First Supplement to Memorandum 90-123

Subject: Study L-3049 - California Statutory Will

Memorandum 90-123, to be considered at the November meeting, presents a staff recommended redraft of the statutory will form for Commission consideration. See Exhibit 1 (first set of yellow pages) to Memorandum 90-123.

The staff asked several persons to review and send us their comments on the staff redraft. The comments we have received are considered in this supplement.

In considering this supplement, you should have before you the staff recommended redraft of the statutory will form that is set out in Exhibit 1 of Memorandum 90-123.

GENERAL REACTION

Exhibit 1 (attached) is a letter from Harold I. Boucher, one of the key developers of the original California Statutory Will Statute. His general reaction to the staff draft is: "For several reasons your draft is a marked improvement over that of the State Bar's Estate Planning Committee." He promises to send detailed comments on the staff draft, but we have not yet received his detailed comments.

Exhibit 2 (attached) is a letter from Professor Gerry W. Beyer, School of Law, St. Mary's University, who has made a careful study of the legislation in this field. See Beyer, *Statutory Will Methodologies--Incorporated Forms vs. Fill--In Forms: Rivalry or Peaceful Coexistence?* 94 Dickinson Law Review 231 (1990). He generally approves of the staff draft, but makes a number of specific comments for Commission consideration. His comments are discussed below.

We have not as yet received any comments from the State Bar. We based the staff redraft to a considerable extent on material provided by the State Bar. Michael V. Vollmer, the Chairperson of the State Bar Committee that worked on this project, plans to attend our November meeting.

REVIEW OF SPECIFIC COMMENTS

REVISION OF PROPERTY DISPOSITION PROVISIONS TO PERMIT GIFTS OF SPECIFIC PROPERTY

General reaction. The staff recommended statutory will form gives the testator the opportunity to make specific gifts of particular property (both real and personal property). See item 3 of staff draft of will form (pages 2 and 3 of Exhibit 1 of Memorandum 90-123--first set of yellow pages). The existing statute and the State Bar recommended redraft does not give the testator this flexibility.

Professor Beyer (Exhibit 1) comments: "I am very pleased to see the staff's form providing the testator with increased opportunities for individualization. This may be the most significant and most beneficial revision."

Special provision for disposition of family home. Professor Beyer suggests:

> You may wish to consider adding a specific section to dispose of any real estate that the testator was using as a home at the time of death. The family home is a very important part of the testator's estate [and] should not [be] relegated to the residual clause nor should reliance be placed on the testator to devise it specifically.

The staff would make no change in the staff draft form in response to this suggestion. The staff agrees that the family home is probably the most significant part of the testator's estate. At the same time, we believe that the testator will be aware of that fact and will consider whether he or she desires to give the family home to a particular child (or other person) rather than allowing it to go in equal shares under the residual clause. The staff draft gives the testator the option of giving the family home to a particular child or person if that is the testator's desire. We see no need to complicate the form by adding a specific provision relating to the family home.

Requirement that takers of household and personal items share equally. Professor Beyer notes that the staff draft (page 2 of Exhibit 1 to Memorandum 90-123) requires that the testator treat all takers of household and personal items equally. This continues a provision of the existing form and the State Bar redraft. Beyer further notes that the testator would have greater flexibility if Choice Four of Clause 2

of the staff draft permitted the testator to indicate percentages. He suggests the following language:

> d. **Choice Four:** To the following persons equally, unless I indicate a specific percentage. If I indicate specific percentages and they do not add up to 100%, the named persons take equally. **(Insert each person's name.)**

The staff and the State Bar did not offer the testator this option because it would add complexity to the form and offer opportunity for error. Professor Beyer comments:

> I appreciate that authorizing percentages may lead to increased complexity and opportunity for error. However, I believe that the form will be more useful to testators if percentages may be specified. Instead of the interpretation rule that the named persons take equally if the percentages do not add up to 100%, the rule could be that the named persons take in proportion to the percentages. Of course, there would be additional problems if the testator gave percentages for some beneficiaries but not for others. Accordingly, it may be better to presume equality if indicated percentages fail to add 100%.

The form as revised by the staff permits the testator to give a specific item of household and personal items to a specific person. This permits the testator to give one child more than the others (by making specific gifts) if that is the testator's desire. The question is whether the increased flexibility offered when an opportunity is provided to indicate percentages offsets the increased complexity of the form and the increased opportunity for error.

DISPOSITION OF BALANCE OF ESTATE

Professor Beyer points out that the item 4 of the staff draft requires the testator to treat all takers of the residue equally. The relevant portion of the staff draft is found at the bottom of page 3 and the top of page 4 of Exhibit 1 of Memorandum 90-123 ("Balance of My Property").

Professor Beyer comments: "The statutory form is of little use to a testator who wishes to divide the residue (often the bulk of the estate) to individuals, such as children, in an unequal manner. The testator would have greater flexibility if choice three permitted the testator to indicate percentages. The same language suggested above would be appropriate."

It is not unlikely that the testator will want to give one of the children who is more needy than the others a greater portion of the

residue of the estate. Here again, the question is whether the increased flexibility offered when an opportunity is provided to indicate percentages offsets the increased complexity of the form and the increased opportunity for error.

SPECIAL PROVISIONS FOR PERSONS UNDER 25

Professor Beyer agrees with the State Bar that the testator should be "forced to think about the issue [of how the testator wants property to be distributed to adult beneficiaries who are under twenty-five years of age] and make his intent known with respect to gifts to young adults."

He further comments:

> The testator must decide whether or not the gift is outright, and if not outright, the age at which the beneficiary is entitled to unrestricted use. The staff recommendation leaves the whole matter in the hands of the executor without obtaining evidence of the testator's intent. To alleviate the fear that testators would not understand the provision, a longer (but still concise) explanation could be included.

The existing California Statutory Will With Trust Form creates a trust for children and descendants of deceased children which continues until there is no living child under 21 years of age. Until the trust terminates, the trustee "shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age so much, or all, of the (i) principal, or (ii) net income, or (iii) both, as the trustee deems is necessary for their health, support, maintenance, and education." The testator cannot vary this scheme. The California Statutory Will With Trust Form will not be continued when the new California Statutory Will Statute is enacted. The revised will form needs to deal with this problem of precluding mandatory distribution to immature beneficiaries.

This problem is discussed at pages 19-22 of Memorandum 90-123. The staff continues to believe that this matter can and should be dealt with in a provision of the statute rather than in the form itself. We do not believe that the "intent" of the testator concerning distribution to immature beneficiaries is of sufficient importance to complicate the statutory form. In fact, we believe that the decision whether to defer distribution beyond age 18 can better be made at the time the testator's estate is being distributed--and when the executor

is likely to advice of a lawyer--than at the time when the will is executed and when it is unlikely that the testator will have legal counsel. Moreover, a better decision on the matter can be made at the time of estate distribution in light of the known traits of the beneficiaries of the estate. The trustee under the existing California Statutory Will With Trust Form has broad discretionary powers concerning distribution of principal and income to the beneficiaries. We have no problem with giving a similar broad discretion to the executor.

Nevertheless, if desired, the discretion of the executor under the staff draft could be limited by revising a portion of the provision set out on page 21 of Memorandum 90-123 to read:

> The executor may distribute estate assets otherwise distributable to a beneficiary under age 25 to a custodian under the California Uniform Transfers to Minors Act, Part 9 (commencing with Section 3900), in which case the executor shall provide, in making the transfer pursuant to Section 3909, that the time for the transfer to the beneficiary of the custodial property so transferred is delayed until the beneficiary attains the age of 25 years ~~, except that the executor in his or her discretion may provide, in making the transfer pursuant to Section 3909, that the time for transfer to the beneficiary of the custodial property so transferred is delayed only to an earlier time, not earlier that the time the beneficiary attains the age of 18 years~~ .

Even though the transfer to the beneficiary is delayed until the beneficiary attains the age of 25 years, Section 3914 of the Probate Code provides in part:

> 3914. (a) A custodian may deliver or pay to the minor or expend for the minor's benefit as much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (1) the duty or ability of the custodian personally, or of any other person, to support the minor or (2) any other income or property of the minor which may be applicable or available for that purpose.
>
> (b) On petition of an interested person or the minor if the minor has attained the age of 14 years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

The staff believes that this provision provides a better solution to the case of the minor under age 25 than does the existing California Statutory Will with trust. We continue to believe that the will form

should not be complicated by requiring the testator to make choices concerning this matter.

IMPROVED WORDING OF ATTESTATION CLAUSE

Beyer approves the revision of the attestation clause to make the statutory will "self proving."

ADMISSION OF "TECHNICALLY DEFECTIVE" STATUTORY WILL TO PROBATE

Beyer approves the concept of admitting a statutory will to probate even though it was not properly executed in situations where the likelihood of fraud or undue influence is small. However, he has several questions about proposed Section 6270 (set out on page 23 of Memorandum 90-123):

(1) "Does it matter *where* the testator signed the statutory will?"

(2) "What caliber of proof is sufficient to "satisfy" the court (preponderance, clear and convincing, beyond a reasonable doubt?"

(3) "What type of proof is needed for the court to determine that the maker's intent is 'clear'?"

The staff believes that the provision is satisfactory as proposed by the staff. The court must find all three elements: (1) signed by testator, (2) document intended as a will, and (3) intent of testator clear.

