63 1/15/70

Memorandum 70-5

Subject: Study 63 - Evidence Code (Proof of Foreign Official Records)

Attached as Exhibit I is a letter from Charles W. Ricketts, Los Gatos attorney, pointing out a deficiency in the Evidence Code.

Section 1530 of the Evidence Code is concerned with the use of a copy of a writing in official custody to prove the content of the original. Section 1530 is deficient insofar as it prescribes, in subdivision (a)(3), the procedure for proof of foreign official writings. Subdivision (a)(3) requires that the copy of the foreign official record be attested as a correct copy by "a person having authority to make the attestation." The subdivision further requires that the first attester's signature and his official position be certified by a higher foreign official, whose signature can in turn be certified by a still higher official. Such certifications can be continued in a chain until a foreign official is reached as to whom a United States foreign service officer "stationed in the nation in which the writing is kept" has adequate information upon which to base his final certification. In other words, to prove a copy of a foreign official record, it is necessary to have a certificate of a United States foreign service officer stationed in the nation in which the writing is kept.

In some situations, it now is impossible to satisfy the basic requirement of subdivision (a)(3) of Section 1530 because there are no United States foreign service officials in the particular foreign country (such as East Germany) and, hence, there is no one who can make the

certificate required by subdivision (a)(3). As a result, in some situations, it may be extremely difficult and expensive or even impossible to establish such matters as birth, legitimacy, marriage, death, or a will. This may result in injustice or in delay in the resolution of issues now pending in the California courts.

The problem described above is particularly troublesome in the case of a foreign will because Probate Code Section 361 was amended at the 1969 session to provide that a copy of a foreign will (and the related documents concerning the establishment or proof of the will in the foreign country) can be admitted in California "if such copy or other evidence satisfies the requirements of Article 2 (commencing with Section 1530) of Chapter 2 of Division 11 of the Evidence Code."

When Section 1530 of the Evidence Code was drafted in 1964, the Commission had the benefit of a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure and based subdivision (a)(3) on that proposed amendment. After the Evidence Code was enacted in 1965, Rule 44 was revised (in 1966) to provide for proof of foreign official records. In the revision of Rule 44 in 1966, the defect pointed out above was discovered and provision was made in Rule 44 to cover the problem.

Rule 44 (as revised in 1966) includes the following provision to deal with the East Germany type of case:

> If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

The Note of the Advisory Committee regarding revised Rule 44 states:

> Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v. Grabina, 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a) (2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

The full text of Rule 44 and the Advisory Committee Note is set out as Exhibit II (attached).

Exhibit III (attached) is a draft of a bill to correct the defect in Section 1530. The bill adds the substance of the sentence of Rule 44 quoted above, making only those changes needed to conform the language of that sentence to the language used in Section 1530. The bill also adopts the language of Rule 44 which specifies the officers who can make the final certificate. The change made by adopting this language is to restrict the United States foreign service officers who can make the final certificate to certain specified responsible officers and to liberalize the provision by permitting "a diplomatic or consular official of the foreign country assigned or accredited to the United States" to make the final certificate. This latter conforming change achieves desirable

conformity with Rule 44 and liberalizes the rule but at the same time assures that a responsible official will make the final certificate.

The staff considers this matter to be a fairly simple problem since it involves correcting an obvious defect by adopting the latest version of the federal rule upon which the pertinent provision of Section 1530 is based. Accordingly, we believe that the matter should be corrected at the 1970 session. Moreover, because matters are pending in California courts (see Exhibit I), the amendment to Section 1530 should be made an urgency measure, to take effect immediately upon enactment of the measure.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 70-5

EXHIBIT I

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January 13, 1970

California Law Revision Commission
Stanford University Law School
Stanford, California 94305

Attention:
Mr. John De Moully
Executive Secretary

re: Evidence Code
Section 1530, sub.(a)(3)

Dear Mr. De Moully:

The requirement that the "final statement" may be made only by a United States diplomatic officer "stationed in the nation in which the writing is kept" makes it impossible to have an East German's will admitted to probate as a foreign will because United States does not recognize East Germany, also known as German Democratic Republic (GDR), and does not station any diplomatic representative there.

I have just filed in the Superior Court in California an East German's will together with a copy of the establishment procedure record. The copy of the will and of the record of establishment are attested as a correct copy by a person having authority to make the attestation. I shall refer to him as first official. Of course first official is a GDR official.

U.S.A. does recognize West Germany (FRG) and does maintain there those diplomatic officials referred to in Evidence Code 1530, sub (a)(3).

An official whom I shall refer to as second official is an official in FRG. He certified to the genuineness of the signature and of the official position of the first official.

