercise of rights forming the basis for the SLAPP suit be “in connection with a public issue,” and courts initially required SLAPP defendants to demonstrate this element for the statute to apply,<sup>10</sup> court decisions following the 1997 amendment have questioned, weakened, and even eliminated this requirement in certain circumstances. In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 (“*Briggs*”), the California Supreme Court expressly relied on the Legislature’s instruction to construe the statute broadly in holding that “a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance.”<sup>11</sup> Subsequent court decisions in other contexts have also relied on the language from the 1997 amendment in applying a similarly low threshold for the “public issue” requirement.<sup>12</sup>

California courts have repeatedly acknowledged the purposefully expansive application of the anti-SLAPP statute mandated by the Legislature’s instruction to construe the statute broadly. The California Supreme Court has taken the position that “[n]othing in the [anti-SLAPP] statute itself categorically excludes any particular type of action from its operation”<sup>13</sup> and there is “no reason to suppose the Legislature failed to consider the need for reasonable limitations on the use of special motions to strike.”<sup>14</sup> Accordingly, in the absence of specific direction from the Legislature to limit the application of the anti-SLAPP statute, the California Supreme Court will



apply Section 425.16 to any action that “arises from” any act in furtherance of free speech or the right to petition.

However, not all courts that discuss the expansive application of the anti-SLAPP statute approve of this broad application.<sup>15</sup> As early as 1999, Justice Baxter expressed his concern in a dissenting opinion regarding the application of the anti-SLAPP statute:

The majority’s holding expands the definition of a SLAPP suit to include a potentially huge number of cases, thereby making the special motion to strike available in an untold number of legal actions that will bear no resemblance to the paradigm retaliatory SLAPP suit to which the remedial legislation was specifically addressed.<sup>16</sup>

Justice Baxter’s concerns turned out to be well-founded in the probate context.

3. *Legislators and Courts Have Repeatedly Recognized the Importance of Monitoring the Statute’s Function and Adjusting its Language when Necessary To Accomplish the Statute’s Purpose*

While the Legislature can, of course, amend any statute, both the courts and the Legislature have recognized that it is particularly important to monitor the real-world application of the anti-SLAPP statute and be willing to make adjustments as needed to serve the statute’s purpose.

The most direct evidence of the Legislature’s particular willingness to amend the statute is the fact that it has already been amended several times. In 1997, a noted above, the Legislature enacted an amendment to make it clear the statute was to be “construed broadly”<sup>17</sup> based on concerns that courts were interpreting its language too narrowly and thereby excluding cases that were meant to be governed by the statute. In the 1997 amendment, the Legislature added “a fourth category of explicitly protected rights of petition and free speech . . . intended to clarify that the statute’s protections applied to both statements and conduct.” Before the 1997 amendment, the enumerated categories of explicitly protected activities were limited to conduct that involved written or oral communication.<sup>18</sup> Similarly, in 1999, the Legislature “added a section making an appeal possible from any order granting or denying a special motion to strike in order ‘to further the purpose of the anti-SLAPP statute.’ The legislature believed that ‘[w]ithout this ability [to immediately appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated.’”<sup>19</sup> Thus, in the first instance,

the Legislature expanded the scope of the statute’s application to encompass a wider range of conduct, and, in the second instance, the Legislature added a new provision to add a missing piece that would help accomplish the purpose of the statute.

Furthermore, the fact that the Judicial Council continues to collect documents evidencing the statute’s use in practice reveals the Legislature’s desire to monitor the statute’s efficacy and suggests its ongoing willingness to make further amendments should the need arise. The current version of the statute requires that litigants on either side of a special motion to strike provide certain documents to the Judicial Council, which the Judicial Council must “maintain [as] a public record . . . for at least three years.”<sup>20</sup>

Additionally, courts have frequently alluded to the Legislature’s role in amending the statute when necessary to accomplish its goal or avoid undesired collateral effects of its real-world application. In *Briggs*, after holding that the moving party need not separately demonstrate a link to a “public issue” when the alleged SLAPP arises from a statement made in connection with an issue under consideration by a legally authorized official proceeding, the court added: “If we today mistake the Legislature’s intention, the Legislature may easily amend the statute.”<sup>21</sup> The California Supreme Court made a similar statement in *Jarrow Formulas, Inc. v. LaMarche*,<sup>22</sup> putting the onus on the Legislature to specify exceptions to the anti-SLAPP statute: “The Legislature clearly knows how to create an exemption from the anti-SLAPP statute when it wishes to do so.”

In sum, there is little doubt that the anti-SLAPP statute is subject to amendment. When such an amendment is needed to accomplish the statute’s purpose, the Legislature and the courts have consistently and repeatedly recognized the Legislature’s responsibility to step in and make adjustments.

## B. Anti-SLAPP in Practice

To understand the need for a change in the anti-SLAPP regime, it is first necessary to understand how the statute works in practice. The following section provides a brief overview of the relevant anti-SLAPP rules and procedures.

