#L-603 2/4/82

Memorandum 82-9

Subject: Study L-603 - Probate Law (Wills)

Attached is a Staff Draft of Tentative Revisions of the Uniform Probate Code Provisions relating to Wills. This draft incorporates the decisions made at the July and September 1981 meetings. The only sections not previously approved by the Commission are Sections 2-501, 2-501.5, and 2-501.7, which present no significant policy issues. The section on holographic wills (Section 2-503) is included in this draft for completeness, although that section is contained in a separate recommendation.

Does Substantial Compliance Doctrine Go Too Far?

The staff's main concern is the Commission's tentative decision to codify the doctrine of substantial compliance (not part of the UPC), so that the court may excuse compliance with the already-minimal formalities required for execution of a will under the UPC. The UPC only requires that an attested will be in writing, signed, and witnessed. The substantial compliance doctrine would permit the court to admit to probate an unsigned instrument, or one which only had one witness instead of the required two or possibly no witnesses at all, if there is "no reasonable doubt that the decedent intended the instrument to constitute his or her will." Also, although the provision as drafted permits the court to admit a noncomplying "instrument," there is the troublesome problem of whether the term "instrument" might be construed to include a videotaped or voice-taped will. See subdivision (b) of draft Section 2-502; letter from Professor Jesse Dukeminier of February 2, 1982 (attached as Exhibit 1). For the argument in favor of the proposed provision, see the discussion in the narrative portion of the recommendation (text accompanying footnotes 9-30).

This provision may go too far toward dispensing with any execution formalities whatever, and may cause political problems for the proposed legislation. Now that the provision and the supporting argument are drafted, the Commission should give further consideration to whether this provision is desirable.

After the March meeting, the staff will integrate into this draft the remaining UPC sections not included here (discussed in other memos) and which are approved by the Commission in preparation for its general distribution for review and comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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February 2, 1982

Mr. Robert J. Murphy III
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Bob:

I think you've done a very good job of explaining the substantial compliance doctrine. The areas I foresee the substantial compliance doctrine applying include:

1. Witnessing problems: Under the UPC the attesting witness must have "witnessed either the signing or the testator's acknowledgment of the signature or of the will." What does "witnessed" mean? Does it include telephonic witnessing? Take this actual case: T's attorney takes T's will to T's home, where T signs the will and the attorney attests as a witness. The attorney returns to this office with the will and has his secretary call T on the phone. By telephone, T requests the secretary to witness the will. The secretary does so. Is telephonic witnessing permitted under UPC? (Note UPC abolishes requirement of "presence".) If not, would it be okay under the substantial compliance doctrine? (In Matter of Heaney, 75 Misc. 2d 732, 347 N.Y.S.2d 922 (Sur. Ct. 1973), the court denied probate on ground that telephonic presence did not satisfy statutory requirement of acknowledgment in presence.) My answer is that the UPC probably will be interpreted to prevent probate of telephonic witnesses, on ground that the identity of the instrument subscribed cannot be thus verified. But under the substantial compliance doctrine, each case would turn on its own facts and if the secretary was very familiar with the document (having typed it) and the client's signature the court might hold there was no reasonable doubt it was T's will.

You also mention the problem of whether one witness (or none?) would be substantial compliance.

2. Signature problems: Is signing with an X substantial compliance? Present California case law holds that if a will is signed by an X, a witness must write the testator's name near the X and sign his own name as witness. Estate of Mangeri, 55 Cal. App. 3d 76, 127 Cal. Rptr. 438 (1976). I would suppose that if the witness fails to add his name as witness, the substantial compliance doctrine might permit probate.

You also address the problem of the testator who intends to sign but does not because of supervening cause (heart attack).

3. Video or voice taped wills. If the substantial compliance doctrine applied to witnessing and signature problems, such as mentioned above, I would have little objection to it. It even seems a good idea there. But the possible application of the substantial compliance doctrine to video or voice taped wills scares me. I am not convinced that a statutory reference to a "document" in the substantial compliance provision would preclude a video or voice taped will from being treated as a document. A document need not be something written, but according to Oxford Universal Dictionary may be "that which serves to show or prove something." A video or voice taped will is a document in that sense. Even if you said "written document", it might not preclude a voice taped will, which is often referred to as "voice written."

What bothers me about video and voice taped wills (apart from storage problems in probate courts and problems of how are they "witnessed") is that if these are permitted, I foresee companies developing which produce (perhaps on the spot at an amusement park) video or voice taped wills. This might result in a great increase in thoughtless, ill-conceived, and ambiguous wills. We all know how much clearer your thoughts become when you are forced to reduce them to writing. Even though holographic wills written by testator are permitted, I consider it desirable that people seek counsel from a skilled lawyer, who is trained to draw a clear will. I believe that permitting video or voice taped wills would introduce the possibility of wills being produced by people skilled only in video and recording techniques. Already in New York there is an outfit (probably one in California too) which advertises non-legally-binding video "wills", to be played at your funeral or afterward--a video goodbye.

Unless video and voice-taped wills are expressly stated to be outside the substantial compliance doctrine, I would be reluctant to support the doctrine. I think the bar--with good reason--should oppose video and voice taped wills.

Sincerely,

Jesse Dukeminier
Professor of Law

JD:bd

STAFF DRAFT

TENTATIVE REVISIONS OF THE UNIFORM PROBATE CODE PROVISIONS relating to WILLS

(with conforming revisions)

Introduction

A well-drawn wills law should carry out the intent of the testator so far as possible, while minimizing the opportunity for fraud or perjury and promoting a system of probate which is efficient and expeditious. The Commission has completed a portion of its review of the Uniform Probate Code provisions concerning wills[1] and has generally found the UPC provisions preferable in these respects to existing California law. This draft reflects the Commission decisions on wills law made to date.[2]

This publication first discusses the changes the UPC provisions (as revised by the Commission) would make in existing California law. Following this discussion, the UPC provisions relating to wills that have been tentatively approved by the Commission are set out, showing the revisions the Commission believes should be made in those provisions.

The last portion of this publication indicates the disposition of existing California provisions necessitated by adoption of the recommended UPC provisions. The Comment to each California section indicates the UPC provision or provisions that supersede the existing section or the reason why the existing section or a portion thereof is not continued.

Reducing the Number of Formal Requirements for Execution of Attested Wills

California law[3] sets forth nine requirements for an attested 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.

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1. The Commission's tentative revisions of the Uniform Probate Code provisions on intestate succession are contained in a separate publication. See Cal. L. Revision Comm'n, Tentative Revisions of the Intestate Succession Provisions of the Uniform Probate Code (January 15, 1982).

2. The Commission plans to complete its review of the UPC provisions on wills, and then to study the provisions concerning administration of estates.

3. Prob. Code § 50.

(4) The testator's signature must be made or acknowledged in the presence of two witnesses, both present at the same time.

(5) The testator must declare to the witnesses that the writing is his or her will.

(6) The testator must request the witnesses to sign the will.

(7) The witnesses must sign the will.

