

Memorandum 84-75

Subject: Study L-653 - Probate Law and Procedure (Notice of Will)

The Commission's bill (AB 2272) to authorize a voluntary filing with the California Secretary of State of a notice of the existence and location of the testator's will passed the Assembly by a vote of 70 to zero, but died in committee in the Senate. The State Bar Estate Planning, Probate and Trust Law Section opposed the bill on the grounds that it might delay probate and that the costs of the system outweighed its benefits. The bill was supported by the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association and by the Legislative Committee of the American Association of Retired Persons.

The staff thinks we should try again with this proposal in 1985. A staff draft of a Recommendation Relating to Notice of Will is attached to this memorandum. The proposed legislation is in the same form as the last amended version of AB 2272--the bill was amended to make the filing of the certificate of the Secretary of State in a court proceeding voluntary rather than mandatory. The original mandatory filing was a principal source of the State Bar's concern.

Does the Commission want to submit this Recommendation to the 1985 Legislature?

Respectfully submitted,

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Staff Draft**RECOMMENDATION***relating to***NOTICE OF WILL**

After a person dies it is necessary to determine whether the person made a will and, if so, where it is located.¹ Even if the existence and location of a will are known, it is still necessary to search for codicils and any later wills. To assist in this process, the Law Revision Commission recommends establishment of a voluntary registration system whereby notice of a will may be filed with the Secretary of State.² Under this scheme, for a small fee a person may choose to file identifying information and the location of a will, but not the will itself. The information in the notice is kept in strict confidence until the death of the testator. After the death of the testator, a certified copy of the notice on file or a certificate reporting that no notice is on file may be obtained from the Secretary of State and then filed in any proceeding in which the existence of a will made by the testator is relevant. The proposed scheme also permits the testator to file additional notices to change any relevant information or to give notice that a will has been revoked. Neither the failure to file nor the filing of any notice has any effect on the validity of a will or of any court proceeding.

The Commission anticipates that this notice of will registry, involving a relatively modest cost,³ will result in finding wills that otherwise might not be found. This view is supported by British Columbia's experience with a similar system for registration of will notices in place since

¹ See Farrand, *Immediate Arrangements*, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

² A registry system is not unknown to California since the Uniform International Wills Act (Prob. Code §§ 60-60.8, to be superseded by Prob. Code §§ 6380-6388, operative January 1, 1985) permits filing of information with the Secretary of State concerning an international will. Use of an international will is intended to facilitate proving the validity of a will in countries that are signatories to the international convention. The registry established by the Uniform International Wills Act applies only to wills that are executed in conformity with the Act.

³ The fee for filing the notice of will or for requesting a certificate is \$10.

1945.⁴ In 1971, there were 19,250 notices of wills filed in British Columbia.⁵ By 1983, this figure had increased to 57,819 filings.⁶ In 1971, about 20% of the responses to requests for searches were positive.⁷ By 1983, the positive responses had increased to about 40% of the requests for searches.⁸ These figures indicate the growing popularity in British Columbia of their notice of will system, and the increasing efficacy of the system in yielding positive results.

The Commission also considered as an alternative to the notice of will system of British Columbia the provision enacted in many states for deposit of the will itself with a probate court during the testator's lifetime.⁹ In the Commission's view, a system like the British Columbia system for filing a notice of will is preferable to depositing the will itself with a probate court. It is better to have a central filing system because the testator may not die in the county where the will is deposited.¹⁰ Moreover, the costs of handling and storage should be substantially less for the filing of a notice of will rather than for deposit of the will itself.

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4. Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981). See also Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).
 5. Id.
 6. Letter from Division of Vital Statistics of the British Columbia Ministry of Health to the California Law Revision Commission (February 14, 1984).
 7. Law Reform Comm'n of British Columbia, supra note 4.
 8. Letter, supra note 6.
 9. At least ten states have enacted such a provision. Alaska Stat. § 13.11.315 (1983); Ariz. Rev. Stat. Ann. § 14-2901 (1975); Me. Rev. Stat. Ann. tit. 18A, § 2-901 (1981); Mich. Stat. Ann. § 27.5142 (1980); Minn. Stat. Ann. § 525.22 (West 1975); Mont. Code Ann. § 72-2-402 (1983); Neb. Rev. Stat. § 30-2355 (1979); N.M. Stat. Ann. § 45-2-901 (1978); N.D. Cent. Code § 30.1-11-01 (1976); Utah Code Ann. § 75-2-901 (1978). Such a provision is also found in the Uniform Probate Code. Uniform Probate Code § 2-901.
 10. See Official Comment to Uniform Probate Code § 2-901.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 10 (commencing with Section 6360) to Part 1 of Division 6 of the Probate Code, relating to wills.

The people of the State of California do enact as follows:

SECTION 1. Chapter 10 (commencing with Section 6360) is added to Part 1 of Division 6 of the Probate Code, to read:

CHAPTER 10. FILING NOTICE OF WILL

6360. (a) A person who has made a will may file a notice of will in the office of the Secretary of State.