### 1. *The Court’s Two-Pronged Analysis of an Anti-SLAPP Motion*

#### a. First Prong of the Anti-SLAPP Analysis

When a party brings a special motion to strike under Section 425.16, the court must first decide whether the statute applies to the cause of action in question. In other words, the



court must determine whether the moving party has made a “threshold showing” that the challenged cause of action is one *arising from* activity protected by Section 425.16.<sup>23</sup> Generally, Section 425.16 protects acts of the moving party “in furtherance of [his or her] *right of petition* or free speech under the United States Constitution or California Constitution in connection with a public issue.”<sup>24</sup>

Importantly, the phrase “arising from” does not mean the same thing as “in response to,” it has a narrower meaning.<sup>25</sup> The anti-SLAPP statute does *not* encompass any claim that was arguably filed in retaliation for the exercise of speech or petition.<sup>26</sup> A cause of action does not “arise from” protected activity simply because it is filed *after* protected activity took place.<sup>27</sup> Instead, the act on which the plaintiff’s cause of action is based—the alleged harmful act—“must *itself* have been an act in furtherance of the right of petition or free speech.”<sup>28</sup> For example, if a man sues a neighbor for damaging his lawn, and the neighbor later sues the man for scratching his car, the second suit does not “arise from” the first suit, even though it may have been filed in retaliation for it. On the other hand, if the neighbor responds to the lawn damage suit with a defamation suit, alleging that the first suit caused damage to his reputation as a professional landscaper, the second suit would “arise from” protected activity and be covered by the statute because *the alleged harmful act was the first suit itself*—an exercise of the man’s right to petition.

#### b. Second Prong of the Anti-SLAPP Analysis

If the moving party makes the “threshold showing” described above, the burden then shifts to the resisting party to show a “probability of prevailing” on his or her claim.<sup>29</sup> In determining whether the resisting party has satisfied the second prong of the analysis, the court will consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”<sup>30</sup>

Procedurally, this second prong of the anti-SLAPP analysis “operates like a demurrer or motion for summary judgment in ‘reverse.’”<sup>31</sup> As is the case in summary judgment proceedings, the court does not weigh the credibility of the witnesses or “evaluate the weight of the evidence.”<sup>32</sup> “Instead, [the court] accept[s] as true all evidence favorable to the [resisting party] and assess[es] the [moving party’s] evidence only to determine if it defeats the [resisting party’s] submission as a matter of law.”<sup>33</sup>

The resisting party’s burden as to the second prong of the anti-SLAPP analysis is “akin to that of a party opposing a motion for summary judgment.”<sup>34</sup> The resisting party can

defeat an anti-SLAPP motion by demonstrating that the cause of action in question is “both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment.”<sup>35</sup> The resisting party need show only a “minimum level of legal sufficiency and triability”<sup>36</sup> or a case of “minimal merit”<sup>37</sup> to defeat an anti-SLAPP motion. If the resisting party can show “a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be stricken.”<sup>38</sup>

#### 2. Procedural Implications of Filing an Anti-SLAPP Motion

The anti-SLAPP statute sets forth procedural rules regarding discovery, appeal rights, and attorneys’ fees, all of which inure to benefit of the party bringing the special motion to strike. While it makes sense that these rules would be weighted in favor of the moving party assuming the motion was brought in good faith, they are subject to abuse when this is not the case.

First, the filing of a special motion to strike creates an automatic stay in discovery.<sup>39</sup> This discovery stay remains in effect until the court enters an order ruling on the motion.<sup>40</sup> Only upon a noticed motion may the court order that specified discovery be conducted.<sup>41</sup> This automatic discovery stay is intended to further the purpose of the anti-SLAPP statute by saving defendants from the burden and expense of extensive pre-trial litigation on sham pleadings.

Second, an order granting or denying an anti-SLAPP motion is immediately appealable.<sup>42</sup> The Legislature believed that this provision was necessary “to further the purpose of the anti-SLAPP statute” because “[w]ithout this ability [to immediately appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated.”<sup>43</sup>

Third, the anti-SLAPP statute’s rules for recovering attorney fees and costs are heavily weighted in favor of the moving party. For the moving party to recover fees, he or she need only prevail on the special motion to strike.<sup>44</sup> In contrast, the resisting party can only recover fees upon a showing that the motion was “frivolous” or “solely intended to cause unnecessary delay.”<sup>45</sup> Again, this pro-moving-party regime makes sense because it allows a party contesting a legitimate SLAPP suit to recover fees without additional litigation, and it theoretically protects against bad-faith use of the statute by allowing parties resisting a special motion to strike to recover fees if that motion was brought for no good reason.