(8) The witnesses' signatures must be at the end of the will.

(9) The witnesses must sign the will in the testator's presence.[4]

These numerous, technical requirements of California law often have the effect of invalidating wills even though there is no reasonable doubt about the testator's intention and no suspicion of fraud.[5]

In contrast, the UPC requires merely that attested 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 two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."[6] Thus, like California law, the UPC requires that the will be in writing, be signed, and have at least two witnesses. The UPC would loosen the California requirement that the testator's signature be made or acknowledged in the presence of two witnesses, both present at the same time, 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. The UPC would wholly abolish the California requirements that the signatures of the testator (or testator's surrogate) and witnesses be "at the end" of the will, that the testator declare to the witnesses that the writing is his or her will, that the testator request the witnesses to sign the will, and that the witnesses sign in the testator's

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4. Although each witness must sign the will in the testator's presence, the witnesses need not necessarily sign in the presence of each other. In re Estate of Dow, 181 Cal. 106, 183 P. 794 (1919); In re Estate of Armstrong, 8 Cal.2d 204, 209, 64 P.2d 1093 (1937); In re Estate of Miner, 105 Cal. App. 593, 595, 288 P. 120 (1930).

5. Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979).

6. Uniform Probate Code § 2-502.

presence. The effect of enactment of the UPC provision in California would be to validate many wills which would be held invalid under present California law for various technical deficiencies.[7]

The Commission recommends adoption of the UPC rule which retains the basic essentials for execution of an attested will, namely, that the will be in writing, signed, and witnessed, and would eliminate the numerous and technical requirements of California law which serve mainly to invalidate wills and thus cause far more harm than good.[8]

Substantial Compliance with Execution Formalities

Introduction. The California courts have traditionally insisted on strict compliance with statutory requirements for execution of formal, attested wills.[9] Although the UPC reduces the number of execution

7. See Niles, supra note 5.

8. The relaxed UPC approach to execution of wills represents the overwhelming weight of modern judicial and scholarly opinion. See Niles, supra note 5, at 210.

9. See, e.g., Estate of Howell, 50 Cal.2d 211, 215, 324 P.2d 578 (1958); In re Estate of Seaman, 146 Cal. 455, 80 P. 700 (1905); Estate of Mangeri, 55 Cal. App.3d 76, 82, 127 Cal. Rptr. 438 (1976); Estate of Moore, 92 Cal. App.2d 120, 122-24, 206 P.2d 413 (1949).

In the Seaman case, supra, the court elaborated on the doctrine of strict compliance:

> The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. . . . For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the legislature, as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute.
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> It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity for such alteration is permitted the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative

formalities, requiring only that the will be in writing, signed, and witnessed,[10] there is nothing in the UPC to prevent the courts from continuing to insist on literal compliance with the few formalities retained by it.[11]

The strict compliance doctrine has been criticized as being harsh, mistaken, and needless,[12] particularly since the principal will substitutes (joint tenancy, joint and survivor accounts with banks and brokerage houses, revocable inter vivos trusts, and cash value life insurance) do not have formalistic attestation requirements.[13] The doctrine of sub-

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intent was doubtless to guard against fraud and uncertainty in the testamentary dispositions of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." [Citation omitted.]

Occasionally, a case can be found where the court takes a less strict approach. See, e.g., Estate of Chase, 51 Cal. App.2d 353, 124 P.2d 895 (1942). Although the will in the Chase case was mostly handwritten, parts of it were printed, and the will was therefore probated as a formal, attested will and its validity was determined under Section 50 of the Probate Code. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 113-22, at 5628-38 (8th ed. 1974).

With respect to holographic wills, the California cases take a less strict approach than with respect to formal attested wills: The cases tend to construe liberally the statutory provisions governing execution of holographic wills so as to uphold their validity. See, e.g., Estate of Baker, 59 Cal.2d 680, 683, 381 P.2d 913, 31 Cal. Rptr. 33 (1963); Estate of Janes, 18 Cal.2d 512, 515-16, 116 P.2d 438 (1941); Estate of Williams, 198 Cal. App.2d 238, 241, 17 Cal. Rptr. 716 (1961).

10. Uniform Probate Code § 2-502.

11. See Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 510 (1975).

12. Id. at 489:

> The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.

13. Id. at 503-11.

stantial compliance has long been routinely used by the courts to hold formal defects harmless and to sustain transactions despite noncompliance with the Statute of Frauds.[14] A similar analysis should be applied to formal defects under the Wills Act.[15]

In 1975, South Australia adopted the substantial compliance doctrine by a statute which provides that a document not executed with the formalities required by the Wills Act may nonetheless be admitted to probate as the decedent's will if the court "is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."[16] Although initially there was some concern that the South Australian legislation would open the floodgates to fraud and litigation, those fears did not materialize, and experience with the legislation since its enactment shows that the probate process functions well without the strict compliance rule.[17]

If the substantial compliance doctrine in the form enacted in South Australia were included as part of the UPC provision on execution of attested wills, the doctrine would not excuse the requirement that the will be in writing. This is because the South Australian provision only applies to a non-complying "document."[18] However, the doctrine could be used to admit a will to probate despite noncompliance with either the signature or witness requirements.

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14. Id. at 498-99, 531.

15. Id.; Nelson & Starck, Formalities and Formalism: A Critical Look at the Execution of Wills, 6 Pepperdine L. Rev. 331 (1979).

16. 1975 Acts S. Austl. No. 86, § 9. See generally Langbein, Crumbling of the Wills Act: Australians Point the Way, 65 Am. B.A.J. 1192 (1979); Palk, Informal Wills: From Soldiers to Citizens, 5 Adelaide L. Rev. 382 (1973-1976).

    West Germany has by statute adopted the substantial compliance doctrine with respect to holographic wills. See Langbein, Substantial Compliance With the Wills Act, 88 Harv L. Rev. 489, 512, 526 n.127 (1975).

17. Langbein, Crumbling of the Wills Act: Australians Point the Way, 65 Am. B.A.J. 1192, 1194-95 (1979). In the seven years since the South Australian legislation was enacted, there has been only one reported decision construing and applying it, and in that case the court lauded the remedial purposes of the act. See Estate of Graham, 20 S. Austl. St. R. 198 (1978).

18. See 1975 Acts S. Austl. No. 86, § 9.

Requirement that the will be signed. The courts rely on a signature on the will as the most important evidence of finality of testamentary intent.[19] The substantial compliance doctrine would rarely excuse the requirement of a signature, since it would seldom be possible to fulfill the purpose of the signature requirement without strict compliance.[20] Nonetheless, there may be a rare case where it would be appropriate to admit an unsigned will to probate. For example, suppose the testator publishes a document as his or her will to the gathered attesting witneses, takes up a pen and lowers it toward the signature line when an interloper's bullet or a coronary seizure fells the testator.[21] Where there is persuasive evidence that the testator's intention to sign the will was final and only a sudden impediment stayed the testator's hand, the purposes of the Wills Act are satisfied without a signature.[22] In such a case, the doctrine of substantial compliance would save the will.

