

Memorandum 82-11

Subject: Study L-603 - Probate Law (Validity of Will Under Law of Another State or Country)

Assume that a testator has died in California (state 1) where probate is pending. At all times the testator's state of domicile is state 2, but the will was executed in state 3 while the testator was on vacation there. Because of local differences in wills law, it is possible that the will is valid in one of these three states but invalid in another.

Both California law and the UPC have closely similar provisions to deal with this situation. Both would validate the will in the California proceeding if the will is valid under the law of any one of the three involved states (state of domicile, state of execution, or forum state). See Prob. Code § 26 (attached to this memorandum as Exhibit 1); UPC § 2-506 (attached to this memorandum as Exhibit 2). The purpose of validating the will when it is valid in any one of the involved jurisdictions is to "provide a wide opportunity for validation of expectations of testators." Official Comment to UPC § 2-506.

There is one important substantive difference between California law and the UPC: The California validation rule applies only to a will "made out of this state," while the UPC rule applies to wills executed within California as well as without. Prob. Code § 26; UPC § 2-506; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 335 n.20 (1976). Thus California and the UPC would reach opposite results in the case where the testator is domiciled in some other state and the will is valid there, but executes the will defectively in California so that it is invalid under California law. California law would not validate the will in the California probate proceeding since the will was executed here. Under the UPC rule, however, the will would be valid in California because valid in the testator's state of domicile.

In the situation described above, the UPC rule better serves the stated purposes of fulfilling the expectations of testators and having national uniformity of wills law. Accordingly, the staff recommends the UPC validation rule which is not limited to wills executed outside the forum state.

The UPC section is also better drafted, since it states the rule affirmatively (a "will is valid if") rather than negatively as does the California provision ("[n]o will . . . is valid . . . unless"). Accordingly, the staff recommends that UPC Section 2-506 be adopted in place of Probate Code Section 26.

Respectfully submitted,

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EXHIBIT 1

PROBATE CODE § 26

§ 26. Foreign wills; validity

No will made out of this state is valid as a will in this state unless (1) executed according to the provisions of this act, or (2) executed according to the laws of the state in which it was executed, or (3) valid under the laws of the state in which the testator was domiciled at the time of his death, or (4) valid under the laws of the state in which the testator was domiciled on the date of execution of the will. (Stats.1931, c. 281, § 26. Amended by Stats.1972, c. 713, § 1.)

EXHIBIT 2

UNIFORM PROBATE CODE § 2-506

Section 2-506. [Choice of Law as to Execution.]

A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

COMMENT

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this state would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico exe-

cutes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.