

Memorandum 84-13

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

At the last meeting, the Commission decided to recommend a rule similar to the New York statute requiring witnesses to sign the will not later than 30 days after the will is signed by the testator. The draft section and Comment are attached as Exhibit 1.

Professor Richard Wellman has written to report a case in Nebraska (a UPC state) where the claim is being made that a witness may complete the will by signing it after the testator's death. Professor Wellman thinks this claim is "absurd." A copy of Professor Wellman's letter is attached as Exhibit 2.

Professor Wellman suggests that we consider adding an explicit requirement that the witness sign during the testator's lifetime. This could be accomplished by further revising paragraph (1) of subdivision (c) of Section 6110 (Exhibit 1) to require that the will

(1) Be signed, before the testator's death and not later than 30 days after the will is signed pursuant to subdivision (b), by at least two persons each of whom (i) witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (ii) understand that the instrument they sign is the testator's will.

The staff thinks the revision proposed by Professor Wellman expresses sound policy. If the witness could determine the validity or invalidity of the will after the testator's death by signing or not signing, the witness would be in the undesirable position of being able to bargain with the testator's devisees and heirs and thus obtain an unfair advantage.

On the other hand, the staff has found no reported decision dealing with this fact situation, so the Nebraska case is apparently a case of first impression. No state deals with the matter by statute, and the UPC is silent on the question.

Does the Commission wish to adopt Professor Wellman's suggestion?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

Probate Code § 6110 (amended). Execution of witnessed will

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

(c) The will shall be witnessed by ~~being~~ one of the following methods:

(1) Be signed, not later than 30 days after the will is signed pursuant to subdivision (b), by at least two persons each of whom ~~(1)~~ (i) ~~being present at the same time;~~ witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) (ii) understand that the instrument they sign is the testator's will.

(2) Be acknowledged before a notary public at any place within this state.

Comment. Section 6110 is amended to substitute for the former requirement that the witnesses be "present at the same time" the new requirement that they sign not later than 30 days after the will is signed by the testator (or by some other person for the testator). This new requirement is drawn from New York law. See N.Y. Est. Powers & Trusts Law § 3-2.1 (McKinney 19__). Under Section 6110, only two witnesses who sign within 30 days of execution by the testator are needed to establish the validity of the will, even where there are three or more persons who sign as witnesses. Because California recognizes a nonstatutory presumption of due execution (see, e.g., Estate of Gray, 75 Cal. App.2d 386, 392, 171 P.2d 113 (1946)), the burden is on one contesting the will to establish that the 30-day requirement has not been satisfied.

Section 6110 is also amended to add the alternative of having a will acknowledged before a notary public. The form of the notary's certificate of acknowledgment is prescribed by Section 6110.5. See also Gov't Code §§ 8200-8230. Under paragraph (2) of subdivision (c), the acknowledgment must be made before a notary, and not before one of the various other officers referred to in Civil Code Section 1181 (judge, district attorney, etc.).

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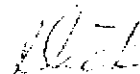
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Re: Study L-650 (Execution of
Witnessed Will)

Dear John,

In connection with your Study L-650 (Execution of Witnessed Will), I have recently learned of a case in Nebraska where the claim is being made that a witness may complete a will by signing it after the testator's death. I think the point is absurd, but it is at least not discouraged by UPC 2-502 or by the recent proposals of your commission. Perhaps thought should be given to requiring that the witness sign "during the testator's lifetime."

Sincerely,



Richard V. Wellman
Educational Director

RVW/khb