Or, the will may be signed but the signature is defective. Suppose the testator is too ill to make a complete signature and therefore signs by mark, but the mark is invalid because the witness fails to write the testator's name near the mark.[23] If there is no question that the testator intended the instrument to constitute his or her will, the doctrine of substantial compliance would save the will.

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19. Langbein, supra note 11, at 518.

20. Id. Because the proponents of an unsigned will would bear an almost hopeless burden of proof, it is unlikely that people would litigate such claims in any number. Id.

21. This example is taken from Langbein, supra note 11, at 518.

22. Langbein, supra note 11, at 518.

23. Under the UPC, whether the testator may sign the will by mark is to be determined under the general law of the enacting state. Official Comment to Uniform Probate Code § 2-502. In California, instruments (including wills) may be signed by mark if the person cannot write, provided the technical requirements are complied with. See Civil Code § 14; Code Civ. Proc. § 17; Estate of Mangeri, 55 Cal. App.3d 76, 127 Cal. Rptr. 438 (1976). Occasionally a will is invalidated because the testator signed by mark but did not comply fully with the formal requirements for such a mark, even though there is absolutely no question that the testator intended the defective instrument to constitute his or her will. See Estate of Mangeri, supra.

Requirement that the will be witnessed. The requirement that the will be witnessed has been nearly as fundamental in wills law as the requirements of a writing and a signature.[24] The participation of witnesses is the major factor in ceremonializing the execution, and those who survive the testator will be able to testify to due execution.[25] On the other hand, a partial failure to satisfy the witness requirement ought to be remediable under the substantial compliance doctrine: Attestation by one witness where the statute calls for two is not such a serious defect because execution of the will was witnessed and the omission goes to the quantity rather than the quality of the evidence.[26] Other evidence of finality of intention and deliberateness of execution might suffice to show that the missing witness was harmless to the statutory purpose.[27]

Recommendation. The courts should have the same latitude to hold harmless a formal defect in a will as the courts have long had with respect to other kinds of instruments under the Statute of Frauds. A will should be signed and witnessed in the usual case. However, if noncompliance with the signature or witness requirement can be shown to be clearly harmless in a particular case, there is no sound reason why the instrument should be excluded from probate with the likely result that the testator will die intestate, contrary to the testator's obvious intent.

The South Australian legislation requires that, before the noncomplying document is admitted to probate, there must be "no reasonable doubt" about the decedent's intent.[28] This does not unduly undercut the signature and witness requirements, yet it gives the courts some latitude to avoid

24. Langbein, supra note 11, at 521.

25. Id.

26. Id. at 521-22.

27. Id. at 522.

28. See 1975 Acts S. Austl. No. 86, § 9.

injustice in extreme and sympathetic cases.[29] Accordingly, the Commission recommends enactment of the substance of the South Australian version of the substantial compliance doctrine in the UPC provision concerning the requirements for execution of attested wills.[30]

Interested Witness Not Disqualified As Will Beneficiary

Under California law, a subscribing witness is disqualified from taking under the will unless there are two other disinterested subscribing witnesses.[31] The UPC permits an interested witness to attest the

29. In the South Australian case of Estate of Graham, 20 S. Austl. St. R. 198, 205 (1978), it was said that "in most cases, the greater the departure from the requirements of formal validity dictated by" the Wills Act, "the harder will it be for the Court to reach the desired state of satisfaction" that the testament should be admitted to probate. In other words, the more drastic the noncompliance, the greater will be the proponent's burden of proof:

> This reading of the statutory language [by the Graham case] is very close to the burden-shifting rule that was envisaged in the scholarly literature preceding the South Australian statute, in which it had been urged that the proponents of the will should bear the burden of proving that the particular execution defect is harmless to the purposes of the Wills Act.

Langbein, Crumbling of the Wills Act: Australians Point the Way, 65 Am. B.A.J. 1192, 1195 (1979).

30. The Commission does not recommend the extension of the South Australian provision to apply to holographic wills. The Commission has recommended enactment of the UPC provision on holographic wills (Uniform Probate Code § 2-503) which requires only that the "material provisions" of the will and the signature be in the testator's handwriting. See Cal. L. Revision Comm'n Reports, Recommendation relating to Holographic and Nuncupative Wills (November 1981). The holographic will is already an exceedingly informal document, and enactment of the UPC provision would significantly relax the California requirements for a holographic will. To go beyond this by applying the doctrine of substantial compliance to holographic wills would create the opportunity for fraud: If, for example the holograph were entirely in the testator's handwriting except that the name of a legatee were typewritten, there would be little assurance that the typewritten portion was made by the testator; yet it would appear that the substantial compliance doctrine would permit such an instrument to be admitted to probate. See Bird, Sleight of Handwriting: The Holographic Will in California, 32 Hastings L.J. 605, 630-31 (1981).

31. Prob. Code § 51. 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 (1) the amount provided in the will or (2) the intestate share. Id.

will without forfeiting any benefits under the will.[32] The UPC drafters were of the view that the California-type provision has not succeeded in preventing fraud and undue influence, and that in most cases of undue influence the influencer is careful not to sign as a witness.[33] According to the UPC drafters, the disqualification of a subscribing witness from taking under the will too often penalizes the innocent use of a member of the testator's family on a home-drawn will.[34] A substantial gift by will to a witness would not automatically be invalidated under the UPC, but would be a suspicious circumstance and could be challenged on grounds of undue influence.[35]

The Commission recommends adoption of the UPC rule which does not disqualify a subscribing witness from taking under the will in place of the California rule. The extent to which a witness is interested should go to the credibility of the witness without requiring an automatic forfeiture of benefits under the will.[36]

Revocation of Wills by Physical Act Such As Destruction

Elimination of requirement of two witnesses to prove destruction. Both California law and the UPC provide that a will may be revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent

32. Uniform Probate Code § 2-505. It should be noted that under California law the fact that a subscribing witness is "interested" does not invalidate the will. See Estate of Tkachuk, 73 Cal. App.3d 14, 17-20, 139 Cal. Rptr. 55 (1977). The UPC rule which does not automatically bar a gift to a subscribing witness is consistent with the California rule permitting a person to witness a will even though "interested."

33. Official Comment to Uniform Probate Code § 2-505.

34. Id.

35. Id.

36. Niles, supra note 5, at 210. In its 1973 critique of the Uniform Probate Code, the State Bar expressed the view that the UPC provision authorizing use of an interested witness, when considered along with the UPC's relaxation of execution formalities, 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). However, the UPC's Joint Editorial Board responded to this criticism by saying that no reason appears "why will contestants will be less able to bring all salient facts to the 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).

and for the purpose of revoking it, either by the testator or by some other person in the testator's presence and by the testator's direction.[37] However, California law goes on to provide that if the act is done by someone other than the testator, two witnesses are required to prove both the fact of injury or destruction and the direction of the testator.[38] The UPC has no such requirement, and, oddly, California does not require two witnesses when the testator is the one who destroyed the will.[39] If the purpose of the two-witness rule is to prevent the will from being purloined after the testator's death and a fraudulent claim of revocation made, there is no justification for requiring two witnesses when destruction is by someone other than the testator, yet requiring only one witness when destruction is by the testator. The two-witness rule would seem mainly to frustrate the testator's intent by excluding proof by a single credible witness that the will was destroyed in the testator's presence and at the testator's direction for the purpose of revoking it. Accordingly, the Commission recommends elimination of the two-witness requirement.

