

Memorandum 84-47

Subject: Study L-650 - Witnessed Wills

Assembly Bill 2294 was introduced to effectuate the Commission's Recommendation Relating to Execution of Witnessed Wills. The bill would substitute the requirement that the witnesses sign the will not later than 30 days after execution by the testator for the existing requirement that the witnesses be "present at the same time" to observe the testator sign the will or acknowledge it. A copy of the recommendation is attached. As the recommendation notes, California is among a minority of the states that require the testator to sign or acknowledge the will in the presence of both witnesses "present at the same time." There is a strong trend in recent years to eliminate the present-at-the-same-time requirement.

Assembly Bill 2294 has passed the Assembly with amendments. A copy of the bill is attached. Assembly Member McAlister is strongly in favor of the principle of Assembly Bill 2294 as are other legislators. There are, however, some legislators who do not want to change the requirements for execution of a will even though they recognize the need to avoid a will being held invalid because of failure to comply with the "present at the same time" requirement. They especially do not like the most recent Assembly amendments to the bill. They would prefer to retain unchanged the statement of the requirements for execution of a will but would add an escape provision to permit a court to find that the will was valid even though the present-at-the-same-time requirement was not satisfied. We believe that Assembly Member McAlister and the others who are strongly in support of Assembly Bill 2294 would have no great problem if the bill were amended to adopt this scheme.

The staff suggests that Section 6110 be continued unchanged by Assembly Bill 2294. This section reads:

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

(c) The will shall be witnessed by being signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will.

We propose to amend Assembly Bill 2294 so that the only thing the bill would do would be to add a new Section 6110.5 to the Probate Code, to read:

6110.5 Notwithstanding Section 6110, if the witnesses to a will are not present at the same time to witness either the signing of the will or the testator's acknowledgment of the signature or of the will, the will is not invalid for that reason if the proponent of the will establishes that the testator was of sound mind and free from duress, menace, fraud, and undue influence at the time each witness witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will.

If the approach suggested above is adopted, there will be no change in the requirements for the execution of a will. Those requirements will continue to apply to the execution of a will, and the procedure for executing a will would remain unchanged by Assembly Bill 2294. However, in those rare cases where the present-at-the-same-time requirement is not satisfied, the new section would allow the court to uphold the validity of the will where it is clear that the will is otherwise valid. Accordingly, the revised scheme will deal with the problem identified without changing the basic requirements for execution of a will.

If the Commission agrees with the staff suggested approach outlined above, we will ask Assembly Member McAlister to amend the bill accordingly before it is set for hearing in the Senate. We believe he will be willing to make this amendment if it is recommended by the Commission.

Respectfully submitted,

John H. DeMouilly
Executive Secretary