#L-600 12/31/82

First Supplement to Memorandum 83-1

Subject: Study L-600 - Probate Law

This supplement presents various matters in connection with the bills relating to probate law and procedure that the Commission has recommended to the 1983 legislative session.

EXECUTION OF WILL

At the last meeting, the Commission eliminated the provision in the draft statute which permitted the testator to sign a will and then to acknowledge the signature to two witnesses at different times. The draft statute was revised to require both witnesses to be present at the same time for the execution ceremony. The proposed legislation submitted to the Legislature (AB 25) requires that both witnesses be present at the same time to witness the testator signing the will or that the testator's acknowledgment of the signature be made when both witnesses are present at the same time. See the discussion in Memorandum 83-1 (page 1) and see Exhibit 1 to Memorandum 83-1 for the text of the proposed statute.

I think that it is fair to say that the Commission restored the "present at the same time" requirement primarily because of a desire to eliminate areas of disagreement with the Estate Planning, Trust and Probate Law Section of the State Bar.

Our consultant--Professor Jesse Dukeminier--has written that he is very much distressed that the Commission decided to reverse its earlier decision and to restore the present requirement of California law that the witnesses to a will must be present at the same time when the testator signs or acknowledges. You should read his letter (attached as Exhibit 1) with care. He makes a strong case against the "present at the same time" requirement. Does the Commission desire to eliminate the "being present at the same time" requirement in paragraph (1) of subdivision (c) of Section 6110 (Exhibit 1 of Memorandum 83-1)?

AMENDMENTS TO BILLS RELATING TO PROBATE LAW AND PROCEDURE

ASSEMBLY BILL NO. 25 (EXHIBIT 2 - ATTACHED)

Assembly Bill No. 25 is the bill introduced to effectuate the Commission's recommendation that the existing provisions relating to wills and intestate succession and related matters be replaced by a comprehensive new statute. Exhibit 2 (attached) sets out a number of amendments that the staff proposes be made to AB 25. You should check these amendments against the copy of AB 25 previously sent to you. Most of the amendments are technical. A few deserve some explanation:

(1) Amendments 3-5 will fill a gap in the definition of community property. They make no substantive change in the bill as proposed.

(2) Amendment 15 inserts in the statute a statement that is consistent with the statement found in the official Comment to various sections.

(3) Amendments 16-18 are needed to make clear that the person executing a statutory will can check a square that eliminates a bond for an individual named in the will as an executor, trustee, or guardian. The existing language is unclear whether the elimination of a bond provision covers individuals not named in the will but serving as executors or trustees.

(4) Amendment 24 restores language of the existing statute. The revised language in AB 25 is unclear.

(5) Amendment 25 eliminates unnecessary language.

ASSEMBLY BILL NO. 68 (EXHIBIT 3 - ATTACHED)

The amendments to AB 68 are all technical amendments.

ASSEMBLY BILL NO. 28 (EXHIBIT 4 - ATTACHED)

The amendments to AB 28 are technical amendments.

ASSEMBLY BILL NO. 53 (EXHIBIT 5 - ATTACHED)

The amendments to AB 53 are technical.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

December 17, 1982

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road, Rm. D-2
Palo Alto, CA 94306

Dear John:

Re: Probate Study L-625

I was very much distressed that the Commission decided to reverse its earlier decision and to keep the present requirement of California law that the witnesses to a will must be present at the same time when the testator signs or acknowledges. The Uniform Probate Code does not require the witnesses to be present at the same time. I regard the UPC as so greatly preferable to present California law on this point that I was startled to find any opposition to the change.

The Commission apparently acted in response to a letter from Mr. James Devine, representing the Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section, which opposed the change in California law. I should like to make the case for the UPC provision, praying that the Commission will reverse its latest position.

In my research on wills I have found no technical requirement which causes wills to fail so often as the requirement that the witnesses be present at the same time before the testator. The presence requirement rarely causes a will execution ceremony supervised by an attorney to fail, because good attorneys know that the witnesses should be present at the same time. I say good attorneys, because there have been recent cases in which the attorney takes a will to testator's home, where testator signs and the attorney signs as a witness, then the attorney returns to his office and has his secretary call the testator, who requests the secretary to witness the will, and the secretary does so. The wills have been denied probate. In re Jefferson, 349 So. 2d 1032 (Miss. 1977); In re Heaney, 75 Misc. 2d 732, 374 N.Y.S.2d 922 (Sur. Ct. 1973). And there have been cases where the attorney has been liable for malpractice for sending a will to the testator with inadequate instructions for its execution. Ross v. Caunters, [1980] 1 ch. 297.