Elimination of presumption that lost will was destroyed with revocatory intent. Under California decisional law, if it is shown that the will was in possession of the testator before death, that the testator was competent until death, and that after death the will could not be found, it is presumed that the testator destroyed the will with intent to revoke it.[40] The UPC is exactly the opposite: The contestant of a will has the burden of establishing that the will has been revoked, as well as establishing any fraud or mistake.[41] The UPC rule is preferable for three reasons: (1) The disappearance of the testator's will is

37. Prob. Code § 74; Uniform Probate Code § 2-507.

38. Prob. Code § 74. It is not clear under Section 74 whether the witnesses must be eyewitnesses, or whether the person who destroyed the will is a qualified witness. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 347 n.51 (1976).

39. See Prob. Code § 74; Estate of Olmsted, 122 Cal. 224, 54 P. 745 (1898); 7 B. Witkin, Summary of California Law Wills and Probate § 151, at 5667 (8th ed. 1974).

40. 7 B. Witkin, Summary of California Law Wills and Probate § 381, at 5844 (8th ed. 1974).

41. Uniform Probate Code § 3-407. It appears that this provision applies whether the will is physically available or not. See French & Fletcher, supra note 38, at 351 n.62.

at least as likely to have occurred innocently as it is to have occurred fraudulently;[42] (2) a presumption of revocation would make it easier for someone to cause intestacy by purloining the testator's will; and (3) elimination of the presumption of revocation will further the public policy against intestacy. Accordingly, the Commission recommends eliminating the presumption of revocation under California law, and substituting the UPC rule which puts the burden of proving revocation on the contestant of a will.[43]

Elimination of Informal Revocation by Instrument Affecting Property

The UPC provisions for revocation of a will by a later will are closely similar to the California provisions: Both provide that the later will may revoke the earlier one by an express revocation clause, or the later will may be wholly or partially inconsistent with the

42. This is particularly true where the testator executed two or more duplicate original wills, retaining one and perhaps leaving another with the attorney. Cases have arisen where the testator's duplicate could not be found after death and the presumption of revocation has been applied, even though other duplicate originals were still in existence. See Annot., 17 A.L.R.2d 805 (1951). This result has been criticized since it is likely that the testator assumed that since there were other executed originals of the will it was not necessary to preserve the one in the testator's possession. Id. at 808-09.

43. The Commission recommends that Section 76 of the Probate Code be retained. Section 76 provides that a "will executed in duplicate is revoked if one of the duplicates" is revoked by an act such as destruction. Although no such provision appears in the UPC, the California rule is consistent with the rule uniformly followed in other jurisdictions. See Annot., 17 A.L.R.2d 805, 808-12 (1951); 79 Am. Jur.2d Wills § 549 (1975).

The Commission recommends the repeal of Section 79 of the Probate Code which provides that "revocation of a will revokes all its codicils." This apparent flat rule of California law has been qualified by a case which held that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963). The UPC has no provision comparable to Section 79, seemingly leaving the matter to be resolved as a question of the testator's intent in the particular case. See French & Fletcher, supra note 38, at 348. Thus the UPC's silence on the matter appears to be more consistent with present California law than the somewhat inaccurate statement of Section 79.

earlier one in which case the earlier will is revoked to the extent of the inconsistency.[44] In either case, the later revoking instrument must be executed with the same formalities as a will.[45]

However, California has an additional provision which permits revocation of a will by an instrument which is not executed with the formalities for a will: If the testator alters his or her interest in property by an instrument (such as a deed) which expressly revokes a provision of a prior will which disposes of the same property, the revocatory language of the instrument has the effect of revoking the will provision.[46] The Commission recommends the elimination of this informal revocation method. Revocation of a will by a later instrument is a testamentary act and should be accomplished with the same formalities required for execution of a will.[47]

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44. Prob. Code §§ 72, 74; Uniform Probate Code § 2-507. Although the UPC and California provisions are closely similar, the Commission recommends the UPC provisions since the drafting is considerably simpler than the drafting of the corresponding California provisions.

    California law contains a provision that when a second will contains dispositive provisions wholly inconsistent with the dispositive provisions of a prior will, the court need not give effect to the appointment of an executor in the first will even though the second will is silent on the matter if that appears consistent with the testator's intent. See Prob. Code § 72. Although this provision would be repealed under the Commission's recommendation, the UPC provision appears to be consistent with it. See Official Comment to Uniform Probate Code § 2-507.

45. Prob. Code § 74; Official Comment to Uniform Probate Code § 2-507. The revoking instrument may be a holographic will. 7 B. Witkin, Summary of California Law Wills and Probate § 152, at 5668 (8th ed. 1974).

46. Prob. Code § 73. The cases that have arisen under Section 73 have generally applied an ademption analysis, rather than discussing it in terms of revocation. See French & Fletcher, supra note 38, at 344 n.48 (1976). To the extent Section 73 is an ademption provision, it is superfluous. See note 100 infra. Section 73 has also sometimes been applied in the context of determining the effect on a will of a marital settlement agreement incident to divorce. French & Fletcher, supra. However, this application of Section 73 has been superseded by Section 80 of the Probate Code which was enacted in 1980 specifically to deal with this problem.

47. Professor Turrentine agrees with this view. See Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956). This provision is particularly troublesome where the testator reacquires the property and dies without having changed the will. Id.

Revocation by Divorce or Annulment

California has long followed the rule that dissolution or annulment of the testator's marriage has no effect on dispositive provisions in the will in favor of the former spouse.[48] The UPC, however, provides that divorce or annulment of the testator's marriage does revoke any disposition made by will to the former spouse unless the will expressly provides otherwise.[49]

The California rule of nonrevocation generally produces results contrary to what the average testator would have wanted had the testator thought about the matter.[50] In most cases where the testator fails to change his or her will following a divorce, the failure is probably inadvertent.[51] The statutory rule should correspond to that which most divorcing spouses would intend in such a situation.[52] Accordingly, the Commission recommends that the California rule of nonrevocation by divorce be replaced by the UPC rule of revocation of the dispositive provisions in favor of the former spouse.[53]

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48. See In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin, Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974). The California Legislature recently reaffirmed this rule. See 1980 Cal. Stats. ch. 1188, § 1 (codified at Civil Code § 4352).

49. Uniform Probate Code § 2-508. Under the UPC section, divorce or annulment also revokes any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Id.

