Study L-637 October 24, 2007

Third Supplement to Memorandum 2007-44

Revision of No Contest Clause Statute (Discussion of Issues)

The Commission has received additional comment on the matters discussed in Memorandum 2007-44. The letter is attached in the exhibit as follows:

Exhibit p.

- Michael Gerson (10/25/07) 1

Probable Cause

Mr. Gerson raises a number of questions about the proposed standard for probable cause to bring a direct contest. The staff's proposed language is reproduced below for reference:

> For the purposes of this section, a contestant has probable cause to bring a contest if the facts known to the contestant, at the time of filing the contest, would cause a reasonable attorney to believe that there is a reasonable likelihood that relief will be granted after an opportunity for further investigation or discovery.

Mr. Gerson's questions will be addressed orally at the meeting.

Property Ownership Contest

The staff spoke informally with Neil Horton about whether the draft language to authorize the enforcement of a no contest clause against a property ownership claim is precise enough. The concern was that creative attorneys might try to stretch the concept of "property ownership claim" to include other types of actions, or circumvent it by claiming that an action is not really a property ownership claim.

The staff suggested that the language could be tightened, without changing its intended meaning, if it were revised along the following lines:

> 21330. …
> (c) "Property ownership ~~claim~~ contest" means a pleading that ~~asserts ownership~~ contests the transferor's ownership of property that is specifically identified in a protected instrument as the

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transferor's property, or that would be given as a specific gift under a protected instrument.

21333. A no contest clause may only be enforced against the following types of contests:

…

(b) A property ownership ~~claim~~ contest, if the no contest clause expressly states that it applies to a property ownership ~~claim~~ contest.

…

The staff finds the revision inoffensive, and perhaps a bit clearer than the earlier drafted language. However, it is not known whether this language would find more or less support from TEXCOM.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

EMAIL FROM MICHAEL GERSON (FORWARDED BY NEIL HORTON) (10/25/07)

I am not sure if I should respond directly to Brian Hebert or if TEXCOMM has made similar comments, but I do have some questions about the most recent Memorandum, 2007-44, proposal relating to the probable cause definition.

First, the proposal switches from "facts known to the contestant" to a "reasonable attorney to believe" -- that's switching who's the key party to consider.

Who is it, the contestant or the attorney? The Memorandum implies that the facts are also known to the attorney, but the proposed language does not state that.

Second, what "reasonable attorney" do you consider? Is that an attorney in the city/county? A specialist? A litigator or a transactional attorney? The moving party's attorney? Or is it a certain number of attorneys?

Third, is the client expected to go ask some (say 3) attorneys for their opinions and get them in writing? Is the failure to do a basis for saying there was no attempt to meet the standard so no probable cause?

Fourth, would presenting evidence that the client met that "reasonable attorney" standard be a waiver of the attorney client privilege? (For example, the cross-examiner asks: Dear attorney, what facts did you learn from your client and what analysis did you conduct to reach your conclusions?)

Fifth, what constitutes "relief will be granted"? Is this any relief? If any relief is granted, is that sufficient for all allegations?

Sixth, the memorandum in its discussion uses "would be granted", but uses "will be granted" in the text. Why the difference?

Seventh, what constitutes, as the Memorandum states, "a belief that the facts are probably sufficient to establish the legal grounds for relief"?

Michael C. Gerson, Esq.