

Memorandum 82-19

Subject: Study L-606 - Probate Law (Contracts Concerning Succession
and Provisions Relating to Effect of Death)

The Commission has previously approved UPC Section 2-701 relating to contracts to make or not to revoke a will, or to die intestate. The Commission has also approved UPC Section 6-201 which validates pay-on-death provisions in written instruments in connection with its recommendation relating to nonprobate transfers. These two sections, their Law Revision Commission and UPC Comments, and the explanatory material which will appear in the preliminary part of our ultimate recommendation, are all set out in Exhibit 1 to this Memorandum. The conforming revisions are in Exhibit 2. These sections present no new policy questions.

UPC Section 6-201 is also in Assembly Bill No. 325 which was killed in the Assembly Judiciary Committee. However, the objections which killed the bill were not directed to this section. Accordingly, the staff proposes to include this section in our wills recommendation.

Respectfully submitted,

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EXHIBIT 1

Contract to Make or Not to Revoke a Will, or to Die Intestate

In California, a promise to make a will, or not to revoke a will already made, comes within the Statute of Frauds.¹ Such a promise must therefore generally be in writing and, if oral, is generally unenforceable.²

However, the California courts have developed a number of doctrines to permit enforcement of an oral promise to make or not to revoke a will in order to avoid the harshness that would be caused by a strict application of the Statute of Frauds. These doctrines are as follows:

(1) An oral agreement concerning a will which is unenforceable when made may become enforceable if a written note or memorandum is later made--the later writing is said to "relate back" to the earlier oral agreement.³

(2) Oral testimony is admissible in a court proceeding concerning points on which a written agreement is silent, so long as the testimony does not contradict the writing.⁴

(3) In extreme cases where the decedent has made an oral promise to make or not to revoke a will and has induced another to change his or

1. See *Zaring v. Brown*, 41 Cal. App.2d 227, 231, 106 P.2d 224 (1940). The California Statute of Frauds (Civil Code § 1624) provides in pertinent part as follows:

1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

. . . .

(6) An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will.

2. *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198 (1935); 1 B. Witkin, *Summary of California Law Contracts* § 223, at 197 (8th ed. 1973); 7 B. Witkin, *Summary of California Law Wills and Probate* § 94, at 5611 (8th ed. 1974).

3. See *Potter v. Bland*, 136 Cal. App.2d 125, 131, 288 P.2d 569 (1955). See generally 1 B. Witkin, *Summary of California Law Contracts* § 205, at 186 (8th ed. 1973).

4. *Potter v. Bland*, 136 Cal. App.2d 125, 132, 288 P.2d 569 (1955).

her position in reliance on the oral promise, the courts will find an estoppel to set up the bar of the Statute of Frauds, and will thus enforce the oral promise.⁵

(4) In some cases, the courts have enforced an oral promise to leave property to another by finding an oral express trust.⁶

If the court cannot find sufficient basis to award to the plaintiff the property in the decedent's estate which was promised to be left by will under one of the foregoing theories, the court may nonetheless award the plaintiff the reasonable value of services rendered to the decedent in return for an unenforceable promise by the decedent to leave property to the plaintiff by will.⁷

The fundamental problem with permitting proof of oral agreements to make or not to revoke a will is that the alleged promisor is deceased, and is therefore unable to testify. There is thus a dangerous opportunity for the fabrication of testimony concerning the existence of such an

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5. See, e.g., Walker v. Calloway, 99 Cal. App.2d 675, 222 P.2d 455 (1950). In the Walker case, the decedent had persuaded the plaintiff, his ex-wife, to move to California from her home in Michigan to care for him as he was dying of cancer in return for his oral promise to leave his property to her by will. Noting the disagreeable nature of the services the plaintiff gave to the decedent, the court held she was entitled to have the oral promise enforced by constructive trust.

In the context of mutual wills, the court has held that if two people execute mutual wills and orally agree not to revoke them, one of them dies, the survivor accepts the benefits under the decedent's will, and then the survivor revokes his or her own will, a constructive fraud sufficient to raise an estoppel has been practiced, and equity will enforce a constructive trust on the property. Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198 (1935); see Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954); Potter v. Bland, 136 Cal. App.2d 125, 132-33, 288 P.2d 569 (1955).

6. See Maddox v. Rainoldi, 163 Cal. App.2d 384, 329 P.2d 599 (1958). In the Maddox case, the promisor had orally agreed to hold real property in trust for the common use of the plaintiffs and herself during her lifetime, with title to vest in her daughter (one of the plaintiffs) on her death. Plaintiffs had made substantial improvements on the real property in reliance on the oral declarations of the promisor. The court held that this was sufficient to take the oral declaration of trust out of the Statute of Frauds.
7. Drvol v. Bant, 183 Cal. App.2d 351, 356-57, 7 Cal. Rptr. 1 (1960). See generally 1 B. Witkin, Summary of California Law Contracts § 49, at 60, § 223, at 198, § 259, at 225 (8th ed. 1973).

agreement.⁸ Good public policy requires some form of written evidence that such an agreement actually exists.⁹ This is what the UPC provides.¹⁰

Under the UPC, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate,¹¹ can be established only (1) by provisions of a will stating material provisions of the contract, (2) by an express reference in the will to the contract and extrinsic evidence proving the terms of the contract, or (3) by a writing signed by the decedent evidencing the contract.¹² Thus, the UPC does not go so far as to require all of the terms of the contract to be in writing. It merely requires that there be some written evidence that such a contract exists. The evidence may be as minimal as an "express reference" in the will to the contract, the terms of which are entirely oral. Thus, the UPC provision leaves adequate room for the courts to develop reasonable interpretations of its requirements and thereby to avoid harsh results.¹³

Adoption of the UPC provision relating to contracts concerning a will would further the purpose of having national uniformity of wills law, and would provide a clearer, more detailed statutory statement than the present Statute of Frauds provides. Accordingly, the Commission recommends enactment of the UPC provision in place of the applicable portion of the Statute of Frauds.

8. To some extent, this danger is ameliorated by the rule in California that there must be clear and convincing evidence to prove an oral agreement to make or not to revoke a will. See *Notten v. Mensing*, 3 Cal.2d 469, 477, 45 P.2d 198 (1935); *Lynch v. Lichtenthaler*, 85 Cal. App.2d 437, 441, 193 P.2d 77 (1948).

9. L. Averill, *Uniform Probate Code in a Nutshell* § 11.01, at 115 (1978).

10. See *Uniform Probate Code* § 2-701.

11. There are no California cases concerning an agreement to die intestate. See generally, 79 Am. Jur.2d Wills § 63 (1975).

12. *Uniform Probate Code* § 2-701. The UPC section also provides that the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. Id. This provision is consistent with California decisional law. See *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); *Lich v. Carlin*, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

13. L. Averill, supra note 128.

Pay-on-Death Provisions in Contracts and Instruments

The UPC authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments and deems such provisions to be nontestamentary. In particular, the UPC validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after his death "to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently." The provision validates contractual arrangements which might be held testamentary and invalid under existing law because not made in a valid will. The sole purpose of the provision is to eliminate the testamentary characterization of arrangements falling within the terms of the provision. The provision avoids the need to execute the contract in compliance with the requirements for a will and avoids the need to have the instrument probated. Nothing in the provision limits the rights of creditors under other laws of this state.

PART 7

CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

26762

Section 2-701. Contracts concerning succession

2-701. A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this ~~Act~~ act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Comment. Section 2-701 is the same as Section 2-701 of the Uniform Probate Code and supersedes the last portion of subdivision (6) of Section 1624 of the Civil Code (Statute of Frauds). The second sentence of Section 2-701 is consistent with prior California case law. See *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); *Lich v. Carlin*, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

UNIFORM PROBATE CODE COMMENT

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the ma-

terial provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

405/863

§ 2-702. Dispositive provisions in written instruments

~~6-204~~ 2-702. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance

or any other written instrument effective as a contract, gift, conveyance, or trust is ~~deemed to be nontestamentary~~ not invalid because the instrument does not comply with the requirements for execution of a will, and this ~~Code~~ code does not invalidate the instrument or any provision of the following provisions :

(1) ~~that~~ That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his or her death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently ; .

(2) ~~that~~ That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the ~~promissor~~ promisor before payment or demand ; ~~or~~ .

(3) ~~that~~ That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

Comment. Section 2-702 is the same in substance as UPC Section 6-201. The UPC language that the provisions referred to in this section are "deemed to be nontestamentary" has been replaced by the language making them "not invalid because the instrument does not comply with the requirements for execution of a will." This change is nonsubstantive.

Paragraphs (1) and (3) of subdivision (a) may expand California law with respect to the kinds of transfers on death which are valid. For example, although the question has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code Section 6-201. However, a contractual provision has been upheld that should the owner of a business predecease the manager, the manager would receive the business, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. Estate of Howe, 31 Cal.2d 395, 189 P.2d 5 (1948). Also, the payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, e.g., Gov't Code §§ 21332-21335 (public employees' death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations).

Paragraph (2) codifies California case law. See Bergman v. Ornbaun, 33 Cal. App.2d 680, 92 P.2d 654 (1939) (unpaid installments under promissory note cancelled on death of promisee). See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 87-89, at 5607-09 (8th ed. 1974).

UNIFORM PROBATE CODE COMMENT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts,

as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing tends to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

EXHIBIT 2
CONFORMING REVISION

07438

Civil Code § 1624 (amended). Statute of frauds

1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof;
2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794;
3. An agreement made upon consideration of marriage other than a mutual promise to marry;
4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged;
5. An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where such lease is for a longer period than one year, for compensation or a commission;
6. An agreement which by its terms is not to be performed during the lifetime of the promisor ~~; or an agreement to devise or bequeath any property, or to make any provision for any person by will ;~~
7. An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of said indebtedness by the purchaser is specifically provided for in the conveyance of such property.

Comment. Section 1624 is amended to delete the last portion of subdivision 6 (agreement to devise or bequeath property or to make any provision by will) which is superseded by UPC Section 2-701.