Nonetheless, in spite of these occasional lapses by attorneys, it is wills whose execution is not supervised by an attorney that we are talking about. A typical case is In re Groffman, [1969] 1 W.L.R. 733, which I use as the leading case in my casebook. There a lawyer drafted a will for the testator and told him generally about the execution requirements. One evening afterward, the testator and his wife had two couples, Mr. & Mrs. A. and Mr. & Mrs. B, for dinner. While sitting in the living room, testator asked Mr. A and Mr. B to witness his will. Testator and Mr. A went into the dining room where testator acknowledged his signature, and Mr. A signed as witness. Then Mr. A returned to the living room and told Mr. B, who was somewhat cumbrous in his movements, to hurry up. Mr. B then went into the dining room and witnessed the will. The will was denied probate because Mr. A and Mr. B were not in the dining room at the same time.

The other typical case where the simultaneous presence requirement defeats probate is where the testator is in the hospital and has his signature witnessed by, say, a patient in the next room and a nurse down the hall at the nurses' station. See In re Colling, [1972] 1 W.L.R. 1440.

The simultaneous presence requirement in California law requires only that testator sign or acknowledge in the presence of witnesses present at the same time. The witnesses do not have to sign in each other's presence. Scholars have examined the reasons for the simultaneous presence requirement and have not found any convincing reason. It is sometimes suggested that the witnesses are attesting not just to the signature of the testator, but also to his mental capacity, and hence they both must attest to this at one moment of time. This reason operates on an arguably false premise (that witnesses attest mental capacity as well as signature), and in any case mental capacity can be proven or disproven by other persons than witnesses to the will.

Mr. Devine suggests that abolishing the simultaneous presence requirement might result in wills failing because testator, knowing that the witnesses do not have to be present at the same time, may delay securing a second witness so long that he dies without a second witness to his will. In reply, I will say, first, that this appears to be a very dubious assumption about human behavior. Most people who are "will minded" want to get it attended to and done; they want to get the matter over with. Making a will is a reminder of mortality, which is why a lot of people die intestate. To make a will a person has to grit his teeth and do it. I think it would be an extremely rare case where a person would get one witness on a will and then wait for a month or a year to secure a second. This "procrastinating testator" suggestion reminds me of the "fertile octogenarian", "unborn widow" and other remote possibilities that brought the Rule against Perpetuities into disrepute. Second, Mr. Devine is assuming that people know the exact requirements of an execution ceremony, and that this knowledge influences their behavior. I do not believe this to be true: look at all the wills that fail because faultily executed by laymen. Look at the cases where the wills cannot be probated because the witnesses are not present at the

same time. These testators did not know the exact requirements. Third, it is my belief, based on reading wills cases for a quarter of a century, that many more wills will fail because of the simultaneous presence requirement than will fail because the testator procrastinates in securing a second witness and dies in the meantime. The large majority of states do not require that the witnesses be present at the same time, and I have never heard or read of any special problem in these states arising because of delay in witnessing. Finally, on the equities of the issue, I come down squarely in favor of protecting persons who slip up in the execution ceremony and have their wills witnessed separately. I see no reason to penalize them out of a fear that someone will too long delay securing the second witness. If the will of the procrastinator is invalid, I shall shed few tears.

I would like to bring to the attention of the Commission some words written by Professor Mechem of the University of Pennsylvania, which bear directly on this issue:

> The philosophy of all this [referring to, inter alia, the simultaneous presence requirement] is . . . obvious and familiar. It assumes that the more "safeguards against fraud" the better. It is likewise big-law-office philosophy: every testator must be forced to execute his will just as it would be done if the matter were being handled by a high-powered law firm. This overlooks one very important fact, namely, that the only persons the execution of whose wills are likely to come into question are precisely those persons who do not have the job supervised by a high-powered law firm, but who instead have the matter looked after by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. These persons have the same right to make wills as their more prosperous or sophisticated brothers and sisters who employ good lawyers; the governing philosophy should be to design a wills act that as far as is consistent with safety adapts itself to the knowledge (or ignorance), psychology, and habits of such people so as to create the minimum risk that their testamentary attempts will be frustrated by failure to have the witnesses attest in the presence of the testator, or the like.
>
> Put slightly otherwise, the philosophy should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements. In making this determination, careful attention should be given to the known habits of testators (particularly untutored ones) as illustrated by the thousands of cases decided since 1677. [Mechem, Why Not a Modern Wills Act?, 33 Iowa L. Rev. 501-503 (1948)]

