#L-603 5/29/81

Memorandum 81-29

Subject: Study L-603 - Probate Code (Nuncupative Wills)

The California provisions concerning nuncupative (oral) wills are set forth in Sections 54, 55, and 325 of the Probate Code:

> 54. A nuncupative will is not required to be in writing. It may be made by one who, at the time, is in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or by one who, at the time, is in expectation of immediate death from an injury received the same day. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.
>
> 55. A nuncupative will may dispose of personal property only, and the estate bequeathed must not exceed one thousand dollars in value.
>
> 325. No proof shall be received of a nuncupative will unless it is offered within six months after the testamentary words were spoken, nor unless the words, or the substance thereof, were reduced to writing within 30 days after they were spoken, and such writing is filed with the petition for the probate thereof. Notice of such petition shall be given, and subsequent proceedings in administration had, as in the case of a written will.

The Uniform Probate Code does not permit nuncupative wills. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 343 (1976). Professor Russell Niles (one of the Commission's consultants on probate law) supports the elimination of nuncupative wills. See Niles, Probate Reform in California, 31 Hast. L.J. 185, 211 (1979). Professor Max Rheinstein also favors elimination of nuncupative wills, saying:

> The formalities for the execution of an ordinary will are so simple that the need for a special emergency form is questionable. . . . The nuncupative will is obsolete and its complete abolition would save disappointment and litigation. The special needs of military and naval personnel would best be taken care of by a federal statute providing for the orderly execution of attested wills before summary court martial officers, legal advice officers or similar military or naval officials.

Rheinstein, The Model Probate Code: A Critique, 48 Colum. L. Rev. 534, 550 (1948). The State Bar did not address the question of nuncupative wills in its 1973 critique of the Uniform Probate Code, and there are no reported appellate decisions in California involving such wills.

The courts have historically looked upon nuncupative wills with disfavor because of the opportunity for fraud and perjury. 2 W. Bowe & D. Parker, Page on the Law of Wills § 20.14, at 303 (rev. ed. 1960); see 79 Am. Jur.2d Wills § 724 (1975). The nuncupative will appears to have little usefulness as far as the general citizenry is concerned, and this will be even truer if the UPC provision to make the holographic will more useful (see Memo 81-28) is adopted in California. Accordingly, the staff recommends that the nuncupative will be abolished in California for nonmilitary personnel.

However, the considerations are somewhat different with respect to military and naval personnel. Historically, the law has been more ready to recognize nuncupative wills for military and naval personnel than for the general citizenry. See 2 W. Bowe & D. Parker, supra § 20.25. The reason for this has been stated as follows:

> The imminent dangers, diseases, disasters, and the possibility of sudden death constantly besetting soldiers and sailors, and the inability of such persons to find the time or the means to make deliberate and written testamentary dispositions of their effects, seem at all times to have considered a good and sufficient reason to except their wills from compliance with formalities required to be observed in the execution of wills generally.

79 Am. Jur.2d Wills § 733 (1975). The Model Probate Code (since superseded by the Uniform Probate Code) did contain provisions for nuncupative wills, and these were more favorable to military and naval personnel than to the general citizenry: Nonmilitary personnel could dispose of a maximum of $1,000.00 in personal property, while military and naval personnel could dispose of a maximum of $10,000.00. Rheinstein, supra.

Thus it can be argued that military and naval personnel have "special needs" (see id.) and that California law authorizing nuncupative wills ought to be preserved for military and naval personnel. However, the usefulness of the existing California oral will provisions for military personnel is extremely limited. The provision covers only personal

property and the property must not exceed $1,000 in value. The military person making the will must be in actual fear of death. The requirement of two witnesses, the requirement that the will be reduced to writing within 30 days, and the requirement that proof be made to the court within six months further limit the usefulness of the oral will provisions. (It is interesting to note that these provisions continue the substance of Sections 1288-1290 of the 1872 Civil Code which were drawn from an 1850 statute.) The property to which the oral will may apply is limited in modern times, since insurance benefits, military pay, and other survivor's benefits of military personnel probably are governed by other provisions. The staff proposal to liberalize the recognition of holographic wills avoids the need for an oral will for a testator able to write a holographic will. The availability of legal counsel to military personnel in modern times makes it easier for them to execute a witnessed will.

Although the existing oral will provisions could be made more useful by adopting the $10,000 maximum limit provided in the Model Probate Code, the staff believes that, on balance, it is better policy to require a written will (holographic or witnessed) or to allow the property to be governed by the intestate succession statute. This alternative avoids the possible litigation and the uncertainty created by allowing for the possibility of a claimed oral will and tends to minimize the dangers of fraud, undue influence, and perjury that are inherent in recognizing oral wills. The failure to raise the $1,000 maximum limit during the periods of war during and since World War I indicates that there is little need to rely on the oral will provision for military personnel. Accordingly, the staff recommends that the oral will provisions not be continued in California law.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel