

#L-625

7/5/82

Fourth Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--  
Contractual Arrangements Relating to Death  
§§ 111.010-111.210)

Attached are the provisions of the recommended legislation relating to contractual arrangements relating to rights at death and the related portion of the preliminary portion of the tentative recommendation.

Article 1 of the enclosed material relates to a surviving spouse's waiver of rights. The relevant provision of the Uniform Probate Code permits waiver "by a written contract, agreement or waiver signed by the party waiving after fair disclosure." We have replaced this requirement by more detailed requirements concerning waiver agreements drawn from the Uniform Antenuptial Agreements Act (which will be presented for consideration this summer at the Annual Meeting of the National Conference of Commissioners on Uniform State Laws). You should read Sections 111.010 to 111.080, inclusive, carefully. Sections 111.050 and 111.060 should be given especially careful study.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

## Waiver of Rights by Surviving Spouse

There may be an agreement between the decedent and the surviving spouse in which the surviving spouse purports to waive rights in the estate of the decedent. Such a waiver commonly occurs in an antenuptial agreement, an integrated estate plan, or a marital termination agreement. The agreement may waive such specific items as rights in community property or the right to receive exempt property, family allowance, or probate homestead, or may broadly waive "all rights" in the estate of the decedent.

Although there is little statutory law governing such a waiver,<sup>1</sup> the case law is quite strict in construing a waiver agreement to prevent the loss of valuable statutory property rights.<sup>2</sup> Because husband and wife occupy a confidential and fiduciary relationship, the opportunity for undue influence and duress is great. An effective waiver of rights must be clear and explicit,<sup>3</sup> and the person making the waiver must understand its practical and legal consequences.<sup>4</sup>

It has been suggested that in order for a waiver of rights by a spouse to be effective, the waiver should be made only after complete disclosure of all pertinent facts and upon advice of competent counsel.<sup>5</sup> The proposed law adopts this suggestion<sup>6</sup> and provides that a written agreement of the surviving spouse that waives rights in the estate of the decedent is enforceable unless it is shown that the waiver was made without fair and reasonable disclosure of the property of the decedent

1. See Prob. Code § 80 (enacted 1980 Cal. Stats., ch. 1188) (effect of waiver of rights in marital termination agreement).
2. 7 B. Witkin, Summary of California Law, Wills and Probate §§ 531-532 (8th ed. 1974).
3. See, e.g., cases cited in 9 ALR3d 955 (1966) and 30 ALR3d 858 (1970).
4. Wolfe & Hellman, Handling Surviving Spouse's Share of Marital Property, California Will Drafting Practice § 5.31 (Cal. Cont. Ed. Bar 1982).
5. Kahn & Gallo, The Widow's Election: A Return to Fundamentals, 24 Stan. L. Rev. 531, 542-544 (1972).
6. The text of the proposed law is adapted from the July/August 1982 draft of the Uniform Antenuptial Agreement Act.

or that the surviving spouse was not represented by independent counsel. In cases where there has not been full disclosure or counsel, the waiver should nonetheless be enforceable (except as to any provision the court finds is unconscionable) if it can be shown that (1) the surviving spouse understood the effect of the waiver and voluntarily executed it and (2) either the surviving spouse had an adequate knowledge of the property of the decedent or the waiver made a fair disposition of the property. These rules are generally consistent with the strict construction of existing law, but will provide express statutory standards for the guidance of the parties and the courts.

### Contracts Relating to Wills

A promise to make a will, or not to revoke a will already made, comes within the Statute of Frauds.<sup>1</sup> Such a promise must therefore as a general rule be in writing and is unenforceable if oral.<sup>2</sup> However, the courts have developed a number of doctrines to permit enforcement of an oral promise to make or not to revoke a will in order to avoid the harshness that would be caused by a strict application of the Statute of Frauds.<sup>3</sup>

1. See *Zaring v. Brown*, 41 Cal. App.2d 227, 231, 106 P.2d 224 (1940). The California Statute of Frauds (Civil Code § 1624) provides in pertinent part as follows:

1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

. . . .  
(6) An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will.

2. *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198 (1935); 1 B. Witkin, Summary of California Law Contracts § 223, at 197 (8th ed. 1973); 7 B. Witkin, Summary of California Law Wills and Probate § 94, at 5611 (8th ed. 1974).

3. (1) An oral agreement concerning a will that is unenforceable when made may become enforceable if a written note or memorandum is later made--the later writing is said to "relate back" to the earlier oral agreement. See *Potter v. Bland*, 136 Cal. App.2d 125, 131, 288 P.2d 569 (1955). See generally 1 B. Witkin, Summary of California Law Contracts § 205, at 186 (8th ed. 1973).

