

Memorandum 90-35

Subject: Study L-3036 - Use of Videotape in Connection With Will

We have received several communications on videotaping wills. The most recent is a letter from Mary Ferris of Corning, California, which states:

During the course of conversation with our attorney, I commented I intended to use a VCR to make legacies, as well as for insurance purposes. He said this had to be done in writing. Is this not behind times? Every lay person I have talked to thinks this is a beautiful idea. Isn't it feasible, in this day and age to use this format?

This presents several questions:

(1) Should a videotape of the testator orally stating the dispositive provisions be allowed to serve as the will itself? The staff thinks it should not.

(2) Should a videotape of the execution ceremony be admitted as supporting evidence of the validity and intent of the written will? This appears to be allowed under present California law, but the staff recommends a provision be added to the Probate Code to make this clear.

(3) Should a written will be able to refer to a writing or videotape to dispose of tangible personal property not otherwise specifically disposed of by the will? The staff thinks this merits discussion by the Commission, but we recommend against adopting it.

Videotape As the Will Itself

Apart from nuncupative wills, all states require wills to be in writing. 2 W. Bowe & D. Parker, Page on the Law of Wills § 19.5, at 70 (rev. ed. 1960). The writing requirement appears to preclude use of a videotape as the will. Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 Ohio N.U.L. Rev. 271, 273 (1984). No state statute now permits a videotape to serve as the will. See *id.* at 273-74, 286.

A videotaped will arguably has two advantages over a written will:

(1) A videotaped will would make testamentary intent "more lucid" by enabling the court to view the testator relating his or her

desires." Buckley & Buckley, *Videotaped Wills*, 89 Case & Com. 3, 4 (Nov.-Dec. 1984).

(2) A videotaped will would

provide superior protection against tampering than would its written counterpart. Videotape recorders with time/date generators indicate the exact date and time of recording directly onto the tape. The only pages dated in most written wills are those containing the testimonium, attestation, and acknowledgement. Should the testator neglect to initial the remaining pages, it could be relatively easy to replace such pages if one could match type styles and varieties of paper. With a videotape recording time and date, any later modifications, whether by erasure or "recording-over" the tape, would create clearly visible gaps in the testator's presentation. Such tampering would be obvious to the viewer.

Id.

On the other hand, Professor Jesse Dukeminier wrote to the Commission in 1982 opposing videotaped and voice-taped wills (Memo 82-9). He thought they would be undesirable because they might be carelessly prepared at amusement parks or elsewhere, encouraging thoughtless, ill-conceived, and ambiguous wills. "We all know how much clearer your thoughts become when you are forced to reduce them to writing," he said. He thought testators should seek counsel from a skilled lawyer. He concluded that "the bar -- with good reason -- should oppose video and voice taped wills."

Because of the problems identified by Professor Dukeminier, and because no state now authorizes a videotape to serve as the will, the staff recommends against such a proposal for California.

Videotape of the Will Execution Ceremony

If the Probate Code does not provide an applicable rule, the rules of practice in civil actions apply to probate proceedings. Prob. Code § 1000. Writings are admissible in evidence if relevant and if a proper foundation is laid. 2 B. Witkin, *California Evidence* § 902, at 869 (3d ed. 1986).

Under the Evidence Code, "writing" is broadly defined to mean "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." Evid. Code § 250. This

definition of writing has been held to include a videotape. *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974). Under this authority, it appears that a videotape of a will execution ceremony is now admissible to show proper execution of the will, testamentary intent, and that the testator was of sound mind.

Under present California law, depositions may be videotaped in addition to, but not in lieu of, stenographic recording. Code Civ. Proc. § 2025(1). Ohio and Michigan expressly permit videotape evidence by rules of court. *People v. Moran*, *supra*, at 407 n.7.

In 1985, Indiana enacted the following statute to authorize a videotape of the will execution ceremony to help establish the will (Ind. Code Ann. § 29-1-5-3 (West Supp. 1989)):

Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

- (1) The proper execution of a will.
- (2) The intentions of a testator.
- (3) The mental state or capacity of a testator.
- (4) The authenticity of a will.
- (5) Matters that are determined by a court to be relevant to the probate of a will.

