

Memorandum 84-7

Subject: Study L-653 - Notice of Will

At the November 1983 meeting the Commission reaffirmed its decision to recommend a notice of will registry. (See attached copy of Recommendation Relating to Notice of Will.) The staff is concerned that this proposal will not have a very good chance of passage if Section 6364 retains the requirement that the Secretary of State's certificate reporting the results of a records search be filed with the court in probate proceedings, or other proceedings in which existence of the will is relevant. In an effort to make the notice of will proposal more acceptable to the State Bar, the Commission decided at the September 1982 meeting to revise this provision to make the certificate admissible in evidence, but not require it to be filed. This change did not result in the elimination of State Bar opposition to this proposal in the 1983 legislative session.

Opponents of this proposal have emphasized that Section 6364 would result in a mandatory charge on every estate and might result in delay. (See letter from Kenneth M. Klug, representing the views of the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, attached as Exhibit 3 to the minutes of the November 1983 meeting.) To meet this objection, Section 6364 could be revised as follows:

6364. ~~(a)~~ A certified copy or a certificate of the Secretary of State issued pursuant to Section 6363 ~~shall~~ may be filed with the court in any proceeding for probate of a will or for administration or in any other proceeding in which the existence of a will is relevant. Failure to file the certified copy or certificate of the Secretary of State does not affect the validity of the proceeding.

~~(1) In proceedings for probate of a will or for administration, at a time before any distribution is made or before the time for filing claims expires, whichever is earlier.~~

~~(2) In any other proceeding in which the existence of a will is relevant, promptly after the commencement of the proceeding.~~

~~(b) This section becomes operative on January 1, 1990.~~

The Commission should also note the letter (attached as Exhibit 1) from Mr. Ernest Rusconi of the Santa Clara County Bar Association. At the last meeting the Executive Secretary reported their overwhelming

support for the notice of will recommendation. Mr. Rusconi now reports a one-vote majority opposing the recommendation. Mr. Rusconi also suggests consideration of a system for depositing wills with local courts. This possibility was considered by the Commission at its March 1982 meeting and rejected in light of the costs of storage, handling, and recordkeeping. The notice of will registry was the more palatable alternative suggested at that time and has been on the Commission agenda ever since.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

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December 13, 1983

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, Ca 94036

Re: Proposal for a Will Registry

Dear John:

On December 7, 1983, the Santa Clara County Bar Association Estate Planning, Probate and Trust Section Executive Committee discussed and reconsidered L-653 (the Will registry system). We reviewed the information contained in Mr. Klug's letter dated November 4, 1983, and the information forwarded to you from Vital Statistics, Inc..

Our Executive Committee, after considering this additional information and more debate, reversed its prior position by a one vote majority. So as it stands now, we oppose L-653.

We recommend your Committee study this matter further and compare it with the system available in several eastern States of filing the Will (before death) for safe-keeping with the probate or surrogate clerk. This would be an alternate system which is less costly and would indicate how the public would take to a system providing a different form of registration.

Sincerely Yours,
RUSCONI, JACK, FOSTER & THOMAS

Ernest Rusconi
ERNEST RUSCONI

ER/ksf

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Notice of Will

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

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September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes the establishment of a voluntary registration system for wills in the office of the Secretary of State. After January 1, 1990, a certified copy of the notice on file or a certificate that no notice is on file must be obtained from the office of the Secretary of State and filed in any proceeding in which the existence of a will is relevant.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

NOTICE OF WILL

After a person dies it is necessary to determine whether the person made a will and, if so, where it is located.¹ Even if the existence and location of a will are known, it is still necessary to search for codicils and any later wills. To assist in this process, the Law Revision Commission recommends establishment of a voluntary registration system whereby notice of a will may be filed with the Secretary of State.² Under this scheme, for a small fee a person may choose to file identifying information and the location of a will, but not the will itself. The information in the notice is kept in strict confidence until the death of the testator. After the death of the testator, a certified copy of the notice on file or a certificate reporting that no notice is on file must be obtained from the Secretary of State and then filed in any proceeding in which the existence of a will made by the testator is relevant. The proposed scheme also permits the testator to file additional notices to change any relevant information or to give notice that a will has been revoked. Neither the failure to file nor the filing of any notice has any effect on the validity of a will.