(b) The notice of will shall contain the following information:

- (1) The name of the testator.
- (2) The testator's address.
- (3) The testator's social security or other individual-identifying number established by law, if any.
- (4) The testator's date and place of birth.
- (5) A statement that the testator has made a will and the date of the will.

(6) The place where the will is kept.

(c) The notice may include any of the following:

- (1) The name and address of the testator's attorney.
- (2) The name and address of a person who has custody of the will or custody of a copy of the will.

(d) If the testator's name is changed or if the place where the will is kept is changed, the testator may file a new notice of will containing the correct information. The new notice of will may also refer to the earlier notice of will.

(e) The filing of a notice of will, or the failure to file a notice of will, under this section does not affect the validity of the will.

Comment. Section 6360 provides a new voluntary procedure for filing a notice and location of a will. Section 6360 does not require the filing of the will itself. The procedure provided by this chapter is distinct from that provided under the International Wills Act. See Section 6389 (registry system for international wills information).

6361. (a) A person who has filed a notice of will pursuant to Section 6360 and who has revoked the will referred to in the notice may file in the office of the Secretary of State a notice of revocation of will.

(b) The notice of revocation of will shall contain the following information:

(1) The name of the person who is revoking the will.

(2) The person's address.

(3) The person's social security or other individual-identifying number established by law, if any.

(4) The person's date and place of birth.

(5) A statement that the will referred to in a notice of will filed by the person pursuant to Section 6360 has been revoked.

(c) The filing of a notice of revocation under this section does not itself revoke the will. The failure to file a notice of revocation under this section does not affect the validity of a revocation of a will. No inference that a will has not been revoked may be drawn from the failure to file a notice of revocation.

Comment. Section 6361 is new. This section is intended to provide information as to the revocation of a will. Subdivision (c) makes clear that the filing or nonfiling of a notice of revocation has no effect on the revocation or validity of a will.

6362. Upon presentation of a notice of will or notice of revocation of will for filing and tender of the filing fee to the office of the Secretary of State, the notice shall be filed and indexed. The fee for filing and indexing a notice of will or notice of revocation of will is ten dollars (\$10).

Comment. Section 6362 is new.

6363. (a) Information filed pursuant to this chapter shall be kept in strictest confidence until the death of the testator.

(b) After the death of the testator, upon the request of a person who presents a death certificate or other satisfactory evidence of the testator's death, the Secretary of State shall issue a certified copy of any information on file about the testator's will. If no information on the testator's will is on file, the Secretary of State shall issue a certificate stating that fact. The fee for a certified copy or a certificate under this section is ten dollars (\$10).

Comment. Subdivision (a) of Section 6363 is similar to a portion of Section 6389 in the International Wills Act. Subdivision (b) is drawn in part from Section 6389 of the International Wills Act.

6364. A certified copy or a certificate of the Secretary of State issued pursuant to Section 6363 may be filed with the court in any proceeding for the probate of a will or for administration or in any other proceeding in which the existence of a will is relevant. Failure to file the certified copy or certificate of the Secretary of State shall not affect the validity of the proceeding.

Comment. Section 6364 authorizes, but does not require, the filing of a certified copy or a certificate of the Secretary of State in any proceeding in which the existence of a will is relevant.

6365. The Secretary of State may prescribe the form of the notices, certificates, and requests for information under this chapter.

Comment. Section 6365 is similar to authority provided elsewhere. See, e.g., Code Civ. Proc. §§ 488.375, 488.405 (notice of attachment prescribed by Secretary of State).

6366. Ten years after the Secretary of State has received a request under this chapter for information accompanied by a death certificate or other satisfactory evidence of the testator's death, the Secretary of State may destroy the information filed pursuant to this chapter by the deceased testator and the record of that information.

Comment. Section 6366 permits destruction of obsolete records. The Secretary of State is permitted, but not required, to destroy the records.

6367. (a) The Secretary of State may microfilm or reproduce by other techniques any notice filed under this chapter and may destroy the original. The microfilming or other reproduction shall be made in the manner and on film or paper that complies with the minimum standards of quality approved by the National Bureau of Standards.

(b) The microfilm or other reproduction of a notice under this chapter shall be deemed to be an original record.

Comment. Section 6367 is new and is drawn from other comparable provisions. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007.

6368. An attorney is not subject to liability or professional disciplinary action based on failure of the attorney to advise a client to file or not to file any notice that may be filed under this chapter, whether or not the client previously has filed a notice under this chapter.

Comment. Section 6368 is included to ensure that the filing of notices under this chapter is voluntary and that notices will not be filed merely because the attorney for the person making the will fears that the attorney may be liable for failure to advise the client, for example, to file a notice of will, to file a new notice of will to correct information contained in a previously filed notice, or to file a notice of revocation where a notice of will was previously filed. See Sections 6360 and 6361 and the Comments to those sections.