A videotape may be useful to establish the mental state or capacity of the testator, authenticity of the will, that the will was properly executed, and to make clearer the testator's intent. Although existing California law appears to permit use in evidence of a videotape of the will execution ceremony, legislation similar to the Indiana statute would make this clear. A disadvantage of enacting such a statute might be that practitioners would feel compelled to use this technique in every case, thereby increasing the cost of preparing wills.

On balance, the staff thinks it would be desirable to have express statutory authorization to use a videotape of the will execution ceremony. The staff recommends the following provision:

Probate Code § 8227 (added). Videotape of execution of will

8227. (a) If made under circumstances that indicate that it is an accurate recording of the event it portrays, a videotape of the execution of a will is admissible as evidence of the following:

- (1) Proper execution of the will.
- (2) The intentions of the testator.
- (3) The mental state or capacity of the testator.
- (4) The authenticity of the will.

(5) Matters that the court determines are relevant to probate of the will.

(b) Nothing in this section precludes use of videotape evidence in circumstances not covered by this section.

Comment. Section 8227 is new, and is drawn from Section 29-1-5-3 of the Indiana Code. For a discussion of the Indiana statute, see Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate Into the 21st Century*, 20 Val. U.L. Rev. 83 (1985). See also *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974) (videotape in criminal trial).

Under the introductory clause of subdivision (a), before a videotape may be admitted under Section 8227, a proper foundation must be laid by establishing that it is an accurate recording of the event it portrays. This is consistent with Sections 1400 and 1401 of the Evidence Code. See generally 2 B. Witkin, *California Evidence* § 903, at 869-70 (3d ed. 1986).

Use of Videotape to Dispose of Tangible Personal Property

In 1982, the staff recommended adopting UPC Section 2-513 (Memo 82-12) which provides:

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

The staff quoted a supporter of the UPC provision as follows:

Considering the limitation placed upon the type and extent of property which may be disposed of in this manner, problems of fraud, duress and undue influence are not serious considerations. One of the most beneficial aspects of this provision is to provide a convenient and simple device for the person who would otherwise desire to change his will frequently due to changing desires with respect to testamentary gifts of tangible personal property and effects. This new device appears to be popular both with laymen and with practicing attorneys.

L. Averill, Uniform Probate Code in a Nutshell § 9.08, at 93-94 (1978). The Commission considered the staff recommendation, but rejected the UPC section.

Many people own or have access to a video camera. People sometimes make a videotape of their personal property to preserve evidence for insurance purposes. Ms. Ferris (Exhibit 1) wants to be able to use a videotape both for insurance purposes and for testamentary dispositions. She may be suggesting a provision similar to the UPC section, permitting a videotape to dispose of tangible personal property not disposed of by will.

The Commission thought the UPC section was not needed because the testator may use a holographic will to dispose of personal property, and may revise it frequently to express changing desires. This reasoning seems to apply with equal force to a videotape, suggesting that a videotape is not needed to dispose of personal property because the testator may use a holographic will to do so.

Arguably a videotape is at least as reliable as a holographic will, but the staff is reluctant to recommend a videotape for testamentary purposes. Presumably, a videotape would have to be authenticated by showing that it is what the proponent claims it is before it could be received in evidence. Cf. Evid. Code §§ 1400, 1401. Perhaps there would be other foundational requirements. For a videotaped deposition, for example, the operator must be competent to set up, operate, and monitor the equipment. Code Civ. Proc. § 2025(1). A testator making a videotape might not be aware of foundational requirements, and might fail to include facts necessary to satisfy these requirements in the videotape. We are concerned that a person would rely on the videotape to make dispositions, and that after the person's death the videotape might be rejected because the proper foundation was not laid. This would be a trap for an unwary testator.

There is no urgent need to authorize a videotape for testamentary purposes. The UPC section seems to be a better and simpler way to dispose of tangible personal property, since the testator need only make a list of the property in his or her own handwriting and sign the list. The list can be easily revised. For these reasons, the staff recommends against permitting disposition of personal property by videotape.

If the Commission nonetheless wants to permit a videotape for this purpose, the authority should be granted by enacting UPC Section 2-513 with an additional provision authorizing use of a videotape as an alternative to the writing.

Respectfully submitted,

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