50. For a contrary argument, see Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 714-15 (1967).

51. The instances of inadvertent failure to change the will probably be reduced under recent California legislation requiring that every final judgment dissolving a marriage or declaring a marriage a nullity contain a notice that the court's judgment does not affect provisions of a will. See Civil Code § 4352.

52. See Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 710 (1967).

53. The Commission's recommendation is consistent with the weight of scholarly opinion. See Niles, supra note 5, at 212 (1979); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 610 (1931); Turrentine, supra note 47, at 38 (1956). Accord, State Bar of California, The Uniform Probate Code: Analysis and Critique 45 (1973). But see Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 714-15 (1967).

Revival of Revoked Will

Both California law and the UPC state the rule that if the testator's first will is revoked by a second will and the second will is then revoked, the first will is not thereby automatically revived, but the first will is revived if the second will is revoked by an instrument which contains terms showing that the testator intended the first will to be revived.[54] However, California and the UPC have quite different rules when the second and revoking will is revoked not by an instrument, but rather by a physical act such as destruction. Under California law, destruction of the second will does not revive the first will, regardless of what the testator intended; extrinsic evidence of the testator's intent to revive the first will is inadmissible.[55]

Under the UPC, if the testator revokes the second and revoking will by a physical act such as destruction, the first will may be revived if it is evident from the circumstances of the revocation or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.[56] The UPC rule, of

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54. Prob. Code § 75; Uniform Probate Code § 2-509. Under the Uniform Probate Code, the instrument which revokes the second will and may by its terms revive the first will must itself be executed with the same formalities required for an original will. See Uniform Probate Code §§ 2-509 (speaking in terms of a third "will"), 2-502 (execution formalities), 1-201 ("will" defined). Under California law, revocation may sometimes be accomplished in an instrument which is not executed with the formalities of a will. See Prob. Code § 73. The California provision would be repealed under the Commission's recommendation. See discussion in text accompanying notes 46-47 supra.

    Also, the California anti-revival rule does not apply to a revoking codicil which is later revoked; revocation of a codicil leaves the original will intact. Estate of Hering, 108 Cal. App.3d 88, 166 Cal. Rptr. 298 (1980); Bird, Revocation of a Revoking Codicil: The Renaissance of Revival in California, 33 Hastings L.J. _____ (1982) [pages 40-52 of manuscript, to be published in early 1982].

55. In re Estate of Lones, 108 Cal. 688, 689, 41 P. 771 (1895); Bird, supra note 54, at _____ [footnote 24 of manuscript]; see Prob. Code § 75. The only relief that might be afforded in California would be to avoid the revocation of the second will by applying the doctrine of dependent relative revocation. Niles, supra note 5, at 214.

56. Uniform Probate Code § 2-509.

course, has the hazards present in admitting parol evidence in probate proceedings generally.[57] However, the UPC is more likely to effectuate the testator's actual intent and to avoid intestacy than is the California provision. The California provision frustrates the intent of the testator who destroys a second will intending thereby to revive the first, and leaves an opening for the commission of fraud.[58] The Commission recommends repeal of the California revival statute which defeats intent, and recommends enactment of the UPC provision which better effectuates the testator's intent.[59]

Easing Restrictions on Proof of a Valid But Missing Will

Elimination of rule which excludes a valid but missing will from probate. California law presents the anomalous situation that the proponent of a valid, unrevoked will which cannot be found after the testator's death may be denied probate because it cannot be established that the will was in existence at the testator's death, or was destroyed by public calamity, or destroyed fraudulently during the testator's lifetime, without the testator's knowledge.[60] The UPC has no provision comparable to this provision of California law, with the result that under the UPC any valid, unrevoked will is provable whether or not the will is physically in existence.[61]

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57. See Bird, supra note 54, at _____ [pages 61-63 of manuscript]; T. Atkinson, Handbook of the Law of Wills § 92, at 477 (2d ed. 1953).

58. See Bird, supra note 54, at _____ [pages 12-14 of manuscript]; Evans, supra note 53, at 611-12; Ferrier, Revival of a Revoked Will, 28 Calif. L. Rev. 265, 273, 276 (1940); Niles, supra note 5, at 214. Fraud is possible because a single witness may testify that the testator's only available will was revoked by a later instrument which is no longer in existence. If this testimony is believed, the testator will have died intestate; the anti-revival statute prohibits extrinsic evidence to prove otherwise. Bird, supra at _____ [page 64 of manuscript].

59. The Commission's recommendation is supported by the commentators. See Bird, supra note 54, at _____ [page 69 of manuscript]; Niles, supra note 5, at 218.

60. See Prob. Code § 350; French & Fletcher, supra note 38, at 351-54; Niles, supra note 5, at 213.

61. See French & Fletcher, supra note 38, at 351. This is also the rule of the common law. L. Simes & P. Basye, Problems in Probate Law 298 (1946).

The California rule which denies probate to a missing will under these circumstances, and where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death, is a substantial defect in the law and the Commission recommends its repeal.[62]

Elimination of extraordinary proof and two-witness requirements for provisions of missing will. In California, if the proponent succeeds in showing that the will is missing for a reason that satisfies the statute[66] and thus the will may be admitted to probate, the proponent faces the additional hurdles of the extraordinary proof and two-witness requirements: The will provisions must be "clearly and distinctly proved by at least two credible witnesses."[67] Under the UPC, proof of the provisions

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62. The Commission's recommendation is supported by the commentators. See Niles, supra note 5, at 214, 218; Turrentine, supra note 47, at 38; Note, Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions, 32 Calif. L. Rev. 221 (1944). [correct to cite title of a note?] The California rule which excludes a valid but missing will from probate has been criticized as "legal sophistry" (Niles, supra at 213), a "misguided statute" (9 J. Wigmore, Evidence in Trials at Common Law § 2523, at 577 (Chadbourn rev. 1981)), and a "substantial defect" in the law (Niles, supra at 213). Not only does the California provision (Prob. Code § 350) sometimes have the undesirable effect of excluding a valid, unrevoked will from probate, but may also prevent the court from applying the ameliorative doctrine of dependent relative revocation to avoid injustice. For example, if the testator destroys a first will in the mistaken belief that a second will is valid, the law will presume that the testator intended to revoke the first will only if the second will were valid. In other words, the revocation is not absolute, but is relative to and dependent on the validity of the second will. 7 B. Witkin, Summary of California Law Wills and Probate § 155, at 5670 (8th ed. 1974). By requiring the will to be "in existence" at the testator's death, Section 350 would appear to preclude application of the doctrine of dependent relative revocation to save the destroyed first will. L. Simes & P. Basye, Problems in Probate Law 300 (1946); see Niles, supra at 213.

63. [Reserved.]

64. [Reserved.]

65. [Reserved.]