A U.S.A. diplomatic representative in FRG certified as to second official. But the final statement does not comply with Evidence Code sec. 1530, sub (a)(3) because the will is kept in GDR, not FRG.

Thus at this time it appears to me that the will of the GDR decedent cannot be admitted to probate in California where jurisdiction is based on the presence of about $20,000.00 here.

Probate Code sec. 361, as amended 1969 relating to probate of foreign wills, requires compliance with Evidence Code sections 1530-1532. I do not believe that my problem is solved by section 1532.

Your Commission's comments to subdn (a)(3) of sec. 1530 says that subdivision is based upon a proposed amendment to Rule 44 of the Federal Rules of Civil Procedure. Title 28 U.S.C.A. Please see that Rule and the notes of the advisory committee thereto. Note to subdivision (a)(2), pp 286-287, U.S.C.A. volume. The advisory committee says at p. 287 of West Publishing Co's 1968 edition:

> "Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the requirements of the rule. There may be no United States Consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record without a final certification." (sublineation is mine).

East Germany (GDR) is not the only unrecognized government - i.e., is n the only government wherein no United States diplomatic officer is present. Certainly California should not discriminate against a testat merely because at death he was domiciled in one such country. It seems much better for California to recognize the good sense incorporated in the final sentence of Rule 44, subdn (a)(2).

The requirement of Evidence Code section 1530, subdn (a)(3) that the U. S. Consul who makes the final statement be stationed in the nation of the testator's domicile will deny the testator domiciled in an unrecognized nation the right which his neighbor over the border has and will greatly extend the period of estate administration in California and will add to our already overloaded courts contests to determine heir

Furthermore, California's discriminatory statute violates the statement often made by our courts and by the U.S. Supreme Court that discrimination against aliens are viewed with disfavor; and this is particularly applicable when the discrimination is against only a particular class of aliens: Those resident in unrecognized governments. This also violates international law. See Restatement 2d Foreign Relations Law of the U. S., sec. 166.

Furthermore, U. S. may in the future be ready to recognize a now unrecognized government and to make treaties with it. The treaty negotiations could be seriously affected by a history of unjust treatment of its citizens.

If, as in my case, the will proponent in California has done all he can do to authenticate a foreign record, the opponent should be called upon to show that the will does not truly exist or reads otherwise than as represented.

As Evidence Code sec. 1530, sub (a)(3) now stands evidence by testimony of a witness who saw the will executed, knew the testator and, in fact, actually prepared the will and knew that the will was in fact establish in accordance with GDR law and that the appropriate GDR government official actually issued a certificate comparable to our decree of final distribution vesting the property of record in the legatee would not comply with Probate Code sec. 361 as amended in 1969.

The California Evidence Code was enacted May 18, 1965. Your Commission note to Evidence Code sec. 1530, sub (a)(3) says that subdivision "is based on a proposed amendment to Rule 44 of the Federal Rules of Civil procedure...". The note referred to "mimeo Feb. 25, 1964". I assume that mimeograph was prepared by the federal advisory committee.

Look at Rule 44 as it read before it was recast and amended February 28 1966. Before the 1966 recast Rule 44, final sentence, refers, as does Evidence Code 1530 sub (a)(3) to the final statement ("certificate") to be made by a U.S. diplomatic officer "stationed in the foreign state or country in which the record is kept...". That is the source from which your Commission got its words "stationed in the nation in which the writing is kept...". But, as shown bereinabove, the federal rules committee recast Rule 44, February 28, 1966 (after enactment of California Evidence Code) for the reasons stated on p. 287 of West Publishing Co's 1968 edition of U.S.C.A., Title 28, Federal Rules of Civil Procedure, Rule 44. "There may be no U.S. Consul in a particular foreign country..." the federal committee notes.

The given reason for the 1966 recast of Rule 44 is equally applicable to Evidence Code secl 1530, sub (a()3), and that section should be amended to conform to the 1966 recast of Rule 44.

For text material on Rule 44 (a)(2) - authentication of foreign official record - as amended in 1966, see 2 B BARRON & HOLTZHOFF, Federal Practice & Procedure, sec. 992, pocket part issued after enactment of California Evidence Code, especially pp 104-105 of pocket part, beginning at p.104 last paragraph, starting thus: "Third, the rule makes provision for the unusual case when it may be difficult or impossible to satisfy the cer-

tification requirements of the amended rule."

Amendment of Evidence Code sec. 1530 sub (a)(3) to conform to the last sentence of Rule 44 (a)(2) as amended February 28, 1966 is urgent. All over the State there must be cases involving proof of foreign official records emanating from unrecognized governments, especially East Germa. (German Democratic Republic - GDR).