Unfortunately, all three of these procedural rules are subject to abuse:

- A party seeking to delay the underlying litigation and create extra expense for his or her opponent will often have an incentive to bring an anti-SLAPP motion, regardless of its merit, especially if the underlying litigation involves a type of claim that would easily satisfy the first prong of the anti-SLAPP analysis (i.e., any claim based on speech, such as libel or defamation, or arising from conduct in connection with court proceedings, such as malicious prosecution).
- The automatic discovery stay creates an immediate avenue to delay proceedings, and the right to immediately appeal a decision creates a further opportunity to do the same.
- If the character of the litigation is such that the moving party is able to easily (and therefore inexpensively) satisfy the first prong of the analysis, an anti-SLAPP motion provides the means to bestow disproportionate expense on the adversary, who would likely expend significant resources to make the “probability of prevailing” showing required for his or her claim to survive the anti-SLAPP motion.
- Because the adversary may be forced to make this showing at an early stage and based on limited discovery (due to the automatic discovery stay), there is a real chance that he or she will fail to carry this burden and his or her claim will be stricken. In this scenario, the moving party would recover costs and fees simply by prevailing.
- Even if the adversary succeeds in demonstrating a “probability of prevailing” and his or her claim survives, the process forces the resisting party to “show its hand” by revealing its supporting evidence in the early stages of litigation.
- Finally, because the standard for a resisting party to recover fees against the moving party is so high, the moving party risks little by bringing the anti-SLAPP motion.

### III. ENFORCING NO-CONTEST CLAUSES WHEN DIRECT CONTESTS ARE BROUGHT WITHOUT PROBABLE CAUSE

To lay a foundation for a discussion of the interplay between anti-SLAPP motions and no-contest clause enforcement, the

following provides a brief overview of relevant rules governing the enforcement of no-contest clauses in California.

#### A. In California, No-Contest Clauses Are Enforceable in Only Three Scenarios

No-contest clauses long have been held valid because the clauses promote the public policies of discouraging litigation and effectuating the intent of the donor in disposing of assets.<sup>46</sup> Current law has narrowed the circumstances under which a no-contest clause will be enforced to three situations: (1) a direct contest brought without probable cause; (2) a pleading to challenge a transfer of property on the ground that it was not the transferor’s property at the time of transfer; and (3) the filing of a creditor’s claim or prosecution of an action based on such claim.<sup>47</sup> This article only addresses the application of the anti-SLAPP statute to direct contests brought without probable cause because the other two situations do not present the same factual challenges raised by a direct contest.

#### B. What Is a Direct Contest?

The current statutory scheme applies to will and trust instruments that became irrevocable on or after January 1, 2001. Under it, a no-contest clause may only be enforced in response to a “direct contest” to a will or trust upon a determination that the contest was brought *without probable cause*.<sup>48</sup> A no-contest clause is defined as “a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.”<sup>49</sup> A “contest” is defined as “a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.”<sup>50</sup> A “direct contest” is a contest that “alleges the invalidity” of a testamentary instrument or any terms of such instrument, based on specified grounds, including lack of capacity or undue influence.<sup>51</sup>

#### C. What Constitutes Probable Cause?

The current statutory scheme provides that “probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a *reasonable likelihood that the requested relief will be granted* after an opportunity for further investigation or discovery.”<sup>52</sup> The question of whether probable cause exists depends not only on the “likelihood that the contestant’s ‘factual contentions’ will be proven,” but also on whether those facts are “sufficient to establish a legally sufficient ground for the requested relief.”<sup>53</sup> The “reasonable likelihood” standard requires something more than a showing that success was “a mere possibility” at the time of filing, but something less than a showing that success was “more probable than not.”<sup>54</sup> This is a low standard that



essentially requires the contestant to demonstrate that he or she filed the contest for some cognizable reason. On the other hand, to demonstrate a lack of probable cause, and therefore sustain a disinheritance, a party seeking a contestant's disinheritance must *prove* that, at the time of filing, a reasonable person *would not* have believed there was a reasonable likelihood that the requested relief would be granted.

#### **D. Enforcing No-Contest Clauses: The Petition To Disinherit**

The "petition to disinherit" is the mechanism by which a party seeks to enforce a no-contest clause against a party who has filed a contest.<sup>55</sup> The required timing for filing this petition is arguably governed by the rules applied to cross-complaints.

A cross-complaint is a cause of action brought by a party against whom a cause of action has already been asserted.<sup>56</sup> The Code of Civil Procedure permits a party to bring any cross-complaint that (1) "arises out of the same transaction [or] occurrence . . . as the cause brought against him," or (2) "asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him."<sup>57</sup> A party must file a cross-complaint against any party who filed the complaint against him *before or at the same time* as the answer to the complaint.<sup>58</sup> Otherwise, the party will be forced to seek leave of court to file the cross-complaint.<sup>59</sup>

Although a will or trust contest targets the validity of the instrument rather than the beneficiaries who support the trust as written, a contest is arguably a cause of action "against" the inheriting beneficiaries because the determination of the contest affects those beneficiaries' interest in property and they are bound by the decision in the proceeding.<sup>60</sup> Moreover, a petition to disinherit a beneficiary for violating a no-contest clause arises out of the same "transaction or occurrence" as the cause brought by the contestant—i.e., the execution of the testamentary instrument—and asserts claims in the "property or controversy" which is the subject of the contest—i.e., the validity of the testamentary instrument and the property to which it disposes.