66. Prob. Code § 350; see discussion in text accompanying notes 60-62 supra.

67. Prob. Code § 350.

of a missing will is by a preponderance of the evidence and no minimum number of witnesses is required.[68] The extraordinary proof requirement enlarges the hazard that a valid, unrevoked will may not be provable: Although there is no showing of revocation, there may not be adequate proof to meet the stringent standards.[70]

Although a number of other states have by statute adopted the requirement that at least two witnesses are required to prove the provisions of a missing will, the rule has not worked satisfactorily in those states.[71] The quality of evidence cannot be measured in terms of the number of witnesses. The question is rather one of the credibility of the witness. There may well be cases in which only one witness is available. Yet this single witness may be of such credibility that no further proof is necessary, and none should be required.[72]

The Commission recommends that California's extraordinary proof requirement and two-witness requirement for proof of the terms of a missing will be replaced by the UPC rule which prescribes proof by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where a valid and unrevoked will is nonetheless not provable.

Provision for Spouse Omitted From Pre-Marital Will

Both California law and the UPC provide that if the testator marries after making a will and the will fails to provide for the spouse, on the testator's death the omitted spouse is entitled to an intestate share

68. French & Fletcher, supra note 38, at 351. Under the UPC, if the will is missing, informal probate by written statement of the Registrar is precluded. Id.

69. [Reserved.]

70. French & Fletcher, supra note 38, at 354.

71. L. Simes & P. Basye, Problems in Probate Law 302-03 (1946). For example, where a will was wrongfully destroyed by the testator's wife (but not thereby revoked) and a bequest could not be proved because only one witness could testify that the will had contained the bequest, the injured legatee was permitted to recover damages in a tort action for malicious destruction of the will based on the testimony of a single witness. Id.; Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929). The court avoided the effect of the two-witness requirement by saying that it only applied to probate proceedings, and thus in effect gave the plaintiff her legacy without requiring her to comply with the statute. Id.

72. L. Simes & P. Basye, Problems in Probate Law 302 (1946).

unless it appears from the will that the omission was intentional or unless other specified provision is made for the spouse.[73] The California and UPC provisions differ with respect to the kind of provision outside the will that will suffice as being in lieu of a testamentary provision. California limits such provision outside the will to provision by marriage contract.[74] However, the UPC permits a showing that the testator provided for the spouse by any transfer outside the will, and the testator's intent that the transfer was to be in lieu of a testamentary provision may be shown by statements of the testator, from the amount of the transfer, or from other evidence.[75] Thus the UPC provision would have the effect of reducing the number of instances where the spouse omitted from the testator's pre-marital will could nonetheless claim an intestate share.[76]

The UPC rule more effectively carries out the testator's intent.[77] For this reason, the Commission recommends adoption of the UPC rule which more readily permits evidence that the testator's omission of a spouse from a will made before marriage was intentional because other provision was made for the spouse.

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73. See Prob. Code § 70; Uniform Probate Code § 2-301. Although the California provision speaks in terms of the will being "revoked" as to the omitted spouse, the effect of the provision is to give the omitted spouse an intestate share. Estate of Stewart, 69 Cal.2d 296, 298, 444 P.2d 337, 70 Cal. Rptr. 545 (1968); French & Fletcher, supra note 38, at 374.

74. Prob. Code § 70; French & Fletcher, supra note 38, at 375.

75. Uniform Probate Code § 2-301; see French & Fletcher, supra note 38, at 374.

76. In its 1973 critique of the Uniform Probate Code, the State Bar expressed concern that UPC Section 2-301 would not permit the testator to provide for the omitted spouse by marriage contract as does present California law unless the marriage contract were accompanied by an actual transfer of property. See State Bar of California, The Uniform Probate Code: Analysis and Critique 33 (1973). However, this concern would appear to be adequately dealt with by UPC Section 2-204 which permits a written waiver, before or after marriage, of all benefits from the other spouse by way of intestate succession or from a will executed before the waiver. [Note. The Commission has not yet considered UPC Section 2-204.] Although the waiver does not apply to benefits from a will executed after the waiver, the will itself may make clear that the testator's omission of the other spouse was intentional, and if the will is made after the marriage there is no statutory presumption that the omission was intentional. See Uniform Probate Code § 2-301.

77. See Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 7 (1974).

Uniform Probate Code Provisions As Revised

Article II of the UPC concerns intestate succession and wills. The Commission has considered portions of Article II relating to wills. The Commission's tentative recommendation with respect to the portions of Article II that have been considered by the Commission is set forth below.[78]

The text of each UPC section recommended by the Commission is set forth below. The UPC numbering of sections and parts within Article II has been temporarily retained. The Commission's final recommendation will indicate the appropriate Probate Code section numbers, and article and chapter headings.

Revisions to the UPC language recommended by the Commission are shown by strikeout and italics. The major substantive revisions to the UPC language recommended by the Commission are (1) to broaden the anti-lapse statute so that issue of a predeceased devisee will be substituted for the latter whether or not the predeceased devisee is a blood relative of the testator, (2) to adopt the doctrine of substantial compliance in connection with the formalities required for execution of an attested will, and (3) to preserve the California rule that permits the donor or donee to make a binding determination of the value of an inter vivos gift which is intended to be deducted from a testamentary devise.

Each section is followed by a Commission Comment which indicates what change the new section would make in California law.

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78. The Commission has made separate recommendations on intestate succession and holographic and nuncupative wills. See Cal. L. Revision Comm'n, Tentative Revisions of the Intestate Succession Provisions of the Uniform Probate Provisions (January 15, 1982); Cal. L. Revision Comm'n, Recommendation relating to Holographic and Nuncupative Wills (November 1981).

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INTESTATE SUCCESSION AND WILLS

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Section 2-301. Omitted spouse

2-301. (a) If a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he or she would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in ~~Section 3-902~~ Sections 750 to 753, inclusive .

Comment. Section 2-301 is the same in substance as Section 2-301 of the Uniform Probate Code, except that the California abatement rules set forth in Sections 750 to 753 are substituted for the UPC abatement rules of UPC Section 3-902.

Section 2-301 supersedes former Section 70. Section 2-301 is similar to former Section 70, but, unlike former Section 70, permits a showing that the testator's omission to provide by will for the surviving spouse was intentional by the fact of a "transfer outside the will" if such transfer was intended to be in lieu of a testamentary provision.

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PART 5

WILLS

Section 2-501. Who may make a will

2-501. Any person 18 or more years of age who is of sound mind may make a will.

Comment. Section 2-501 is the same as Section 2-501 of the Uniform Probate Code and continues the substance of a portion of the first sentence of former Section 20 and all of former Section 21.

Section 2-501.5. Property subject to testamentary disposition

2-501.5. The following property is subject to testamentary disposition by a decedent:

(a) The decedent's separate property.

(b) The one-half of the community and quasi-community property that belongs to the decedent.

Comment. Subdivision (a) of Section 2-501.5 continues a portion of the first sentence of former Section 20. Subdivision (b) continues a portion of former Sections 21, 201, and 201.5. The Uniform Probate Code has no section comparable to Section 2-501.5.

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Section 2-501.7. Who may take a testamentary disposition

2-501.7. Except as otherwise provided by law, a testamentary disposition may be made to any person, including any of the following:

(a) A natural person.

(b) A corporation.

(c) An unincorporated association, society, lodge, or any branch thereof.