Applying section 113 Restatement of the Foreign Relations Law of the United States, 2d:

1. GDR is in actual and effective control of the territory and population of East Germany.

2. East Germany has a defined territory and population.

3. The execution of a will by an East German and the establishment of it under the procedure provided by GDR is a matter of an essentially private nature within the effective control of GDR.

See Reporters' Notes under the cited section 113, p. 356.

People in an unrecognized entity do make wills and have them establishe by processes prescribed by the government of their domicile. At least as to matters of such an essentially private nature California could ha no rational basis for refusing to give effect to those wills here.

I am only twenty miles from your office and I shall be pleased to talk to you or your Committee personally.

Very truly yours,

CHARLES W. RICKETTS

Rule 44. Proof of Official Record

(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

As amended Feb. 28, 1966, eff. July 1, 1966.

U.S.C., Title 20:
§ 52 (Smithsonian Institution; evidence of title to site and buildings)
U.S.C., Title 25:
§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)
U.S.C., Title 31:
§ 46 (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)
U.S.C., Title 38:
§ 11g (Seal of Veterans' Administration; authentication of copies of records)
U.S.C., Title 40:
§ 238 (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
§ 270c (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)
U.S.C., Title 43:
§§ 57-59 (Copies of land surveys, etc., in certain states and districts admissible as evidence)
§ 53 (General Land Office registers and receivers; transcripts of records as evidence)
U.S.C., Title 46:
§ 823 (Records of Maritime Commission; copies; publication of reports; evidence)
U.S.C., Title 47:
§ 154(m) (Federal Communications Commission; copies of reports and decisions as evidence)
§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)
U.S.C., Title 49:
§ 14(3) (Interstate Commerce Commission reports and decisions; printing and distribution of copies)
§ 16(13) (Copies of schedules, tariffs, etc. filed with Interstate Commerce Commission as evidence)
§ 19a(l) (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

Note to Subdivision (a) (1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a) (1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a) (1). It also falls within subdivision (a) (2) which may be availed of alternatively. Cf. Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940).

Note to Subdivision (a) (2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See United States v. Aluminum Co. of America, 1 F.R.D. 71 (S.D.N.Y. 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a) (2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed. 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (c) (1963). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be fol-

lowed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See New York Life Ins. Co. v. Aronson, 38 F.Supp. 687 (W.D.Pa. 1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See United States v. Grabina, 219 F.2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a) (2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ.Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp.L. 123, 130-31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Note to Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Note to Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e. g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740-42, 1745; Fakouri v. Cadais, 149 F.2d 321 (5th Cir.1945), cert. denied 326 U.S. 742 (1945); 5 Moore's Federal Practice, par. 44.05 (2d ed. 1951).

Supplementary Note of Advisory Committee Regarding Rules 43 and 44.

For supplementary note of Advisory Committee on this rule, see note under Rule 43.

Commentaries

"Under the former rules almost as many different methods of proof of official records were required as there were departments of government. Under Rule 44, any of the former methods of proof may be used, but the simple unified procedure prescribed in this rule is available in any case in lieu thereof." Daniel K. Hopkinson, 23 Marq.L.Rev., 159.

Cross References

Authenticated and certified copy of Government record by Administrator of General Services admissible on evidence, see section 309(b) of Title 44, Public Printing and Documents.

Form and admissibility of evidence generally, see Rule 43(a).

Library References

Federal Civil Procedure ⟸1189 et seq., 1211 et seq.

C.J.S. Federal Civil Procedure §§ 455 et seq., 460 et seq.

Memorandum 70-5

EXHIBIT III

An act to amend Section 1530 of the Evidence Code, relating to evidence, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Section 1. Section 1530 of the Evidence Code is amended to read:

1530. (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

(1) The copy purports to be published by the authority of the nation or state, or public entity therein, in which the writing is kept;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make the attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of

such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent ~~, or other officer in the foreign service~~ of the United States ~~stationed in the nation in which the writing is kept, authenticated by the seal of his office~~ , or a diplomatic or consular official of the foreign country assigned or accredited to the United States . If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

Sec. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In some situations, it now is impossible to satisfy the basic requirement of paragraph (3) of subdivision (a) of Section 1530 of the Evidence Code because there is no United States official in the particular foreign country (such as East Germany) who can make the final statement required by paragraph (3). As a result, it may be impossible in some situations to establish such matters as birth, legitimacy, marriage, death, or a will. This may result in injustice or in delay in the resolution of issues now pending in California courts. Therefore, it is necessary that this act take immediate effect.