I hope that the Commission will adopt the Uniform Probate Code position on this issue and not continue the simultaneous presence requirement in California law. The chances of defeating meritorious wills are, in my judgment, far greater by continuing this requirement than by deleting it.

Sincerely,

Jesse Dukeminier
Professor of Law

JD/649/bd
cc:James D. Devine, Esq.
Ehrman, Flavin & Morris
400 Camino El Estero
P.O. Box 2229
Monterey, CA 93940

EXHIBIT 2

AMENDMENTS TO ASSEMBLY BILL NO. 25

Amendment 1

On page 1, line 6 of the title, of the printed bill, strike out "and"

Amendment 2

On page 1, line 7 of the title, after "296)" insert:
, and Part 2 (commencing with Section 5501) of Division 5

Amendment 3

On page 9 of the printed bill, strike out line 26 and insert:
means:

(a) Community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state.

Amendment 4

On page 9, line 27, strike out "(a)" and insert:
(b)

Amendment 5

On page 9, line 35, strike out "(b)" and insert:
(c)

Amendment 6

On page 13, between lines 29 and 30, insert:

SEC. 6. Division 2 (commencing with Section 100) is added to the Probate Code, to read:

Amendment 7

On page 23, line 6, strike out "or 6403" and insert:
6242, 6243, 6244, or 6403, or other provision of the Probate Code

Amendment 8

On page 24, between lines 30 and 31, insert:

SEC. 6.5. Part 2 (commencing with Section 5501) of Division 5 of the Probate Code, as proposed to be added by Assembly Bill No. 53 of the 1983-84 Regular Session, is repealed.

Amendment 9

On page 24, line 31, strike out "SEC. 6." and insert:

SEC. 7.

Amendment 10

On page 27, line 1, after "duplicate" insert:

or any part thereof

Amendment 11

On page 28, line 20, after "after" insert:

the execution of the will or before or after

Amendment 12

On page 28, lines 35 and 36, strike out "the provisions of this code relating to"

Amendment 13

On page 29, strike out line 8

Amendment 14

On page 29, line 9, strike out "contains language" and insert:

(c) Nothing in this section limits the effect of any language in the testator's will

Amendment 15

On page 33, between lines 33 and 34, insert:

6178. The rules stated in Sections 6172 to 6177, inclusive, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under the law of this state.

Amendment 16

On page 42, line 30, after "individual" insert:
named in this will as

Amendment 17

On page 42, line 31, strike out "named in this will"

Amendment 18

On page 50, lines 23 and 24, strike out "(a) executor, (b) trustee, or (c) guardian named in this will" and insert:
named in this will as executor, trustee, or guardian

Amendment 19

On page 52, line 20, strike out "and"

Amendment 20

On page 53, line 40, after "both" insert a comma

Amendment 21

On page 60, line 18, strike out "tranfer" and insert:
transfer

Amendment 22

On page 76, line 15, strike out "adminstration" and insert:
administration

Amendment 23

On page 80, line 23, strike out "Pretermitted" and insert:
Omitted

Amendment 24

On page 83, strike out lines 26 to 29, inclusive, and insert: trust or fund has been distributed to the beneficiaries thereof prior to distribution of such benefit from the estate, such benefit passes to the state and escheats to the state under this chapter.

Amendment 25

On page 84, strike out lines 29 to 37, inclusive, and insert:

SEC. 8. This act shall become operative on January 1, 1985.

EXHIBIT 3

AMENDMENTS TO ASSEMBLY BILL NO. 68

Amendment 1

On page 1, line 1 of the title of the printed bill, after "Sections" insert:

63,

Amendment 2

On page 2, strike out line 1 and insert:

SECTION 1. Section 63 of the Civil Code, as amended by Assembly Bill 29 of the 1983-84 Regular Session, is amended to read:

63. An emancipated minor shall be considered as being over the age of majority for the following purposes:

(a) For the purpose of consenting to medical, dental, or psychiatric care, without parental consent, knowledge, or liability.