(2) Oral testimony is admissible in a court proceeding concerning points on which a written agreement is silent, so long as the testimony does not contradict the writing. *Potter v. Bland*, 136 Cal. App.2d 125, 132, 288 P.2d 569 (1955).

The difficulty with permitting enforcement of an oral agreement to make or not to revoke a will is that the alleged promisor is deceased and is therefore unable to testify. There is an opportunity for the fabrication of testimony concerning the existence of such an agreement.<sup>4</sup> Sound policy requires some form of written evidence that such an agreement actually exists.

Under the Uniform Probate Code, for example, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate,<sup>5</sup> can be established only by (1) provisions of a will stating material provisions of the contract, (2) an express reference in the will to the contract and extrinsic evidence proving the terms of the contract, or

---

(3) In an extreme case where the decedent has made an oral promise to make or not to revoke a will and has induced another to change position in reliance on the oral promise, the courts will find an estoppel and will enforce the oral promise. See, e.g., Walker v. Calloway, 99 Cal. App.2d 675, 222 P.2d 455 (1950).

In the context of mutual wills, the court has held that if two people execute mutual wills and orally agree not to revoke them, one of them dies, the survivor accepts the benefits under the decedent's will, and then the survivor revokes his or her own will, a constructive fraud sufficient to raise an estoppel has been practiced, and equity will repose a constructive trust on the property. Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198 (1935); see Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954); Potter v. Bland, 136 Cal. App.2d 125, 132-33, 288 P.2d 569 (1955).

(4) In some cases, the courts have enforced an oral promise to leave property to another by finding an oral express trust. See Maddox v. Rainoldi, 163 Cal. App.2d 384, 329 P.2d 599 (1958).

(5) If the court cannot find a sufficient basis to award to the plaintiff the property in the decedent's estate which was promised to be left by will under one of the foregoing theories, the court may nonetheless award the plaintiff the reasonable value of services rendered to the decedent. Drvol v. Bant, 183 Cal. App.2d 351, 356-57, 7 Cal. Rptr. 1 (1960). See generally 1 B. Witkin, Summary of California Law Contracts § 49, at 60, § 223, at 198, § 259, at 225 (8th ed. 1973).

4. To some extent, this danger is ameliorated by the rule in California that there must be clear and convincing evidence to prove an oral agreement to make or not to revoke a will. See Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198 (1935); Lynch v. Lichtenthaler, 85 Cal. App.2d 437, 441, 193 P.2d 77 (1948).

5. There are no California cases concerning an agreement to die intestate. See generally, 79 Am. Jur.2d Wills § 63 (1975).

(3) a writing signed by the decedent evidencing the contract.<sup>6</sup> Under this provision all of the terms of the contract need not be in writing; it is sufficient that there is some written evidence that the contract exists. The evidence may be as minimal as an "express reference" in the will to the contract, the terms of which are entirely oral. This allows adequate room for the courts to develop reasonable interpretations of the writing requirement and thereby avoid harsh results.<sup>7</sup>

The proposed law adopts the Uniform Probate Code provision governing contracts concerning a will in place of the applicable portion of the Statute of Frauds. This will provide a clearer, more detailed statutory statement than the present Statute of Frauds and will limit the opportunity for fraud by proof of an oral agreement.

#### Pay-on-Death Provisions in Contracts and Instruments

The proposed law includes a statutory provision taken from the Uniform Probate Code that authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments, and deems such provisions to be nontestamentary.<sup>1</sup> In particular, the statute validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after death "to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently." This validates contractual arrangements that might be held testamentary and invalid under existing law because not made in a valid will.<sup>2</sup>

6. Uniform Probate Code § 2-701. Under this provision the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. This is consistent with California decisional law. See *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); *Lich v. Carlin*, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).
7. L. Averill, *Uniform Probate Code in a Nutshell* § 11.01, at 115 (1978).
1. Uniform Probate Code § 6-201.
2. This provision would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee. *Bergman v. Ombaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939). It would also codify the rule that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner. *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). See generally 7 B. Witkin, *Summary*

The sole purpose of the statute is to eliminate the testamentary characterization of arrangements falling within its terms.<sup>3</sup> The statute avoids the need to execute the contract in compliance with the requirements for a will and avoids the need to have the instrument probated. There appears to be no sound reason for holding these types of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes. Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.<sup>4</sup>

---

of California Law Wills and Probate §§ 87-89, at 5607-09 (8th ed. 1974). It may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person. Although the issue has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code § 6-201.