(d) A county, city, city and county, or any municipal corporation.

(e) Any state including this state.

(f) The United States or any instrumentality thereof.

(g) A foreign country or a governmental entity therein.

Comment. Section 2-501.7 continues the substance of former Section 27, except that the former obsolete reference to repealed provisions (former Sections 259-259.2) is replaced with the "except" clause in the introductory paragraph. The "except" clause recognizes that some other provision of law may prohibit a particular testamentary disposition. See, e.g., UPC Section 2-803 (effect of homicide); 31 C.F.R. §§ 500.101-500.809 (1981) (Foreign Assets Control Regulations, prohibiting transfer to a hostile foreign government). The Uniform Probate Code has no section comparable to Section 2-501.7.

For other provisions authorizing various entities to accept testamentary gifts, see Cal. Const. art. 9, § 9 (University of California); Cal. Const. art. 20, § 2 (Stanford University and Huntington Library); Corp. Code §§ 9501 (nonprofit corporation), 10403 (corporation for prevention of cruelty to children or animals); Educ. Code §§ 19174 (county library), 33332 (State Department of Education), 35273 (school district), 70028 (California Maritime Academy); Harb. & Nav. Code §§ 6074 (harbor district), 6294 (port district), 6894 (river port district); Health & Safety Code §§ 8985 (public cemetery district), 9000 (same), 32121 (hospital district); Pub. Res. Code §§ 5101 (monuments in memory of California pioneers), 5158 (park commissioners).

Section 2-502. Execution

2-502. (a) Except as provided for holographic wills, writings within Section [comparable to 2-513, separate writing identifying bequest of tangible property, not yet considered by the Commission], and wills within Section [comparable to 2-506, choice of law as to execution, not yet considered by the Commission], 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~~ two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

(b) An instrument which purports to embody the testamentary intentions of a decedent, notwithstanding that it has not been executed with the formalities required by subdivision (a), is a valid will if the court, upon petition for an order admitting the instrument to probate, is satisfied that there can be no reasonable doubt that the decedent intended the instrument to constitute his or her will.

Comment. Subdivision (a) of Section 2-502 is the same as Section 2-502 of the Uniform Probate Code, and supersedes former Section 50. Subdivision (a) substantially relaxes the formalities required for execution of an attested will under former Section 50 by eliminating the requirements (1) that the signature must be "at the end" of the will, (2) that the testator must "declare" to the attesting witnesses that the instrument is his or her will, (3) that the witnesses' signatures must be "at the end" of the will, (4) that the testator must "request" the witnesses to sign the will, (5) that the witnesses must sign the will in the testator's presence, and (6) that the witnesses must have been "present at the same time."

Subdivision (b) is new and is not found in the Uniform Probate Code. Subdivision (b) is drawn from Section 9 of the South Australian Wills Act Amendment Act (No. 2) of 1975. See generally Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489 (1975); Langbein, Crumbling of the Wills Act: Australians Point the Way, 65 Am. B.A.J. 1192 (1979); Palk, Informal Wills: From Soldiers to Citizens, 5 Adelaide L. Rev. 382 (1973-1976).

Section 2-503. Holographic will

2-503. A will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. If such a will does not contain a statement as to the date of its execution and if such failure results in doubt as to whether its provisions or the inconsistent provisions of some other instrument having testamentary effect are controlling, the will is invalid to the extent of such inconsistency unless the date of the will's execution can be established by other evidence to be after the date of execution of the other instrument.

Comment. The first sentence of Section 2-503 is the same as Section 2-503 of the Uniform Probate Code. The official Comment to Uniform Probate Code Section 2-503 reads: "This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the 'material provisions' to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be 'entirely' in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate."

The second sentence of Section 2-503 is not found in the Uniform Probate Code. This sentence is a clarifying provision designed to deal with the situation where the holographic will and another will (or other instrument having testamentary effect) have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, the sentence requires either that the holographic will be dated or that the date of its execution be shown by other evidence when necessary to determine whether it or some other testamentary instrument is to be given effect. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other instrument, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent instrument is to be given effect. Where the conflict between the holographic will and other instrument is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other instrument does not affect the validity of the holographic will as to other property.

Section 2-503 provides a more liberal rule for determining the validity of a holographic will than former Section 53 which it supersedes. Former Section 53 required that a holographic will be "entirely" in the handwriting of the testator and had the effect of invalidating wills because immaterial provisions of the will were not in the testator's handwriting.

Section 2-505. Who may witness

2-505. (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. Section 2-505 is the same as Section 2-505 of the Uniform Probate Code, and supersedes former Sections 51 and 52. Section 2-505 changes the rule of former Section 51 which disqualified a subscribing witness from taking under the will unless there were two other disinterested subscribing witnesses. Under Section 2-505, an interested witness may attest the will without forfeiting any benefits under the will. Section 2-505 is consistent with former Section 52 (testator's creditor may be competent witness).

Section 2-507. Revocation by writing or by act

2-507. A will or any part thereof is revoked :

~~(1) by~~ (a) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

~~(2) by~~ (b) By being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

Comment. Section 2-507 is the same in substance as Section 2-507 of the Uniform Probate Code, and supersedes former Sections 72 and 74. The provision of former Section 74 requiring two witnesses to prove revocation of a will by someone other than the testator is not continued. Section 2-507 is otherwise consistent with former Sections 72 and 74.

[Note. The Commission has tentatively decided to recommend that portion of UPC Section 3-407 that provides that contestants of a will have the burden of establishing that a will has been revoked. This would change California law to the effect that a revocation is presumed if it is shown that the will was in possession of the testator before death, that the testator was competent until death, and that after death the will could not be found. See 7 B. Witkin, Summary of California Law Wills and Probate § 381, at 5844 (8th ed. 1974).]

Section 2-507.5. Effect of revoking duplicate will

2-507.5. A will executed in duplicate is revoked if one of the duplicates is burned, torn, canceled, obliterated or destroyed under the circumstances mentioned in subdivision (b) of Section 2-507.

Comment. Section 2-507.5 continues the substance of former Section 76. The Uniform Probate Code has no section comparable to Section 2-507.5.

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Section 2-508. Revocation by divorce; no revocation by other changes of circumstances

2-508. If after executing a will the testator is divorced or ~~his marriage annulled, the divoree~~ the testator's marriage is dissolved, annulled, or adjudged a nullity, the divorce, dissolution, or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce , dissolution, ~~or~~ annulment , or adjudication of nullity passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse. For purposes of this section, divorce , dissolution , ~~or~~ annulment , or adjudication of nullity means any divorce , dissolution , ~~or~~ annulment , or adjudication of nullity which would exclude the spouse as a surviving spouse within the meaning of Section [comparable to 2-802(b) (what "surviving spouse" does not include), not yet considered by Commission]. A decree of legal separation which does not terminate the status of husband and wife is not a divorce or dissolution for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Comment. Section 2-508 is the same in substance as Section 2-508 of the Uniform Probate Code. Section 2-508 supersedes former Section 4352 of the Civil Code, and changes the former case law rule that dissolution or annulment of marriage has no effect on the will of either spouse. See In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974).