(b) For the purpose of the minor's capacity to do any of the following:

(1) Enter into a binding contract.

(2) Buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property, including but not limited to shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation.

(3) Sue or be sued in his or her own name.

(4) Compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.

(5) Make or revoke a will.

(6) Make a gift, outright or in trust.

(7) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.

(8) Exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides.

(9) Create for his or her own benefit or for the benefit of others a revocable or irrevocable trust.

(10) Revoke a revocable trust.

(11) Elect to take under or against a will.

(12) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right to surrender the right to revoke a revocable trust.

(13) Make an election or an election and agreement referred to in Section ~~202~~ 649.1 of the Probate Code.

(c) For the purpose of the minor's right to support by his or her parents.

(d) For purposes of the rights of the minor's parents or guardian to the minor's earnings, and to control the minor.

(e) For the purpose of establishing his or her own residence.

(f) For purposes of the application of Sections 300 and 601 of the Welfare and Institutions Code.

(g) For purposes of applying for a work permit pursuant to Section 49110 of the Education Code without the request of his or her parents or guardian.

(h) For the purpose of ending all vicarious liability of the minor's parents or guardian for the minor's torts; providing, that nothing in this section shall affect any liability of a parent, guardian, spouse, or employer imposed by the Vehicle Code, or any vicarious liability which arises from an agency relationship.

(i) For the purpose of enrolling in any school or college.

SEC. 1.5. Section 224.1 of the Civil Code is

Amendment 3

On page 8, strike out line 29 and insert:

Assembly Bill No. 28 of the 1983-84 Regular Session, is amended to read:

Amendment 4

On page 21, line 9, strike out "of" and insert:

or

Amendment 5

On page 29, line 4, strike out the dash and insert:

No. 25

Amendment 6

On page 29, line 7, strike out the dash and insert:

No. 25

Amendment 7

On page 29, after line 7, insert:

SEC. 49. Section 1 of this Act shall not become operative unless Section 63 of the Civil Code is amended by Assembly Bill No. 29 of the 1983-84 Regular Session and that bill is chaptered. If AB 29 is chaptered, Section 63 of the Civil Code as amended by AB 29 remains operative until January 1, 1985, when AB 68 becomes operative, and on and after January 1, 1985, Section 63 of the Civil Code as amended by AB 68 is operative.

SEC. 50. Section 14 of this Act shall not become operative unless Section 282 is added to the Probate Code by Assembly Bill No. 28 of the 1983-84 Regular Session and that bill is chaptered.

EXHIBIT 4

AMENDMENTS TO ASSEMBLY BILL NO. 28

Amendment 1

On page 14, line 2, of the printed bill, strike out the dash and insert:

24

Amendment 2

On page 14, line 5, strike out the dash and insert:

24

EXHIBIT 5

AMENDMENTS TO ASSEMBLY BILL NO. 53

Amendment 1

On page 1, line 5 of the title, of the printed bill, strike out "Section" and insert:

Sections 269, 270, and

Amendment 2

On page 14, between lines 12 and 13, insert:

SEC. 20.5. Section 269, as proposed to be added to the Probate Code by Assembly Bill No. 28 of the 1983-84 Regular Session, is amended to read:

269. "P.O.D. account" means ~~an account subject to a pay/on/death provision as provided in Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code~~ a P.O.D. account as defined in Section 5101.

SEC. 20.7. Section 270, as proposed to be added to the Probate Code by Assembly Bill No. 28 of the 1983-1984 Regular Session, is amended to read:

270. "Totten trust account" means ~~an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney/client~~ a trust account as defined in Section 5101.

Amendment 3

On page 25, after line 25, insert:

SEC. 25. [Insert provision that Sections 20.5 and 20.7 become operative only if AB 28 is enacted, and if AB 28 is enacted the amendments to Sections 269 and 270 made by Sections 20.5 and 20.7 become operative on July 1, 1984, and Sections 269 and 270 as enacted by AB 28 remain operative in the form in which enacted until July 1, 1984, and on and after July 1, 1984, those sections exist as amended by AB 53.]