Because of the risk that the court will apply cross-complaint timing rules to a petition to disinherit,<sup>61</sup> a petitioner who seeks to disinherit a beneficiary under a no-contest clause for filing a direct contest would be wise to adhere to the cross-complaint rules for timing when filing the disinheritance petition. Accordingly, a petitioner who seeks to disinherit a beneficiary under a no-contest clause for filing a will contest should, arguably, file the disinheritance petition within 30 days after service of the will contest and summons.<sup>62</sup> Similarly, a petitioner who seeks to disinherit a beneficiary under a no-contest clause for filing a

direct contest to a trust should, arguably, file the disinheritance petition within the time permitted to respond to the trust contest. If the petitioner does not file the disinheritance petition within the time to file a cross-complaint, the petitioner risks being unable to bring the petition at all if the court denies leave to file it.<sup>63</sup>

If the contestant does not file an anti-SLAPP motion to strike the petition to disinherit after it is filed, the contest and the petition to disinherit are typically tried together since they are factually related. If the contestant is successful and the court declares the contested instrument to be invalid, the petition to disinherit will necessarily be denied. Since the court has already found the instrument invalid, the party seeking disinheritance cannot demonstrate that a reasonable person would not have believed there was a "reasonable likelihood" of success at the time of filing the contest.

On the other hand, if the court rejects the contest and refuses to invalidate the instrument, the party advocating disinheritance has an opportunity to demonstrate that the contestant lacked probable cause to bring the contest. If this argument is successful, the contestant will be disinherited according to the terms of the no-contest clause. Importantly, in this scenario, the disinheritance petitioner will have had the benefit of conducting discovery before presenting his or her best argument for disinheritance. If the contestant had filed an anti-SLAPP motion to strike the petition to disinherit, however, there may have been little discovery.

#### **IV. APPLYING THE ANTI-SLAPP STATUTE TO NO-CONTEST CLAUSE ENFORCEMENT PROCEEDINGS**

An analysis of the interaction between the anti-SLAPP statute and the statutory scheme governing no-contest clauses demonstrates that applying the anti-SLAPP statute to no-contest clause enforcement proceedings is problematic for at least three reasons: (1) it contravenes well-established precedent and policies governing trust and will contests; (2) it confers an unwarranted and unfair strategic advantage on contestants; and (3) it thwarts the legislative intent behind both the anti-SLAPP statute and the rules governing the enforceability of no-contest clauses.

##### **A. The Burden-Shifting Effect of an Anti-SLAPP Motion To Strike a Petition To Disinherit Contravenes Well-Established Precedent and Policies Governing Trust and Will Contests**

Considering the contexts in which anti-SLAPP motions typically arise, trust and estate litigators may not anticipate an anti-SLAPP motion being filed in response to a petition



to disinherit a contestant for violating a no-contest clause. However, the language of Section 425.16 is broad enough for a beneficiary who files a direct contest to claim that any attempt to disinherit that beneficiary constitutes a SLAPP. Because any petition to disinherit is based on a beneficiary's challenge to a testamentary instrument, the disinheritance petition necessarily "arises from" the challenge—an exercise of the beneficiary's "right to petition." Thus, the contestant will be able to easily satisfy the first prong of the anti-SLAPP analysis.<sup>64</sup>

As the analysis moves to the second prong, the burden shifts to the party seeking a disinheritance to demonstrate its "probability of prevailing" on the petition to disinherit. Because that petition requires the petitioner to demonstrate that the contest was brought without probable cause, this means that the party seeking a disinheritance must demonstrate a "probability of prevailing" on the question of whether the facts the contestant knew at the time of filing the contest would cause a reasonable person to believe that there was a "reasonable likelihood" that the requested relief would be granted after an opportunity for further investigation. In essence, this question requires the party seeking a disinheritance to demonstrate a "probability of prevailing" on the transferor's capacity and susceptibility to undue influence because, without a convincing argument that the contested instrument is indeed valid, the court will be unlikely to believe that the contestant did not have probable cause to contest it. Thus, in order to sustain the petition to disinherit in the face of an anti-SLAPP motion, the party seeking a disinheritance must not only demonstrate a "probability of prevailing" on the decedent's capacity and susceptibility to undue influence, but also a "probability of prevailing" on the question of whether a reasonable person would have believed there was a reasonable likelihood that the requested relief will be granted, all while being prohibited from conducting *any* discovery.<sup>65</sup> The failure to carry this burden results in the striking of the disinheritance petition.

