#L-650 10/28/83

Second Supplement to Memorandum 83-100

Subject: Study L-650 - Probate Law and Procedure (Execution of Witnessed Wills)

The basic Memorandum (83-100) states the staff's view that it is not useful to require the witnesses' signatures on a will to be roughly contemporaneous, since there is no required relationship to how long previously the testator signed. The staff has looked at the statutes of some other states, and the New York provision is interesting. It provides in part:

> There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will.

The complete text of this section (N.Y. Est. Powers & Trusts Law § 3-2.1) is set forth in Exhibit 1 attached to this Memorandum.

The section does not make clear whether the required 30-day period commences to run when the testator signs, but the practice commentary following the section does make this clear: "[T]he requisite formalities for the execution and attestation of a will must be completed within a period of thirty days."

Case citations in the commentary indicate that the 30-day provision was intended to deal with the problem that occurred in two New York cases. In one case, the testatrix did not obtain the signature of the second witness until nearly three years after she and the first witness had signed the will. Although there was no governing statute at that time, the court held the will invalid, saying:

> The signing or acknowledgment by the testator, and the publication and the attestation of the witnesses, must be successive, continuous, and contemporaneous acts, and the lapse of over two years after the instrument was signed by one witness before it was signed by the other, exceeds all reasonable limitations.

In re Harty's Estate, 85 Misc. 628, 148 N.Y.S. 1052 (1914).

A more recent New York case upheld a witnessed holographic will where about three months elapsed before all witnesses' signatures were

affixed to the will. In re Estate of Knoepfler, 34 Misc.2d 65, 227 N.Y.S.2d 965 (1962).

It is also interesting to note that, although Pennsylvania requires the testimony of two witnesses for admission of a contested will to probate, there is no requirement that there be any signatures of witnesses on the will. See Pa. Stat. Ann. tit. 20, § 2502; In re Brantlinger's Estate, 418 Pa. 236, 210 A.2d 246 (1966).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

New York Estates, Powers & Trusts Law § 3-2.1. Execution and attestation of wills; formal requirements

(a) Except for nuncupative and holographic wills authorized by 3-2.2, every will must be in writing, and executed and attested in the following manner:

(1) It shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction, subject to the following:

(A) The presence of any matter following the testator's signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution, except that such matter preceding the signature shall not be given effect, in the discretion of the surrogate, if it is so incomplete as not to be readily comprehensible without the aid of matter which follows the signature, or if to give effect to such matter preceding the signature would subvert the testator's general plan for the disposition and administration of his estate.

(B) No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator, or to any matter preceding such signature which was added subsequently to the execution of the will.

(C) Any person who signs the testator's name to the will, as provided in subparagraph (1), shall sign his own name and affix his residence address to the will but shall not be counted as one of the necessary attesting witnesses to the will. A will lacking the signature of the person signing the testator's name shall not be given effect; provided, however, the failure of the person signing the testator's name to affix his address shall not affect the validity of the will.

(2) The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction. The testator may either sign in the presence of, or acknowledge his signature to each attesting witness separately.

(3) The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will.

(4) There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will.

(b) The procedure for the execution and attestation of wills need not be followed in the precise order set forth in paragraph (a) so long as all the requisite formalities are observed during a period of time in which, satisfactorily to the surrogate, the ceremony or ceremonies of execution and attestation continue.

L.1966, c. 952; amended L.1967, c. 686, §§ 12, 13; L.1973, c. 618, § 1; L.1974, c. 181, §§ 1, 2.