3. Nothing in the provision limits the rights of creditors under other laws of the state.
4. Comment to Uniform Probate Code § 6-201.

CHAPTER 3. CONTRACTUAL ARRANGEMENTS RELATING TO  
RIGHTS AT DEATH

Article 1. Surviving Spouse's Waiver of Rights

§ 111.010. "Waiver agreement"

111.010. As used in this article, "waiver agreement" means an agreement between the decedent and the surviving spouse to waive any of the rights listed in subdivision (a) of Section 111.020, whether executed before or during marriage.

Comment. Section 111.010 is new; it is adopted for drafting convenience.

39388

§ 111.020. Rights of surviving spouse that may be waived

111.020. (a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver agreement:

- (1) Property that would pass from the decedent by intestate succession.
- (2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.
- (3) A probate homestead.
- (4) The right to have exempt property set aside.
- (5) Family allowance.
- (6) Family maintenance.
- (7) The right to have an estate set aside under Article 2 (commencing with Section 640) of Chapter 10 of Division 3.
- (8) The right to elect to take community or quasi-community property against the decedent's will.
- (9) The right to take the statutory share of an omitted spouse.
- (10) The right to be appointed as the executor or administrator of the decedent's estate.

(b) Nothing in this article affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including but not limited to property that would pass to the decedent by non-probate transfer, such as joint tenancy or beneficiary of a pay-on-death designation.

Comment. Section 111.020 is new and is drawn in part from the first sentence of Section 2-204 of the Uniform Probate Code. Paragraphs (1) and (2) permit waiver of property, interests, or benefits that would pass to the spouse making the waiver by intestate succession or by virtue of a will of the other spouse executed before the waiver. Paragraphs (3), (4), and (5) are the same in substance as provisions found in UPC Section 2-204 and are consistent with prior California case law. See, e.g., Estate of Howe, 81 Cal. App.2d 95, 183 P.2d 329 (1947) (probate homestead); In re Estate of Fulton, 15 Cal. App.2d 202, 59 P.2d 508 (1936) (exempt property); Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724 (1946) (family allowance). Paragraph (6) is new; prior law did not have provisions for family maintenance. Paragraph (7) is new and is consistent with prior California case law. See Soares v. Steidtmann, 130 Cal. App.2d 401, 278 P.2d 953 (1955). Paragraph (8) is comparable to the provision in UPC Section 2-204 for waiver of the UPC's elective share, and is consistent with prior California case law. See 7 B. Witkin, Summary of California Law Wills and Probate § 20, at 5541 (8th ed. 1974). Paragraph (9) is included to make clear that omission of a spouse from a will pursuant to a waiver agreement does not operate to activate the pretermitted spouse provisions of Section 254.010. Paragraph (10) is new and is consistent with Section 406 (renunciation by executor).

69410

§ 111.030. Waiver must be in writing

111.030. A waiver agreement shall be reduced to a writing stating the terms of the waiver and shall be signed by each spouse or prospective spouse.

Comment. Section 111.030 makes clear that a waiver agreement under this article must be reduced to writing and be signed by both parties to the agreement.

406/213

§ 111.040. Amendment; revocation

111.040. (a) Except as provided in subsection (b), a waiver agreement may not be altered, amended, or revoked except by a subsequent written agreement signed by both of the parties to the waiver agreement.

(b) A party may, by a signed writing, alter, amend, or revoke any or all terms or conditions of a waiver agreement otherwise beneficially enforceable by that party or may assume new duties or obligations pursuant to the agreement.

Comment. Section 111.040 makes clear that the waiver agreement may not be modified or revoked by an oral agreement.

§ 111.050. Waiver agreement enforceable as of right

111.050. A waiver agreement that complies with Section 111.030 is enforceable unless the court determines any of the following:

(a) A fair and reasonable disclosure of the property of the decedent was not provided to the surviving spouse before the execution of the waiver agreement.

(b) The surviving spouse was not represented by independent counsel at the time of execution of the waiver agreement.

Comment. Section 111.050 establishes the basic standards of enforceability for a waiver agreement. A waiver agreement is enforceable unless the surviving spouse shows that he or she was not provided a fair and reasonable disclosure of property or was not represented by independent counsel at the time of execution. By satisfying the conditions of disclosure and independent counsel, the parties can have certainty that their affairs will be governed in an agreed upon manner. If these conditions are not satisfied (for example, counsel may not have been sought at all or each party may not have been separately represented), a waiver agreement may still be enforceable under Section 111.060.