At the very least, this burden-shifting is problematic because it is not consistent with well-established precedent and policies governing will and trust contests. The law presumes that a person has capacity.<sup>66</sup> Consequently, in will and trust contests, the contestant bears the burden of proving "lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."<sup>67</sup> However, as detailed above, a contestant can use the anti-SLAPP statute to shift this burden by filing a special motion to strike. Because the contestant can easily satisfy the first prong of the analysis, the motion effectively shifts the burden to the disinheriting petitioner to show a "probability of prevailing" on the question of whether the contestant lacked probable cause to bring the contest, which, in turn, requires a similar showing on the question of the decedent's capacity and susceptibility to undue influence.

In this way, the anti-SLAPP statute gives the contestant an unfair advantage by improperly shifting the burden and forcing the *petitioner seeking disinheritance* to make an affirmative showing that the decedent had capacity and was not susceptible to undue influence.

Moreover, to the extent this burden-shifting makes it more difficult to disinherit a beneficiary who brings a direct contest without probable cause, it infringes on the Legislature's efforts to carefully balance a number of important policies, including (1) effectuating the intent of the decedent, while (2) ensuring that fraud and undue influence are not shielded from judicial scrutiny. Deference to the intent of the decedent is an overarching goal in trust and estate law. In fact, in proposing the 2010 amendment to the Probate Code's no-contest rules, the Law Revision Commission specifically noted that "[t]he rationale for enforcement of a no contest clause is based primarily on deference to a transferor's intentions and the transferor's fundamental right to place a lawful condition on a gift of the transferor's property."<sup>68</sup> At the same time, the Law Revision Commission recognized that wrongdoers who had used undue influence or fraud to push the decedent to amend an estate plan could use no-contest clauses in the resulting document to shield their actions from judicial scrutiny.<sup>69</sup> Balancing these and other considerations, the Law Revision Commission recommended, and the Legislature enacted, a regime in which no-contest clauses are enforceable only in three specific scenarios, one of which is a direct contest brought without probable cause.<sup>70</sup> When the anti-SLAPP statute is applied to no-contest clause proceedings, however, the burden-shifting that results impedes the enforcement of a no-contest clause against a contestant who brings a contest without probable cause and disrupts this carefully-balanced regime.

## **B. Application of the Anti-SLAPP Statute to No-Contest Clause Enforcement Proceedings Produces Inequitable Results**

While the Legislature enacted the anti-SLAPP statute to protect litigants who faced harassing and meritless lawsuits that were intended to curtail their ability to exercise First Amendment rights, contestants who face a petition to disinherit are distinctly *not* in that class of litigants.<sup>71</sup> A petition to disinherit *cannot* be reasonably understood as a strategic attempt to chill a contestant's right to file or continue the prosecution of a contest. In addition, the petition creates no meaningful increase in the cost of litigation for the contestant since the contest and the disinheriting petition are typically tried together. Further, because the petition to disinherit would not have an effect until after the contest has been fully tried, the petition places no restriction on the contestant's ability to carry the contest through to judgment.



Most significantly, the petition to disinherit cannot be reasonably interpreted as a move to force the contestant to withdraw the contest because doing so would not absolve the contestant from the reach of the no-contest clause. As soon as the contest is filed, the contestant is subject to disinheritance upon a finding that the contest was brought without probable cause, and withdrawing the contest would not change this result.<sup>72</sup>

Finally, to the extent the contestant finds it a burden to demonstrate that he or she brought the contest for *some cognizable reason*, then the contestant fits the profile of the bad-faith litigant the legislators intended to disadvantage by enacting the anti-SLAPP statute. Such a litigant deserves to have his or her baseless litigation efforts curtailed.

Contestants are not the type of litigants the anti-SLAPP statute was enacted to protect. That makes it particularly troubling that they are able to invoke the statute to their great strategic advantage when faced with a petition to disinherit. Contestants facing a petition to disinherit are in a position to take advantage of the strategic benefits of filing an anti-SLAPP motion.

In the 2015 case of *Rosenberg v. Reid*, the Court of Appeal dismissed concerns that applying the anti-SLAPP statute to a petition to disinherit “would ‘in effect’ render all valid No Contest clause enforcement actions SLAPPs,” explaining that this effect “hardly seems excessive” because the second prong of the anti-SLAPP test ensures that only meritless pleadings will ultimately be stricken.<sup>73</sup> However, this reasoning ignores the procedural inequities that arise when the anti-SLAPP statute is applied to no-contest clause enforcement proceedings.<sup>74</sup> The *Rosenberg* court may be correct that only “meritless” pleadings will be stricken, but the real concern is that the current regime creates an unacceptably high risk that legitimate pleadings will be found “meritless” because petitioners are forced to prove a “probability of prevailing” on issues of capacity and susceptibility to undue influence, potentially without the benefit of discovery. The *Rosenberg* court also ignores the cost-shifting and delay issues introduced by the anti-SLAPP statute’s application to no-contest clause enforcement proceedings, and that the statute serves no legitimate purpose to protect litigants because petitions to disinherit are not strategic attempts to chill petitioning activity. This is an unjust application of the statute because it confers a significant unwarranted advantage on contestants, unfairly prejudicing disinheriting petitioners. Indeed, the application of the anti-SLAPP statute in this context, quite ironically, gives the contestant the means to engage in the type of unmeritorious, expensive delay tactics the statute was enacted to curtail.

