Study L-637 February 1, 2008

Third Supplement to Memorandum 2008-3

Revision of No Contest Clause Statute (Material Received at Meeting)

The following material was received by the Commission at the meeting on January 17, 2008, in connection with Study L-637 on Revision of the No Contest Clause Statute, and is attached as an Exhibit:

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM JAMES S. GRAHAM, SAN DIEGO
(JANUARY 16, 2008)

Dear Commission and Staff:

I have been following the work of the Commission relating to the subject referenced above for some time. On January 8, 2008, I received Memorandum 2008-3 which included the revised Staff Draft Recommendation relating to the Revision of the No Contest Statute. In my judgment, it is an outstanding document which should be approved without change.

Yesterday I received the First Supplement to Memorandum 2008-3. After reading it, I was both amazed and alarmed to learn that any last minute changes to the proposals in the Recommendation were being considered on one of its most important parts.

The general transition provision applicable to the probate statutes, Probate Code sec. 3, initially became operative on July 1, 1989. It was discussed and applied by the Supreme Court in Rice v. Clark (2002) 28 Cal.4th 89. There is no reason not to apply this statute as set forth in the Recommendation. The reasoned analysis on this issue set forth in the First Supplement to Memorandum 2008-3 at pages 1-13 provide a more than sufficient response to the concerns that have been raised.

The argument that it is "unfair" to change the law after a person is dead and cannot take steps to adjust to those changes should be rejected. It is well known that the law is organic and is subject to change at any time by judicial rulings and legislative action. The probate area is no different than any other area of the law---and I would suspect that even William Randolph Hearst was aware of this. Nor can it be said that changes in the probate area are few and far between.

If the Recommendation is revised to provide that it should apply only to instruments that vest on or after the operative date of the law, the goal of simplifying this area of the law will be thwarted rather than advanced. In addition, the use of a no contest clause to shield elder financial abuse---which by all accounts is growing exponentially---as well as fraud and undue influence will continue for a good number of years to come.

It is noteworthy that the e-mail from Neil F. Horton dated January 13, 2008, indicates that a motion to make the proposed new law operate prospectively failed for lack of a second when TEXCOMM voted on Memorandum 2008-3. The views of TEXCOMM on this important subject should not be disregarded since its members represent a broad cross section of the attorneys that practice in this area.

In contrast, the views of the Trustees of the Hearst Family Trust should be disregarded as representing only their narrow and parochial views.

If I had more time, I would write more but inasmuch as I received the First Supplement just yesterday, I do not.

Respectfully,

James S. Graham