#L-650 10/31/83

Third Supplement to Memorandum 83-100

Subject: Study L-650 - Probate Law and Procedure (Execution of Witnessed Wills)

Attached is a letter from our consultant, Professor Jesse Dukeminier. He makes a strong case for elimination of the requirement that both witnesses be present at the same time when the testator signs or acknowledges his or her will.

It has become apparent that the reason why we cannot find cases involving the requirement that the witnesses be present at the same time is that the states having significant populations do not have the requirement. We cite English cases in our recommendation, but England eliminated the present-at-the-same-time requirement after those cases were decided.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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October 26, 1983

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Re: Study L-650 (Execution of Witnessed Will)

In regard to the issue of whether the witnesses to a will need be present at the same time, I have a few more things to say.

First, the requirement that the witnesses be present at the same time when the testator signs or acknowledges the will comes directly from the English Wills Act of 1837 (see Estate of Emart, 175 Cal. 238, 165 P. 707 (1917), for history of Probate Code § 50). The requirement was eliminated by the English Administration of Justice Act 1982, Pt. IV, after it proved to bar the probate of meritorious wills.

This requirement has also been eliminated in a number of states that formerly had it. In 1983 only Florida, Indiana, Iowa, Kentucky, Louisiana, New Hampshire, New Mexico, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin require both witnesses to be present at the same time. The other three-quarters of the states do not. Note that presence of the witnesses at the same time is not a requirement in the most populous, urban states, like New York, Massachusetts, Illinois, and Texas, which have the most litigation regarding wills. The absence of the requirement has not led to any problems in these states of which I am aware.

Second, the only plausible argument in favor of requiring the witnesses to be present at the same time is that the witnesses should be able to testify to the testator's mental capacity at one point in time--when the will is executed. I do not agree with your staff's position that the relevant time for determining mental capacity is when the testator signs, not when the witnessess sign. I think the relevant time is execution of the will, and a will is not executed until all the formalities are performed. Accord: T. Atkinson, Wills 241 (2d ed. 1953). Suppose, for example, that testator typed and signed a will while perfectly rational and then, a year later, when non compos mentis, pulled the will out of his desk drawer and acknowledged his signature to two witnesses, who then

signed. I do not believe the will could be probated because at the time of the acknowledgment testator did not know what he was doing. Therefore I concede that, if witnesses can attest separately, there may arise a problem about what is the relevant time for determining mental capacity.

Although I concede that a problem may arise, this problem is almost entirely a fanciful one. It apparently has never arisen in the three-quarters of the states that do not require simultaneous witnessing. Atkinson on Wills and Page on Wills, the two leading treatises, do not cite any case in which the issue is whether the time for determining mental capacity is the time of the first witnessing or the time of the second witnessing or whether the testator must have capacity at both times. They do not even discuss the issue. What is the reason why this is a non-issue in other jurisdictions that permit separate witnessing?

I suggest it is not an issue because only the most extraordinary confluence of facts can raise it. It can only be an issue if:

(1) the witnessing occurs separately (and separate witnessing occurs in only a small number of cases);

(2) the testator's mental capacity or duress or undue influence is in issue (and only a small percentage of cases involve these issues); and

(3) the testator allegedly was mentally incapacitated at the time of one witnessing and not at the time of the other. If the testator was mentally incapacitated at both times, the issue of which time is controlling does not arise. It is highly unlikely that a person who is mentally incapacitated at the time of the first witnessing will recover capacity for the second. On the other hand, a person with mental capacity on the first witnessing will likely have it on the second witnessing, which usually occurs within a few days. Mental incapacity usually does not occur suddenly, but develops over a period of time as the mind deteriorates. It is unlikely that capacity will be lost in the usually short time between the two witnessings. The fact that it would take a truly extraordinary confluence of facts to raise the issue appears to be the best explanation of why this issue has never arisen or, at least, has never been reported or discussed in the treatises.

If the issue were to arise I would predict very confidently that a court would hold that the testator must have mental capacity both at the time of signing before one witness and at the time of acknowledging before the other. Both these events are necessary to the due execution of a will, and policy requires that the testator have mental capacity at the time of each event before each witness. Can anyone believe that a court would order probate of a will if the testator were sane before one witness and insane before the other?

The Commission could add a proviso tailored to this particular issue, providing that if the will is witnessed separately the requirements of mental capacity and freedom from undue influence and duress must be met at

both times of signing before one witness and later acknowledging before another. This appears to be an acceptable compromise with the Bar since it deals only with the issue the Bar has raised while permitting probate of meritorious wills. I myself, however, think it just clutters up the statutes to add a proviso to cover a rare hypothetical situation that has never arisen elsewhere. I think the courts will deal responsibly with the matter if it does arise, and I think it is quite predictable what they will do. I really believe that the Commission is chasing a red herring.

The Commission should vote for the elimination of this trap in the wills execution procedure which will only ensnare a layperson, never a lawyer, and which does not serve in any way to prevent fraud. The people of California should not have a useless and dangerous technicality interfering with their right to make a will without seeing a lawyer. It is unfair to bar probate of a will which satisfies the ritual and evidentiary policies underlying the Statute of Wills because of a fanciful issue that has never arisen elsewhere and, if it does arise, will be handled in a predictable fashion by the courts.

Sincerely,

Jesse Dukeminier

Jesse Dukeminier
Professor of Law

JD/1105/bd
cc/Prof. Russell Niles