69415

§ 111.060. Waiver agreement enforceable in discretion of court

111.060. (a) Except as provided in subdivision (b), a waiver agreement that complies with Section 111.030 but is not enforceable under Section 111.050 is enforceable if the court determines any of the following:

(1) The waiver agreement at the time of execution made a fair and reasonable disposition of the rights of the surviving spouse and the surviving spouse understood the effect of and voluntarily executed the waiver agreement.

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property of the decedent and understood the effect of and voluntarily executed the waiver agreement.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver agreement pursuant to subdivision (a) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

Comment. Under subdivision (a) of Section 111.060 an agreement that is not enforceable pursuant to Section 110.050 may be enforceable if it is shown that the agreement at the time of execution made a fair and reasonable disposition of the rights of the surviving spouse or the surviving spouse had, or reasonably should have had, an adequate knowledge of the property of the other party. However, in both cases, it must also be shown that the surviving spouse understood the effect of and voluntarily executed the waiver agreement.

Subdivision (b) provides an "escape valve" from the liberal standards of enforceability provided by subdivision (a) and permits the court to refuse to enforce all, or a portion, of the waiver agreement if it finds that enforcement would be "unconscionable" under the existing facts and circumstances. Satisfaction of the standards of enforceability provided by subdivision (a) should insure in the vast majority of cases that the agreement was fairly made and properly enforceable. However, in the exceptional case, circumstances may have changed in a way that neither party may have contemplated and enforcement of the agreement in its entirety would now be unconscionable. In short, subdivision (b) provides a measure of flexibility. It should be emphasized, however, that this subdivision is not intended to apply in any but the extraordinary case and never applies where the conditions required by Section 111.050 are met.

39383

§ 111.070. Effect of waiver of all rights or complete property settlement

111.070. Unless the waiver agreement or property settlement provides to the contrary, a waiver agreement of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or dissolution or annulment of marriage, is a waiver by the spouse of the rights described in subdivision (a) of Section 111.020 and Section 204.050 does not apply.

Comment. Section 111.070 supersedes former Section 80 and is drawn from the second sentence of Section 2-204 of the Uniform Probate Code.

999/556

§ 111.080. Validity of agreements under prior law not affected

111.080. Nothing in this article affects the validity or effect of any agreement or property settlement made prior to June 30, 1984, and the validity and effect of such an agreement or property settlement shall be determined by the law applicable to the agreement or settlement on June 30, 1984.

Comment. Section 111.080 makes clear that the provisions of this article have no effect on waiver agreements or property settlements made prior to the operative date of this article. See also Section 111.020(b) (nothing in article affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a) of Section 111.020).

26762

Article 2. Contracts Concerning Will  
or Succession

§ 111.110. Contracts concerning will or succession

111.110. (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after June 30, 1984, can be established only by one of the following:

- (1) Provisions of a will stating material provisions of the contract.
  - (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
  - (3) A writing signed by the decedent evidencing the contract.
- (b) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Comment. Section 111.110 is the same in substance as Section 2-701 of the Uniform Probate Code and supersedes the last portion of subdivision (6) of Section 1624 of the Civil Code (Statute of Frauds). Subdivision (b) is consistent with prior case law. See Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); Lich v. Carlin, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

405/863

Article 3. Provisions in Written Instruments

§ 111.210. Dispositive provisions in written instruments

111.210. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument or any of the following provisions:

- (1) That money or other benefits theretofore due to, controlled by, or owned by a decedent shall be paid after the decedent's death to a person designated by the decedent in either the instrument or a separate

writing, including a will, executed at the same time as the instrument or subsequently.

(2) That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under any other law.

Comment. Section 111.210 is the same in substance as Section 6-201 of the Uniform Probate Code. The UPC language that the provisions referred to in this section are "deemed to be nontestamentary" has been replaced by the language making them "not invalid because the instrument does not comply with the requirements for execution of a will." This change is nonsubstantive.

Subdivision (a) makes clear what kinds of transfers on death are valid and is consistent with prior California decisions and statutes applicable to particular kinds of transfers. For example, a contract was upheld that provided that the manager of a business was to receive the business if the manager survived the owner, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). The payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, e.g., Gov't Code §§ 21332-21335 (public employees' death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations); Prob. Code § 206.510 (designation of trustee as payee of life insurance).

Paragraph (2) of subdivision (a) codifies prior case law. See *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939) (unpaid installments under promissory note cancelled on death of promisee). See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 87-89, at 5607-09 (8th ed. 1974).