

## Memorandum 81-30

Subject: Study L-603 - Probate Code (Execution of Witnessed Wills)

The Uniform Probate Code reduces the formalities for execution of a witnessed will to a minimum with the objective of validating the will whenever possible. This Memorandum discusses the changes in this area of California law which the UPC would make, presents the policy arguments pro and con, and recommends enactment of the UPC provisions concerning execution of wills. The pertinent California provisions (Probate Code §§ 50-52) are attached to this Memorandum as Exhibit 1. The pertinent UPC provisions (UPC §§ 2-502, 2-505) are attached to this Memorandum as Exhibit 2.

Comparison of California and UPC Provisions for Execution of Wills

In contrast to the relaxed approach of the UPC, the California formalities required for the execution of a witnessed will are numerous and technical. Section 50 of the Probate Code (Exhibit 1) sets forth nine requirements for a witnessed will:

- (1) It must be in writing.
- (2) It must either be signed by the testator, or be signed by some other person in the testator's presence and at the testator's direction.
- (3) The signature must be at the end of the will.
- (4) The testator's signature must be made or acknowledged in the presence of both witnesses, present at the same time.
- (5) The testator must declare to the witnesses that the writing is his or her will.
- (6) At least two witnesses must sign the will.
- (7) The witnesses' signatures must be at the end of the will.
- (8) The witnesses must sign the will at the request of the testator.
- (9) The witnesses must sign the will in the testator's presence (but not necessarily in the presence of each other).

See Niles, Probate Reform in California, 31 Hast. L.J. 185, 209 n.148 (1979).

The UPC, on the other hand, requires merely that witnessed wills "be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." UPC § 2-502 (Exhibit 2). Thus the UPC would retain requirements 1 (in writing), 2 (signed), and 6 (two witnesses) of California law. It would abolish requirements 3 (signature "at the end" of the will), 5 (declaration by testator), 7 (witnesses' signatures "at the end" of the will), 8 (request by testator that witnesses sign), and 9 (witnesses sign in testator's presence), and would loosen requirement 4 so that the witnesses need not be present at the same time, and so each witness may witness any of the following: (1) the signing of the will by the testator, (2) the testator's acknowledgment that the signature is genuine, or (3) the testator's acknowledgment that the document is his or her will. See UPC § 2-502 and Official Comment thereto (Exhibit 2). (The UPC also makes separate provision for a "self-proving" will, made and attested before a notary.)

The relaxed UPC approach represents the overwhelming weight of modern judicial and scholarly opinion, which has been critical of rigid application of formal requirements for execution of wills so as to invalidate them even when there is no reasonable doubt about the testator's intent and no suspicion of fraud. See Niles, supra at 210. The specific changes the UPC would make are discussed below.

Elimination of requirement that testator's signature be "at the end" of the will. The California requirement that the testator's signature be "at the end" of the will is to prevent fraud by the insertion of additional matter following the last paragraph of the will. See In re Estate of Seaman, 146 Cal. 455, 460, 462-63, 80 P. 700 (1905). However, experience has shown that cases where wills have been altered after execution are "very rare," while cases where the intention of the testator has been wholly defeated by rigid application of the rule that the testator's signature must be at the end of the will are "alarmingly frequent." Estate of Chase, 51 Cal. App.2d 353, 359, 124 P.2d 895 (1942).

Under the UPC, the testator may write his or her name in the body of the will. If that is intended to be the signature which gives effect to the will, the UPC requirement that the will be "signed" is satisfied. See Official Comment to UPC § 2-502 (Exhibit 2). Accepting that the invalidation of wills on technical grounds is a more serious problem than the fraudulent alteration of wills, the UPC change appears salutary, and the staff recommends it.

Reduction of attestation formalities. The remaining California formalities which would be eliminated by the UPC all deal with the manner in which a will is witnessed. The formal requirements for witnessing of wills are thought to serve three purposes: (1) They reduce the likelihood that an instrument will be admitted to probate which was not intended by its maker to be a will; (2) They minimize the opportunity for a bogus instrument to be substituted for the true will; (3) They make available persons to testify in probate that the testator was apparently free from duress, menace, or undue influence, and was of a sound and disposing mind. See In re Estate of Emart, 175 Cal. 238, 239, 165 P. 707 (1917); Mechem, Why Not A Modern Wills Act?, 33 Iowa L. Rev. 501, 504-05 (1948).

