Second Supplement to Memorandum 90-123

Subject: Study L-3049 - California Statutory Will

Attached is a letter from Harold I. Boucher, Pillsbury, Madison & Sutro, commenting on the First Supplement to Memorandum 90-123. His comments are discussed in this supplement.

In considering this supplement, you should have before you the staff recommended redraft of the statutory will form that is set out in Exhibit 1 of Memorandum 90-123 (first set of yellow pages).

## GENERAL COMMENT

Mr. Boucher comments generally:

> Your draft of a proposed revision of the California Statutory Will is a marked improvement over both the present form and the Bar Committee's draft, and in my opinion your reasons for departing from several provisions in the Bar's draft are sound and convincing.

## SPECIFIC COMMENTS ON STAFF DRAFT

### ELIMINATION OF WILL WITH TRUST

The staff draft follows the lead of the State Bar Committee and provides only one California Statutory Will form. The California Statutory Will With Trust form is not continued. The reason is that having two different forms causes confusion to the persons who may wish to use a statutory will form.

Mr. Boucher comments:

> The elimination of the Will With Trust may meet with the approval of many lawyers, but I do not believe it fits the needs of single parents of modest means who have minor children, especially if the parent cannot afford the expense of creating a Living Trust, or uses the form as a stop gap until a Trust can be created. Although a Statutory Revocable Living Trust could eliminate Probate and Conservatorship for the single parent, there has not been any move yet by the Bar to draft a Statutory Revocable Living Trust form.

The staff believes that one form is adequate. The Executor is given specific authority to distribute estate property otherwise

distributable to a beneficiary under age 25 to a custodian under the California Uniform Transfers to Minors Act, in which case the time of transfer to the beneficiary of the custodial property so transferred is delayed until the time the beneficiary attains 25 years of age (with the Executor given discretion to provide in the transfer to the custodian that the time for transfer to the beneficiary shall be delayed only to an earlier time not earlier than the time the beneficiary attains the age of 18 years). This provision is, in the opinion of the staff, sufficient to deal with the immature beneficiary situation. The staff believes that the custodianship under the California Uniform Transfers to Minors Act is an adequate substitute for the trust created by the existing California Statutory Will with Trust.

There is, however, one revision that we suggest in the staff draft of the form to deal with this comment of Mr. Boucher. Clause 5 on page 4 of the staff draft form set out in the first set of yellow pages attached to Memorandum 90-123 provides for the designation of a "Guardian of the Property" with provision for designating "Second" and "Third" guardians if the prior designated guardian is unable or unwilling to serve. The staff believes that the draft statute should be revised to provide that the person so designated (if a designation is made) shall serve as custodian under the Uniform Transfers to Minors Act if the Executor makes a transfer under that act.

**NAMING ISSUE IN THE STATUTORY WILL**

The staff draft does not include the provision of the State Bar draft that provides for a listing of the testator's children. Boucher approves the omission of this provision, stating:

> Naming the testator's spouse in a will has been routine for a long time, but in recent years, it became fashionable for California lawyers to name issue. I see no reason to name them. For hundreds of years English testators never listed in wills the names of issue.

The staff view is that requiring identification of the testator's children will create more problems that it will solve.

**INCLUSION OF DESCENDANTS OF ISSUE**

The existing California Statutory Will form provides that only "surviving" children take personal and household items. The issue of a

deceased child takes none of this property. The State Bar draft and the staff draft permits the issue of deceased child to take. Boucher approves this revision, commenting:

> There should be no objection to the inclusion of the descendants of issue. Perhaps draftsmen of the New York form which California draftsmen followed, did not want to bother with the problem of distributing personal property to minors.

**DISTRIBUTION TO MINORS**

Boucher comments: "Your solution of the problem concerning distributions to minors is quite satisfactory. It should meet the desires of most who will use the form."

The staff solution is to provide nothing in the statutory form concerning the mechanics for distribution to minors, but to provide in the statute that the Executor may distribute property otherwise distributable to a beneficiary under age 25 to a custodian under the California Uniform Transfers to Minors Act to be held until the beneficiary reaches age 25. Presumably, Boucher is approving the staff revision set out in the middle of page 5 of the First Supplement to Memorandum 90-123.

**INFORMATION ABOUT STATUTORY WILL**

Boucher states: I approve of your placement of information about the Will and its execution."

**BAR'S DEFINITION OF TRUST**

Boucher comments" "The Bar's definition of a Trust must be corrected.

**TECHNICALLY DEFECTIVE WILLS**

The staff draft (which implements a State Bar recommendation) includes a provision permitting the court to admit a will to probate even though its execution was technically defective if certain requirements are satisfied. Boucher has no problem with this concept, but he would go further. He believes that statutory wills should be given equal treatment with holographic wills, "that is, look at testamentary intent and not dwell on 'defects.'" "Eliminating as best we can the chances of creating defects in execution would turn things around. The focus would be on testamentary intent, a look at the document's contents, and no on how it was executed."

Specifically, he strongly urges at pages 2-4 of his letter that the requirement of witnesses to a statutory will (and also all wills) be eliminated. He notes that witnesses are not required for a valid holographic will.

The staff does not recommend that the requirement of witnesses to a statutory will be eliminated. However, we urge you to read the discussion on this issue in Mr. Boucher's letter.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2nd Supp Memo 90 123

EXHIBIT 1

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November 20, 1990

John H. DeMoully, Esq.
California Law Revision Commission
4000 Middlefield Road. Suite D-2
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Dear Mr. DeMoully,

Enclosed is my response to your First Supplement to Memorandum 90-123.

Please keep me advised of the Commission's actions.

Sincerely,

Harold I. Boucher

Enc.
cc: Prof. Gerry W. Beyer
Irving Kellogg, Esq.
Francis J. Collin Jr. Esq.
William l. Hoisington, Esq.
Richard Stevens, Esq.