### C. Application of the Anti-SLAPP Statute to No-Contest Clause Enforcement Proceedings Increases Pre-Contest Litigation and Delay, Thwarting Primary Objectives of Both the Anti-SLAPP Statute and Provisions of the Probate Code Governing Will and Trust Contests

In 2010, the Legislature reaffirmed its commitment to the goals behind the anti-SLAPP statute by eliminating the “safe harbor” provisions of former Probate Code section 21320,<sup>75</sup> which formerly allowed parties to file an action for declaratory relief to determine whether a proposed action would be considered a “contest” under an applicable no-contest clause,<sup>76</sup> in order to reduce “excessive pre-contest litigation.”<sup>77</sup>

The application of the anti-SLAPP statute to the enforcement of no-contest clauses *increases* pre-contest litigation and delay, thereby circumventing both the purpose of the anti-SLAPP statute and the solutions initiated by the 2010 amendments to Probate Code section 21320. Once an anti-SLAPP motion is filed, all discovery and proceedings in the underlying contest are stayed until the court enters judgment on the motion. Further delays result if the losing party appeals the court’s decision on the anti-SLAPP motion. If parties wish to conduct discovery relating to the anti-SLAPP motion, they will have to seek leave of court to do so. In the meantime, the parties and the courts are left to incur the costs of litigation on the anti-SLAPP motion.

Because of the strategic advantages, contestants are using anti-SLAPP motions making the anti-SLAPP statute, as applied to no-contest clause enforcement proceedings, the means for a contestant to assert the same type of costly, delaying litigation tactics that the statute was designed to avoid. The application of the anti-SLAPP statute to no-contest clause enforcement proceedings not only fails to serve the explicit goals of the Legislature, it actually encourages the very behavior the legislation was put in place to avoid.

### V. THE ANTI-SLAPP STATUTE SHOULD BE AMENDED TO ADD AN EXEMPTION FOR NO-CONTEST CLAUSE ENFORCEMENT PROCEEDINGS

Although there are a number of ways to address the problems identified in this article,<sup>78</sup> the authors believe that amending the anti-SLAPP statute to add an exemption for no-contest clause proceedings is the most direct and effective way of doing so. The statute already exempts certain litigation from its reach,<sup>79</sup> so this proposed amendment would be as simple as adding another exemption. Contestants facing a petition to





disinherit would not suffer any meaningful burden in being made to demonstrate that they had “probable cause”—i.e., some cognizable reason—to bring the contest, and, if they do struggle to satisfy this exceptionally low standard, their baseless contests are exactly the type of needless litigation the anti-SLAPP statute was enacted to curtail. The anti-SLAPP statute serves no legitimate purpose when applied to no-contest clause enforcement proceedings, so exempting such proceedings from its reach would cause no legitimate harm.

The anti-SLAPP statute was enacted to accomplish specific objectives. But when applied to no-contest clause enforcement proceedings, it actively encourages the very behavior it was designed to prevent. Accordingly, the authors call on the Legislature to specifically exempt actions brought under Probate Code section 21311(a)(1) from the application of the anti-SLAPP statute. It’s time for a change.

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1 Special thanks to Matthew W. McMurtrey for his help in editing this article.

2 Stats. 1992, ch. 726, section 2.

3 Code Civ. Proc., section 425.16, subd. (a).

4 A search for California decisions citing Code of Civil Procedure section 425.16 on Thomson Reuters Westlaw resulted in 4,682 cases, as of March 6, 2016.

5 Tate, *California’s Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope* (2000) 33 Loy. L.A. L.Rev. 801, 801, fn. 2. Available at <<http://digitalcommons.lmu.edu/llr/vol33/iss3/1/>> (as of Mar. 10, 2016), (hereafter Tate).

6 *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 890–891, citing *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815. (“The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants’ continued political or legal opposition to the developers’ plans.”).

7 Code Civ. Proc., section 425.16, subd. (b)(1), italics added.

8 Code Civ. Proc., section 425.16, subd. (a), as amended by Stats. 1997, ch. 271, section 1; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119 (“In 1997, after the Court of Appeal’s decision in this case, the Legislature amended section 425.16, effecting no substantive changes to the anti-SLAPP scheme, but providing that the statute ‘shall be construed broadly.’”).

9 *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1120 (“The Legislature’s 1997 amendment of the statute to mandate that it be broadly construed apparently was prompted by judicial decisions, including that of the Court of Appeal in this case, that had narrowly construed it to include an overall ‘public issue’ limitation.”), citing Stats. 1997, ch. 271, section 1.