The first of these purposes (excluding nontestamentary instrument from probate) is arguably served by the requirements that the testator "declare" to the witnesses that the instrument is his or her will and "request" them to witness the instrument. Professor Mechem argues that these requirements cause more harm than good:

If it be said that "publication" is essential to establish testamentary intent, the answer is that what is needed is evidence that T intended to utter the instrument as his own and have it take effect. The nature of the instrument will be determinable from its own terms. Testator's opinion that the instrument is a will is not determinative; it is doubtful that it is even relevant [assuming an unambiguous instrument]. Statutes requiring publication lead too often to one of two things: the failure of a meritorious will or the determination, at the expense of much good time and money, that there has been a publication by some process of implication so dubious as to rob the result of any value.

Mechem, supra at 505-06.

The California cases have weakened the statutory publication requirement by not requiring that the declaration and request be spoken in words, but permitting them to be inferred from the testator's conduct and from the surrounding circumstances, further buttressed by the presumption of due execution. See 7 B. Witkin, Summary of California Law Wills and Probate § 118, at 5633-34 (8th ed. 1974); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 339 n.28 (1976); In re Estate of Johnson, 100 Cal. App. 676, 280 P. 987 (1929). Thus California appears to permit, as Professor Mechem says, a "process of implication so dubious as to rob the result of any value." There appears to be no sound reason why the testator's failure to publish the instrument as his or her will should invalidate an instrument which is on its face clearly testamentary. The staff recommends elimination of the publication requirement as the UPC would do.

The second and third purposes for the formal requirements for witnessing of wills (preventing substitution of bogus instrument and having witnesses to testify in probate) are arguably served by the requirements that the testator sign or acknowledge the will in the presence of the witnesses, both present at the same time, and that the witnesses sign in the presence of the testator. The UPC provision is very liberal, and would appear to permit a testator to sign the will, acknowledge this fact by telephone to two friends, and then mail them the will for their signatures as witnesses. Kossow, Probate Law and the Uniform Probate Code: "One for the Money . . .", 61 Geo. L.J. 1357, 1380 (1973).

It has been suggested that elimination of the presence requirement would permit a witness to take the will out of the testator's presence and substitute for it a spurious instrument. Mechem, supra at 504-05. Professor Mechem thinks this is a "preposterous" notion:

It assumes a group of witnesses (and possibly an attorney as well) who have carefully prepared in advance an elaborate scheme of forgery and deception. It assumes a testator who is too unconscious or too indifferent to identify his own will when it is brought back to him; it assumes that he either dies at once or never bothers to look at his will after its execution. And finally, it involves the super-absurdity of assuming that a group of expert criminals who are capable of executing such a scheme and have found a suitably incompetent victim, could be frustrated in their fell designs by the existence of a statutory provision requiring the will to be attested in the presence of the testator!

Moreover, witnesses bent on such a scheme of fraud would be sure to testify that they had signed the will in the testator's presence:

Thus the requirement of signing in the presence of the testator would in practice serve only to defeat meritorious wills since only honest witnesses (or, worse, those who had been bribed to defeat the will) would testify that they had signed out of testator's presence.

Mechem, supra at 505. This analysis seems sound, and the "bogus instrument" argument appears to be an insufficient rationale for the presence requirement.

However, the argument that the witnesses should see the testator at the time of attestation in order to minimize the possibility of duress or undue influence and to be able later to testify concerning the testator's apparent capacity seems more substantial. Like California law, the UPC contemplates the use of the testimony of an attesting witness in some cases (see Prob. Code § 329; UPC § 3-406), and the value of such testimony would be reduced if the testator's acknowledgment is made to the witness by telephone. Perhaps this is a better argument for lawyers to adhere to an attestation ceremony than for probate courts to invalidate wills. Professor Perry Evans, the draftsman of the 1931 Probate Code, saw no need for both witnesses to be present at the same time, although Professor Evans might not have been enthusiastic about acknowledgment by telephone. See Evans, Comments on the Probate Code of California, 19 Cal. L. Rev. 602, 609 (1931).

With some misgivings, the staff recommends the UPC's elimination of the presence requirement.