The Commission anticipates that this notice of will registry, involving a relatively modest cost,³ will result in finding wills that otherwise might not be found. This view is supported by British Columbia's experience with a similar system for registration of will notices in place since

¹ See Farrand, *Immediate Arrangements*, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

² A registry system is not unknown to California since the Uniform International Wills Act (Prob. Code §§ 60-60.8, to be superseded by Prob. Code §§ 6380-6388, operative January 1, 1985) permits filing of information with the Secretary of State concerning an international will. Use of an international will is intended to facilitate proving the validity of a will in countries that are signatories to the international convention. The registry established by the Uniform International Wills Act applies only to wills that are executed in conformity with the Act.

³ The fee for filing the notice of will or for requesting a certificate is \$10.

1945.⁴ The Law Reform Commission of British Columbia has reported the following:⁵

The surprisingly high volume of registrations in the Wills Registry belies criticisms of voluntary systems. In 1971 there were 19,250 notices of wills filed. Four years later this figure had doubled to 37,275, and in 1978 46,217 notices were filed with the Registry. These figures are impressive in light of the relatively small population of the Province and the fact that the scheme is not advertised. Another significant statistic is the number of positive responses to searches. The Wills Registration Division of the Vital Statistics Branch has indicated that in 1971 there were four times as many negative as positive responses issued. In 1978 the office issued 12,450 negative certificates and 7,255 positive certificates. One expects that in the future the number of positive responses will continue to increase.

The requirement that a certified copy or a certificate of the Secretary of State be filed in proceedings where relevant would apply only after January 1, 1990. This delay will allow time for a sufficient number of filings to be made to justify searching the records.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 10 (commencing with Section 6360) to Part 1 of Division 6 of the Probate Code, relating to wills.

The people of the State of California do enact as follows:

SECTION 1. Chapter 10 (commencing with Section 6360) is added to Part 1 of Division 6 of the Probate Code, to read:

⁴ See Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).

⁵ Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981).

CHAPTER 10. FILING NOTICE OF WILL

§ 6360. Filing notice of will

6360. (a) A person who has made a will may file a notice of will in the office of the Secretary of State.

(b) The notice of will shall contain the following information:

- (1) The name of the testator.
- (2) The testator's address.
- (3) The testator's social security or other individual-identifying number established by law, if any.
- (4) The testator's date and place of birth.
- (5) A statement that the testator has made a will and the date of the will.
- (6) The place where the will is kept.
- (c) The notice may include any of the following:
 - (1) The name and address of the testator's attorney.
 - (2) The name and address of a person who has custody of the will or custody of a copy of the will.

(d) If the testator's name is changed or if the place where the will is kept is changed, the testator may file a new notice of will containing the correct information. The new notice of will may also refer to the earlier notice of will.

(e) The filing of a notice of will, or the failure to file a notice of will, under this section does not affect the validity of the will.

Comment. Section 6360 provides a new voluntary procedure for filing a notice of the existence and location of a will. Registration is voluntary, but a search of the records is required for any proceeding in which the existence of a will is relevant. See Section 6364. Section 6360 does not require or permit the filing of the will itself. The procedure provided by this chapter is distinct from that provided under the International Wills Act. See Section 6389 (registry system for international wills information).

§ 6361. Filing notice of revocation

6361. (a) A person who has filed a notice of will pursuant to Section 6360 and who has revoked the will referred to in the notice may file in the office of the Secretary of State a notice of revocation of will.

(b) The notice of revocation of will shall contain the following information:

- (1) The name of the person who is revoking the will.
- (2) The person's address.
- (3) The person's social security or other individual-identifying number established by law, if any.
- (4) The person's date and place of birth.
- (5) A statement that the will referred to in a notice of will filed by the person pursuant to Section 6360 has been revoked.