10 See, e.g., *Zhao v. Wong* (1996) 48 Cal.App.4th 1114 (holding that Section 425.16 did not apply because the defendant failed to satisfy the requirement that the oral statement or writing giving rise to the

suit was “in connection with a public issue”), disapproved by *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1106.

11 *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123, italics in original.

12 See, e.g., *Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042 (holding that a company employee’s statements about a prominent businessman were subject to the anti-SLAPP statute, and interpreting “an issue of public interest” as “any issue in which the public is interested”).

13 *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.

14 *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.

15 See, e.g., *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1003 (“As we said, something is wrong with this picture, and we hope the Legislature will see fit to change it.”); *Navellier v. Sletten, supra*, 29 Cal.4th at p. 96 (dis. opn. of Brown, J.) (“The cure has become the disease—SLAPP motions are now just the latest form of abusive litigation.”); *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 11 (“We cannot help but observe the increasing frequency with which anti-SLAPP motions are brought, imposing an added burden on opposing parties as well as the courts. While a special motion to strike is an appropriate screening mechanism to eliminate meritless litigation at an early stage, such motions should only be brought when they fit within the parameters of section 425.16.”); *Moran v. Endres* (2006) 135 Cal.App.4th 952, 956 (conc. opn. of Mosk, J.) (“Code of Civil Procedure section 425.16 . . . has resulted in numerous appeals that involve various ambiguities and apparent unintended consequences.”).

16 *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1129 (conc. & dis. opn. of Baxter, J.).

17 See note 8, *ante*.

18 Tate, *supra*, at p. 808.

19 *Ibid*.

20 Code Civ. Proc., section 425.16, subs. (j)(1) and (j)(2).

21 *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.

22 *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.

23 *Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.

24 Code Civ. Proc., section 425.16, subd. (b)(1), italics added.

25 *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77.

26 *Ibid*.

27 *Id.* at pp. 76-77.

28 *Id.* at p. 78, italics in original.

29 *Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.

30 Code Civ. Proc. section 425.16, subd. (b)(2).

31 *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.

32 *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal. App.4th 688, 699-700.



- 33 *Ibid.*
- 34 *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 317; see also *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.
- 35 *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.
- 36 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5.
- 37 *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675, quoting *Navellier v. Sletten, supra*, 29 Cal.4th at p. 95.
- 38 *Ibid.*, italics in original.
- 39 Code Civ. Proc., section 425.16, subd. (g).
- 40 *Ibid.*
- 41 *Ibid.*
- 42 Code Civ. Proc., section 425.16, subd. (i).
- 43 Tate, *supra*, at p. 808.
- 44 Code Civ. Proc., section 425.16, subd. (c)(1).
- 45 *Ibid.*
- 46 *Donkin v. Donkin* (2013) 58 Cal.4th 412, 422; *Burch v. George* (1994) 7 Cal.4th 246, 254; *Estate of Ferber* (1998) 66 Cal.App.4th 244, 249, as modified on denial of reh'g (Sept. 15, 1998) (“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.”).
- 47 Prob. Code, section 21311, subd. (a).
- 48 Prob. Code, section 21311, subd. (a)(1).
- 49 Prob. Code, section 21310, subd. (c).
- 50 Prob. Code, section 21310, subd. (a).
- 51 Prob. Code, section 21310, subd. (b).
- 52 Prob. Code, section 21311, subd. (b), italics added.
- 53 *Revision of No Contest Clause Statute* (2007) 37 Cal. L. Revision Comm'n Reports 359, 397.
- 54 *Id.* at p. 398, citing *People v. Proctor* (1992) 4 Cal.4th 499, 523 (construing Penal Code section 1033); *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 653, fn. 4 (construing Penal Code section 938.1).
- 55 Although probate court litigants file such petitions under a number of different names (petition to enforce no-contest clause, petition to determine persons entitled to distributions, petition to determine heirship, etc.), the authors have chosen to refer to such a petition solely as a “petition to disinherit” or a “disinheriting petition” for the sake of simplicity.
- 56 See Code Civ. Proc., section 428.10.
- 57 Code Civ. Proc., section 428.10, subd. (b); see also Prob. Code, section 1000 (“Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions . . . apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.”).
- 58 Code Civ. Proc., section 428.50, subd. (a).
- 59 Code Civ. Proc., section 428.50, subd. (c).
- 60 See Prob. Code, section 8251, subd. (c)(3).
- 61 The timing for filing a petition to disinherit might also be governed by Probate Code section 11700, which provides: “At any time after letters are first issued to a general personal representative and before an order for final distribution is made, the personal representative, or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate, may file a petition for a court determination of the persons entitled to distribution of the decedent’s estate.” If a petitioner could be certain that section 11700 governed the timing of petitions to disinherit, the petitioner would have the option to wait to file the petition until after discovery has been conducted, without incurring a risk that he or she would be barred from bringing the petition at that later time. However, because there have been no definitive decisions holding that petitions to disinherit are governed *exclusively* by Probate Code section 11700, and a court might apply the procedural rules for the timing of cross-complaints to such a petition, this article discusses timing of the petition to disinherit in light of the risks that arise if the court applies the stricter timing standards laid out in the cross-complaint rules.
- 62 See Prob. Code, section 8250.
- 63 Although Code of Civil Procedure section 426.50, governing leave to amend in these circumstances, declares that “[t]his subdivision shall be liberally construed to avoid forfeiture of causes of action,” that section requires the court to find that “the party who failed to [file the cross-complaint] acted in good faith” to grant leave to file, so there is a risk that the court will reject the petitioner’s purported “good faith” basis for not filing the disinheriting petition earlier.
- 64 See *Rosenberg v. Reid* (Cal. Ct.App., Oct. 8, 2015, B256895) 2015 WL 588389 at p. 6 (acknowledging that “actions to enforce a no contest clause will . . . in many cases arise from protected activity under the anti-SLAPP statute”).
- 65 The petitioner could avoid being forced to prove a “probability of prevailing” with limited discovery by waiting to file the petition to disinherit until after discovery has been conducted, though this risks having the court deny leave to file the petition after the time period set forth in the rules for cross-complaints, as previously explained. Waiting to file the petition until after trial on the contest would be even more risky, since such filing would likely require a second trial, dramatically increasing litigation expense, and therefore likely decreasing the chance that the court would grant leave to file the petition on a finding that the petitioner’s delay was in “good faith.”
- 66 Prob. Code, section 810.
- 67 Prob. Code, section 8252, subd. (a).
- 68 *Revision of No Contest Clause Statute, supra*, 37 Cal. L. Revision Comm'n Reports at p. 390.
- 69 *Id.* at p. 388.
- 70 Prob. Code, section 21311, subd. (a).
- 71 Indeed, the application of the anti-SLAPP statute to no-contest clause enforcement proceedings fulfills a prediction Justice Baxter made in his *Briggs* dissent, writing that the majority’s broad application of the statute “will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply.”