#### Permitting Witness to Benefit Under the Will

Under California law (Probate Code Section 51 - Exhibit 1), a subscribing witness is disqualified from taking under the will unless there are two other disinterested subscribing witnesses. If the interested witness would be entitled to an intestate share of the estate if the will were not established, the disqualification is limited so that the interested witness may take the lesser of the amount provided in the will or the intestate share.

The UPC permits an interested witness to attest the will without forfeiting any benefits under the will. UPC § 2-505 (Exhibit 2). The UPC provision is justified in the Official Comment as follows:

[T]he purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses

in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

Professor Niles supports the UPC change, saying, "[N]ow that interested witnesses in general are not barred from testifying in court, if a witness to a will is interested, there is little reason not to allow that interest to go only to the credibility of the witness without requiring a forfeiture of any part of a devise." Niles, supra at 210. However, in its 1973 critique of the UPC, the State Bar singled out this change for critical mention. The state Bar was of the view that the potential use of an interested witness, when considered along with the other changes the UPC would make in the formalities for execution of witnessed wills, would provide "greatly increased opportunities for fraud or undue influence to be exercised on the testator." State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973). The UPC's Joint Editorial Board responded to this criticism by saying that the State Bar "does not explain why will contestants will be less able to bring all salient facts to a court's attention under the UPC than under existing rules." Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 13 (1974).

Although the staff has some reservations about this change, this appears to be a case where the argument for national uniformity of wills law tips the scale in favor of the UPC provision.

### Conclusion

By weakening the ceremonial value of attestation, the UPC drafters have made a deliberate policy choice to repudiate the "protective function" of the law. See Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 496, 511 (1975). Professor Langbein supports this policy choice because:

(1) The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in

preventing the many cases of fraud and undue influence which are proved each year.

(2) Protective formalities do more harm than good, voiding homemade wills for harmless violations.

(3) Protective formalities are not needed. Since fraud or undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.

Langbein, supra at 496.

The case for elimination of the requirement that the testator's signature be "at the end" of the will is convincing. The case for permitting an attesting witness to benefit under the will is somewhat weaker, but is supported by the need for national uniformity of wills law.

The UPC drafters were influenced by the proliferation of will substitutes (e.g., joint tenancy, joint and survivor accounts with banks and brokerage houses, revocable inter vivos trusts, and cash value life insurance) which do not have formalistic attestation requirements. Langbein, supra at 503-11. The "flexibility and comparative informality of the will substitutes" have made the rigid application of Wills Act formalities "ever more incongruous and indefensible." Id. at 504.

The staff is of the view that the proponents of the UPC have made a convincing case that the invalidation of defectively executed wills is a more serious problem than any increased incidence of fraud that might occur if the technical rules are relaxed. Accordingly, the staff recommends adoption of UPC Sections 2-502 (execution) and 2-505 (interested witness) in place of the technical rules of California Probate Code Sections 50 and 51.

Respectfully submitted,

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## Exhibit 1

## Ch. 2

## EXECUTION OF WILLS

## § 50

## § 50. Wills; execution; attestation

Every will, other than a nuncupative will, must be in writing and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

**Subscription**

(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. A person who subscribes the testator's name, by his direction, should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will.

**Presence of witnesses**

(2) The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time.

**Testator's declaration**

(3) The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will.

**Attesting witnesses**

(4) There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will.

(Stats.1931, c. 281, § 50.)

## § 51. Devises; bequests and legacies to subscribing witnesses

All beneficial devises, bequests and legacies to a subscribing witness are void unless there are two other and disinterested subscribing witnesses to the will, except that if such interested witness would be entitled to any share of the estate of the testator in case the will were not established, he shall take such proportion of the devise or bequest made to him in the will as does not exceed the share of the estate which would be distributed to him if the will were not established.

(Stats.1931, c. 281, § 51.)

## § 52. Creditors as competent witnesses

A mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

(Stats.1931, c. 281, § 52.)

## Exhibit 2

Pt. 5            **INTESTATE SUCCESSION—WILLS    § 2-502****Section 2-502. [Execution.]**

Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

**COMMENT**

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or

witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under Section 2-503 as a holograph.

**Section 2-505. [Who May Witness.]**

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

**COMMENT**

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by

will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under Section 3-406.