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Section 2-509. Revival of revoked will

2-509. (a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that ~~he~~ the testator intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

Comment. Section 2-509 is the same in substance as Section 2-509 of the Uniform Probate Code, and supersedes former Section 75. Section 2-509 sets forth a presumption against revival of a previously revoked will, the same as under former Section 75. However, where revocation of the second will is by an act such as destruction, Section 2-509 permits the testator's intent that the first will be revived to be shown by extrinsic evidence, thus producing results generally more consistent with the testator's intent.

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Disposition of Provisions of Existing Law Relating to Wills

Set forth below is the text of provisions of existing law which would be superseded or affected by the Uniform Probate Code provisions on wills, and a Comment to each section indicating the new section that would supersede existing language. The Comments are drafted as though the recommended legislation were already enacted.

Civil Code § 1389.4 (amended). Appointment to previously deceased appointee by will or instrument effective at death of donee

1389.4. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the ~~surviving~~ issue of such appointee who survive the appointee by 120 hours shall take the appointed property ~~, per stirpes and not per capita,~~ and if they are all of the same degree of kinship they take equally, but if of unequal degree then those of more remote degree take by representation as provided in Probate Code Section [2-106]. Such issue shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.4 is amended to make the rule of representation consistent with the rule of representation for intestate succession (see UPC § 2-106, approved by the Commission), and to require the issue of a predeceased appointee to survive the latter by 120 hours before they will be substituted as takers, consistent with the law of wills and intestate succession (see UPC §§ 2-104 [intestate succession], approved by the Commission, 2-601 [wills], not yet considered by the Commission).

07439

Civil Code § 4352 (repealed). Notice concerning effect of dissolution or judgment of nullity of marriage on a will

4352. Every final judgment declaring a marriage a nullity or dissolving a marriage shall contain the following notice:

Notice: Please review your will. Unless a provision is made in the property settlement agreement, this court proceeding does not affect your will and the ability of your former spouse to take under it.

Comment. Former Section 4352 is superseded by UPC Section 2-508.

Probate Code § 20 (repealed). Who may make a will; disposal of testator's property or body

20. Every person of sound mind, over the age of 18 years, may dispose of his or her separate property, real and personal, by will. In addition, every such person may by will dispose of the whole or any part of his or her body to a teaching institution, university, college, State Director of Public Health or legally licensed hospital, or to or for the use of any nonprofit blood bank, artery bank, eye bank, or other therapeutic service operated by any agency approved by the Director of Public Health under rules and regulations established by the director, either for use as such institution, university, college, hospital or agency may see fit, or for use as expressly designated therein.

Comment. The first sentence of former Section 20 is continued in UPC Section 2-501 and in Section [2-501.5]. The second sentence of former Section 20 is superseded by the Uniform Anatomical Gift Act (Health & Safety Code §§ 7150-7157).

24841

Probate Code § 21 (repealed). Disposition of community property by will

21. Every person of sound mind, over the age of 18 years, may dispose of community property by will to the extent provided in Chapter 1 of Division 2 of this code.

Comment. Former Section 21 is continued in UPC Section 2-501 and Section [2-501.5].

07441

Probate Code § 50 (repealed). Formal requirements for execution of an attested will

50. 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:

(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.

(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.

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

(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.

Comment. Former Section 50 is superseded by UPC Section 2-502.

07447

Probate Code § 51 (repealed). Interested witness disqualified to take

51. 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.

Comment. Former Section 51 is superseded by UPC Section 2-505.

08150

Probate Code § 52 (repealed). Creditors as competent witnesses

52. 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.

Comment. The substance of former Section 52 is continued in UPC Section 2-505.

[Note. Probate Code Section 53 would be amended to substitute the UPC provision on holographic wills, and Sections 54, 55, and 325 relating to nuncupative wills would be repealed, under the Commission's Recommendation relating to Holographic and Nuncupative Wills (November 1981).]

Probate Code § 70 (repealed). Effect of marriage on prior will

70. If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received.

Comment. Former Section 70 is superseded by UPC Section 2-301.

08152

Probate Code § 72 (repealed). Effect of subsequent will on prior will

72. A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; but the mere naming of an executor in the prior will need not be given effect by the court when the subsequent will is otherwise wholly inconsistent with the terms of the prior will, the intention of the testator in this respect being left to the determination of the court.

Comment. Former Section 72 is superseded by UPC Section 2-507.

08157

Probate Code § 73 (repealed). Instrument altering interest in property disposed of by will

73. If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

Comment. Former Section 73 is not continued. Informal revocation of a provision of the testator's will in the manner authorized under former Section 73 is no longer permitted. If the testator conveys away

the entire interest in property which is also disposed of in the testator's will, the testamentary gift will be adeemed by extinction. See Official Comment to UPC § 2-612; 7 B. Witkin, Summary of California Law Wills and Probate § 218, at 5728 (8th ed. 1974). If the property is conveyed away in part, Section 78 will apply (no revocation where testator's interest "is altered, but not wholly divested") and the testamentary gift would not be adeemed.

08363

Probate Code § 74 (repealed). Revocation by writing or by act

74. Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities required for the execution of a will; or,

(2) By being burnt, torn, canceled, defaced, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

Comment. Former Section 74 is superseded by UPC Section 2-507.

09036

Probate Code § 75 (repealed). Effect of revocation of revoking will on prior will

75. If, after making a will, the testator makes a second will, the destruction or other revocation of the second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction or other revocation, the first will is duly republished.

Comment. Former Section 75 is superseded by UPC Section 2-509.

§ 76
09038

Probate Code § 76 (repealed). Effect of revoking duplicate will

76. A will executed in duplicate is revoked if one of the duplicates is burnt, torn, canceled, defaced, obliterated or destroyed under the circumstances mentioned in subdivision 2 of Section 74 of this code.

Comment. Former Section 76 is continued in substance in Section 2-507.5.

09041

Probate Code § 79 (repealed). Effect of revocation of a will on codicils

79. The revocation of a will revokes all its codicils.

Comment. Former Section 79 is not continued. Former Section 79 was not a complete statement of the law since the section had been qualified by a case which held that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will and is not revoked by revocation of the underlying will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963).

There is no provision in the Uniform Probate Code comparable to former Section 79. By the repeal of Section 79, the question of whether revocation of a will revokes its codicils is left to case law development under the Uniform Probate Code.

09042

Probate Code § 350 (repealed). Proof of lost or destroyed will

350. No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Comment. Former Section 350 is not continued. Thus any unrevoked will is provable in probate whether or not the will is physically in existence. The provisions of such a will are provable by a preponderance of the evidence, and may be proved by a single witness.

[Note. The staff will add appropriate citations to the Comment to former Section 350 after the Commission has considered the procedural provisions of Article III of the Uniform Probate Code. See, e.g., UPC §§ 3-301, 3-303, 3-402, 3-405, 3-406, 3-407.]