Dear Mr. DeMoully,

I thank you for a copy of the First Supplement to Memorandum 90-123.

Your draft of a proposed revision of the California Statutory Will is a marked improvement over both the present form and the Bar Committee's draft, and in my opinion your reasons for departing from several provisions in the Bar's draft are sound and convincing.

**Elimination of Will With Trust.** The elimination of the Will With Trust may meet with the approval of many lawyers, but I do believe it fits the needs of single parents of modest means who have minor children, especially if the parent cannot afford the expense of creating a Living Trust, or uses the form as a stop gap until a Trust can be created. Although a Statutory Revocable Living Trust could eliminate Probate and Conservatorship for the single parent, there has not been any move yet by the Bar to draft a Statutory Revocable Living Trust form.

**Naming Issue in the Statutory Will.** Naming the testator's spouse in a will has been routine for a long time, but in recent years, it became fashionable for California lawyers to name issue. I see no reason to name them. For hundreds of years English testators never listed in wills the names of issue.

**Inclusion of Descendants of Issue.** There should be no objection to the inclusion of the descendants of issue. Perhaps draftsmen of the New York form which California draftsmen followed, did not want to bother with the problem of distributing personal property to minors.

**Distribution to Minors.** Your solution of the problem concerning distributions to minors is quite satisfactory. It should meet the desires of most who will use the form.

**Information about Statutory Will.** I approve of your placement of information about the Will and its execution.

**Bar's Definition of Trust.** The Bar's definition of a Trust must be corrected.

**Proposed Changes.** You list on page 3 of the First Supplement to Memorandum 90-123 seven items - proposed changes.

Of the seven items, the one that needs serious study is **ATTESTATION.** The assertion that witnessing wills is an **anachronism** is probably true.

## THE ATTESTATION PROBLEM

### Attestion of Wills is Based Upon Centuries of a Precedent. Are Witnesses really necessary?

Unless the Statutory Will has an Attestation provision that is foolproof to execute, Probate Judges will continue to deny probate because of a "technical execution defect." Eliminating witnesses entirely from the Statutory Will would eliminate one chance of a maker creating a "technical defect."

A Holographic Will does not have to be witnessed. Why does one that is typewritten need witnesses? The Settlor of a Living Trust must sign it, but witnesses are not required. A Deed needs no witness.

I am satisfied that the reason for the custom of requiring witnesses to a Will, not holographic, is because we have been happily following a legal precedent that was established about four or five thousand years ago - the Assyrian and Egyptian precedent of having witnesses to legal documents. A precedent that apparently has never been questioned as to its necessity infsofar as wills are concerned.

Egyptologist Sir J. Gardner Wilkinson wrote:

*"In the mode of executing deeds, conveyances and other civil contracts, the Egyptians were peculiarly circumstantial and minute; and the great number of witnesses is a singular feature in those documents."*

He referred to the translation of the enchorial papyrus of Paris containing the original deed relating to the mummies. The deed was dated in the reign of Ptolemy and Cleopatra. Under the statement in the deed: "Names of the witnesses present," sixteen **men** are named.

Sir Henry Spelman, the English historian and antiquary, writing in the 17th Century, reports that the Saxon will of Birtrick and Elfsuith, his wife, made jointly according to the manner of the time, about the year 980, was witnessed by a dozen people.

He writes:

*"First it seemeth to be made in Calatis Comitiis, that is, in an Assembly called together for that purpose. Then whereas the Civil Law requireth necessarily seven Witnesses, here there were a dozen, lest it might be defective in that one was a* **Woman**, *and some other under age or Bond-men."*

About 2000 B.C. the Egytian, Uah, left a will written on papyrus. Following Egyptian precedence, it had three witnesses. And following

the Egyptian custom of describing witnesses to documents, each witness to Uah's will was described.

Their description, according to the translation by Egyptologist F.L.L. Griffith, was:

*"Decorator (or polisher?) of Columns," the second, "Doorkeeper of the temple, Ankhefti's son Apa," and the third, "Doorkeeper of the temple, Sneb's son Sneb."*

About 5000 years ago, Prince Nekure, who was a son of King Khafre, the builder of the middle Egyptian Pyramid, had his will carved on the stone wall of his tomb at Giza, Egypt. I do not know if there were witnesses, but if so, I wonder how the witnessing was done. By chisels?

And for the evidence of another precedent that has come to us from Eqyptian legal practice, and which we have followed for centuries, I call your attention to what Prince Nekure's will stated.

The introductory clause of the will is remarkable in the light of the practice in will writing for hundreds of years since. **Nekure refers to his health.**

Egyptologist Breasted states the will opens with:

**"King's son, Nekure...he makes the (following) (command) (decree) (while) living upon his two feet without ailing in any respect."**

Freely translated the German version reads: "When he lived on his two feet and while he was not sick."

Perhaps we should take a fresh look at the precedent of witnessing documents. If we dispensed with the requirement of witnesses to a Statutory Will it would simplify its execution. Could we provide that one witness would be sufficient, and allow the maker to have the witness sign when the maker signed the will or at a later time? Notarization would not be a practical alternative.

Could we dispense with witnesses for all Wills? Or would that violate the tradition of ceremony that has so long accompanied the execution of Wills, particularly lawyer drawn wills?

I leave it to you to deal with the problem of "technically defective" Statutory Wills. I do believe, however, that Probate Courts should give them equal treatment with holographic wills, that is, look at testamentary intent and not dwell on "defects." Eliminating as best we

can the chances of creating defects in execution would turn things around. The focus would be on testamentary intent, a look at the document's contents, and not on how it was executed.

Sincerely,

Harold I. Boucher

November 20, 1990