*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1124 (conc. & dis. opn. of Baxter, J).

- 72 See *Revision of No Contest Clause Statute, supra*, 37 Cal. L. Revision Comm'n Reports at p. 391 (“[F]orfeiture of a gift under a no contest clause is triggered by the mere filing of a pleading. This creates a clear choice for a contestant. The only way to avoid forfeiture is to take no court action at all.”).
- 73 *Rosenberg v. Reid, supra*, 2015 WL 588389 at p. 6, citing *Navellier v. Sletten, supra*, 29 Cal.4th at pp. 93-94.
- 74 The anti-SLAPP statute was enacted in reaction to procedural abuses by litigants whose goal was “delay and diversion” and who were not deterred by the prospect of losing on the merits: “Because of the motives behind the SLAPP action, the usual judicial safeguards were seen as inadequate because they focused on preventing a meritless claim from prevailing.” Tate, *supra*, at p. 805. Now that the anti-SLAPP statute itself is being abused by litigants who seek delay and diversion, the *Rosenberg* court’s reassurance that meritless anti-SLAPP motions present no problem because those motions will eventually be determined on the merits is unsatisfactory.
- 75 Stats. 2008, ch. 174, section 2, became operative on January 1, 2010, and applies retroactively to all instruments that became irrevocable on or after January 1, 2001; see Prob. Code, section 21315, subd. (a).
- 76 Former Prob. Code, section 21320, subd. (a); *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.
- 77 Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1264 (2007-2008 Reg. Sess.) as amended June 18, 2008, p. 4.

- 78 To a certain extent, the problems identified in this article could be resolved if the law were revised to explicitly permit petitioners to bring petitions to disinherit beyond the time limits imposed on cross-complaints. This could be accomplished by an amendment in the Code of Civil Procedure or the Probate Code to declare explicitly that petitions to disinherit are not to be governed by the rules for timing of cross-complaints. However, allowing petitions to disinherit to be brought after trial on the contest would create complications in that (a) the issues of the facts contestant knew at the time of filing and whether those facts are sufficient to establish probable cause to bring the contest would not be properly before the court during the trial on the contest; and so (b) the filing of a petition to disinherit after trial on the contest would likely create the need for a second trial, an unnecessary burden on the court and the parties. Another potential solution would be to set new rules governing the timing of petitions to disinherit that would require such petitions to be filed after the close of discovery but before trial. This solution would help alleviate concerns over the petitioner being forced to show a “probability of prevailing” with limited discovery, but the anti-SLAPP statute could still be invoked at that point, causing a delay in proceedings, and the problem would therefore not be completely solved. Thus, the best solution is to eliminate the applicability of the anti-SLAPP statute to no-contest clause enforcement proceedings because it gets to the root of the problem, i.e., the fact that the anti-SLAPP statute is not needed in this context and creates unwarranted imbalance when introduced.
- 79 See Code Civ. Proc., section 425.16, subd. (d) (“This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.”).

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