(c) The filing of a notice of revocation under this section does not itself revoke the will. The failure to file a notice of revocation under this section does not affect the validity of a revocation of a will. No inference that a will has not been revoked may be drawn from the failure to file a notice of revocation.

Comment. Section 6361 is new. This section is intended to provide information as to the revocation of a will. Subdivision (c) makes clear that the filing or nonfiling of a notice of revocation has no effect on the revocation or validity of a will.

§ 6362. Filing and indexing of notices; fee

6362. Upon presentation of a notice of will or notice of revocation of will for filing and tender of the filing fee to the office of the Secretary of State, the notice shall be filed and indexed. The fee for filing and indexing a notice of will or notice of revocation of will is ten dollars (\$10).

Comment. Section 6362 is new.

§ 6363. Release of information

6363. (a) Information filed pursuant to this chapter shall be kept in strictest confidence until the death of the testator.

(b) After the death of the testator, upon the request of a person who presents a death certificate or other satisfactory evidence of the testator's death, the Secretary of State shall issue a certified copy of any information on file about the testator's will. If no information on the testator's will is on file, the Secretary of State shall issue a certificate stating that fact. The fee for a certified copy or a certificate under this section is ten dollars (\$10).

Comment. Subdivision (a) of Section 6363 is similar to a portion of Section 6389 in the International Wills Act. Subdivision (b) is drawn in part from Section 6389 of the International Wills Act. A certified copy or a certificate from the Secretary of State is necessary in proceedings under this code where the existence of a will is relevant, as provided in Section 6364.

§ 6364. Filing of certificate in probate and other proceedings

6364. (a) A certified copy or a certificate of the Secretary of State issued pursuant to Section 6363 shall be filed with the court:

(1) In proceedings for probate of a will or for administration, at a time before any distribution is made or before the time for filing claims expires, whichever is earlier.

(2) In any other proceeding in which the existence of a will is relevant, promptly after the commencement of the proceeding.

(b) This section becomes operative on January 1, 1990.

Comment. Subdivision (a) of Section 6364 makes clear that a petitioner in any proceeding concerning the disposition of property upon death must file a certified copy or the Secretary of State's certificate relating to whether there is a notice of a will on file. Subdivision (b) delays the application of this requirement to allow time for a significant number of notices to be filed.

§ 6365. Regulations

6365. The Secretary of State may prescribe the form of the notices, certificates, and requests for information under this chapter.

Comment. Section 6365 is similar to authority provided elsewhere. See, *e.g.*, Code Civ. Proc. §§ 488.375, 488.405 (notice of attachment prescribed by Secretary of State).

§ 6366. Destruction of obsolete records

6366. Ten years after the Secretary of State has received a request under this chapter for information accompanied by a death certificate or other satisfactory evidence of the testator's death, the Secretary of State may destroy the information filed pursuant to this chapter by the deceased testator and the record of that information.

Comment. Section 6366 permits destruction of obsolete records. The Secretary of State is permitted, but not required, to destroy the records.

§ 6367. Microfilming notices; destruction of originals

6367. (a) The Secretary of State may microfilm or reproduce by other techniques any notice filed under this chapter and may destroy the original. The microfilming or other reproduction shall be made in the manner and on film or paper that complies with the minimum standards of quality approved by the National Bureau of Standards.

(b) The microfilm or other reproduction of a notice under this chapter shall be deemed to be an original record.

Comment. Section 6367 is new and is drawn from other comparable provisions. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007.

§ 6368. Protection of attorney from liability

6368. An attorney is not subject to liability or professional disciplinary action based on failure of the attorney to advise a client to file or not to file any notice that may be filed under this chapter, whether or not the client previously has filed a notice under this chapter.

Comment. Section 6368 is included to ensure that the filing of notices under this chapter is voluntary and that notices will not be filed merely because the attorney for the person making the will fears that the attorney may be liable for failure to advise the client, for example, to file a notice of will, to file a new notice of will to correct information contained in a previously filed notice, or to file a notice of revocation where a notice of will was previously filed. See Sections 6360 and 6361 and the Comments to those sections.