#L-650 9/13/83

Second Supplement to Memorandum 83-54

Subject: Study L-650 - Execution of Witnessed Will

We have received additional comments from interested persons on the Tentative Recommendation Relating to Execution of Witnessed Wills.

Professor Niles comments:

> 2. I am strongly in favor of simplifying the requirements for the execution of wills (Memo 83-54), especially with respect to the requirement that both witnesses be present at the same time. I am neutral about the notary public suggestion.

Lawrence R. Tapper, Deputy Attorney General, comments:

> It is proposed that the current rule requiring two witnesses both be present when the testator either signs or acknowledges his signature to his will, is overly restrictive and has been known to result in the technical failure of documents otherwise beyond suspicion. Unfortunately, there are only a handful of cases cited, and not one is from California. In at least one of the cases (Estate of Jefferson) the attorneys' malpractice insurance undoubtedly kicked in to provide fulfillment of the testator's intent. Thus, the question is whether a case has been made for eliminating the simultaneous presence of two witnesses or reducing the number to one in the case of a notary public acknowledging the will. I do not believe it has. The material distributed acknowledges at least one downside risk that before the testator can find a second witness to acknowledge the will, he or she may die. There would seem to be at least two additional risks: (1) with only one witness or perhaps two who were not present at the time the will was signed, the likelihood of a contest would seem greater, and (2) there is a substantial danger that a testator who has signed his will will either forget to obtain the necessary signatures from witnesses or procrastinate to the point where the witnesses will no longer be able to speak to testamentary capacity or lack of fraud or duress at the time of the signing. Of course, if the proposed provisions can be shown to have worked well in other states for a long time (considering the ambulatory nature of a will until one dies), and these problems have not materialized, then I will be more comfortable considering them for California. On the other hand, once they have been adopted and relied upon it will be extremely difficult to reverse the process and return to a restrictive rule. As far as our personal experience is concerned, there was one case in which this office was involved where the existence of a second witness who recalled crucial bedside statements resulted in our successful prosecution of a contest in which charity benefited by a quarter of a million dollars. This is an important piece of legislation which I would be happy to discuss further with you if you wish.

The staff is not persuaded that the risks that Mr. Tapper sees in the elimination of the present-at-the-same-time requirement are significant enough to justify denying probate to a will that clearly is valid except that the witnesses did not sign in the presence of each other.

Respectfully submitted,

John H. DeMoully
Executive Secretary