

## Third Supplement to Memorandum 83-22

Subject: Study L-605 - Probate Law (Assembly Bill No. 25)

Valerie Merritt (Exhibit 2 to Second Supplement to Memorandum 83-22) raises a concern that UPC language in Sections 6140 and 6141 of the proposed legislation might preclude the court from considering the circumstances surrounding execution of the will as an aid to determining the testator's intent. This concern stems from the following under-scored language of proposed Sections 6140 and 6141:

6140. The intention of a testator as expressed in his or her will controls the legal effect of the dispositions in the will.

6141. The rules of construction in this chapter apply unless a contrary intention is indicated by the will.

However, this language in the statutes of other UPC states has not precluded the courts in those states from applying the traditional rule that surrounding circumstances may be considered in construing the testator's will. As a policy matter, this traditional rule should be preserved in California. Out of an abundance of caution, the staff suggests that the following section be added to AB 25 to make this clear:

§ 6141.5. Extrinsic evidence not precluded

6141.5. Nothing in Section 6140 or 6141 precludes the court from considering:

- (a) The circumstances surrounding execution of the will to determine the meaning of the will.
- (b) Extrinsic evidence of the testator's intent when the will is ambiguous.

Comment. Section 6141.5 makes clear that the court may consider the circumstances surrounding execution of the will to aid in determining its meaning, and may consider other extrinsic evidence when the will is ambiguous. This is consistent with prior California law. See Estate of Webb, 76 Cal. App.3d 169, 142 Cal. Rptr. 642 (1977); 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-161, at 5676-78 (8th ed. 1974). This is also consistent with cases in other states which have enacted the Uniform Probate Code provisions comparable to Sections 6140 and 6141 (UPC § 2-603). See In re Estate of Blacksill, 124 Ariz. 130, 602 P.2d 511 (1979); In re Estate of Smith, 119 Ariz. 293, 580 P.2d 754 (1978); In re Estate of Rice, 406 So.2d 469 (Fla. App. 1981); In re Estate of Leshner, 365 So.2d 815 (Fla. App. 1979); State v. Keller, 173

Mont. 523, 568 P.2d 166 (1977); In re Estate of Shadden, 93 N.M. 274, 599 P.2d 1071 (1979).

In an appropriate case, extrinsic evidence of the testator's intent may include oral declarations of the testator. See In re Estate of Dominici, 151 Cal. 181, 185-86, 90 P. 488 (1907) (testator's oral instructions to attorney); 7 B. Witkin, supra § 161, at 5676-78.

Respectfully submitted,

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