There is no requirement in California that the testator sign at the "end" of the will, but where the will is signed will be an important factor in determining whether the court is satisfied as to whether the testator intended the document to have testamentary effect. As to the degree of proof required and whether the testator's intent is "clear," we believe that the provision is adequate in its present form. Do we want, for example, to provide that even though the court "is satisfied that the maker knew and approved of the contents of the will and intended it to have testamentary effect" and the court finds that the "testamentary intent of the maker as reflected in the document is clear," the court nevertheless must reject the probate of the will because the court (although the evidence is sufficient to satisfy the court) is reluctant to find the evidence sufficient to meet the "clear and convincing" standard or the "beyond a reasonable doubt" standard. Nevertheless, if the Commission wishes to provide for the standard of proof, we could revise the introductory clause of Section 6270 to read:

6270. Notwithstanding Section 6110, a document executed on a California Statutory Will form provided by section 6275 is valid as a will if all of the following requirements are shown to be satisfied by clear and convincing evidence:

Beyer also asks whether the Commission wishes to consider extending the rule of Section 6270 to all wills. The Commission considered this issue a few years ago and has decided not to provide such a general rule. It should be noted, however, that a number of law reform commissions have studied this matter in recent years and most, if not all, have recommended a general provision to permit admission to probate of "technically defective" wills. A number of common law jurisdictions have enacted legislation as a result of these recommendations. If the Commission desires, the staff can prepare a memorandum on this issue for a future meeting.

EFFECT OF ADDITIONS OR DELETIONS ON STATUTORY FORM

Beyer approves the provision concerning the effect of additions or deletions on the face of the statutory will as proposed by the staff.

PROVIDING INFORMATION TO PERSON EXECUTING THE FORM

The staff draft includes background information for the person who is considering use of the statutory will form. A short warning notice is included at the front of the staff form (page 1 of Exhibit 1 to Memorandum 90-123) and more detailed information in question and answer form is found at the end of the staff form (pages 10-13 of same exhibit). The State Bar redraft of the form placed all of this information at the front of the form.

Manner of Presenting Background Information. The discussion of the staff organization of the background material is found on page 26 of Memorandum 90-123. We have retained the question and answer format suggested by the State Bar at the back of the form, but we have included at the front of the form the substance of the short warning statement found in the existing statutory will form.

Professor Beyer (Exhibit 2, page 3) comments:

> I like the question and answer format suggested by the State Bar but I also agree with the staff that individuals are prone to skip lengthy material. If the staff's bifurcated approach is retained, I would urge that the numbered items in the notice and instructions be given hearings. The headings are more likely to catch a person's attention than is a page of relatively solid text. For example,

1. **Requirements to Sign this Will**--You must be at least 18 years old and of sound mind to sign this will.

5. **Taxes**--This will is not designed to reduce taxes. You may want to discuss tax matters with a tax advisor.

The notice and instructions at the front of the form are printed in bold type. Does the Commission wish to adopt the suggestion made by Professor Beyer.

Definition of Trust. Both Boucher (Exhibit 1) and Beyer (Exhibit 2) are both concerned with question 18 (page 13 of the revised form).

Beyer says: "I recommend that you reword the explanation of a trust in question 18; it is misleading to limit trust beneficiaries to those who are young, immature, elderly, or who have a problem or disability."

Boucher makes the same point, stating that the answer to question 18 "is not a correct definition of a Trust." He states:

> I know many lawyers who have drafted Revocable Living Trust for clients. None of these clients "has a problem or disability." We can write a better explanation for "What is a trust?" - an explanation that will give the reader an accurate picture of a trust and not discourage him from executing one for fear that he will be thought of as a person with "a problem or disability."

The staff believes that it would be desirable to revise the definition along the lines suggested by the commentators.

IDENTIFICATION OF FAMILY MEMBERS

Beyer agrees with the staff's conclusion that requiring identification of the testator's "children" "may be more trouble than its worth."

Respectfully submitted,

John H. DeMoully
Executive Secretary

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October 2, 1990

John H. DeMoully, Esq.
California Law Revision Commission
4000 Middlefield Road. Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N
OCT 03 1990
RECEIVED

Dear Mr. DeMoully,

I received and thank you for your letter of September 26, 1990 with which you enclosed a copy of Memorandum 90-123.

For several reasons your draft is a marked improvement over that of the State Bar's Estate Planning Committee.

In a few days I will send to you my detailed comments concerning your draft. Meanwhile I call attention to item 18 on page 13 of Exhibit 1 - Staff Recommended Revised Statutory Will Form. Item 18 "What is a trust?" is not a correct definition of a Trust.

One of Mr. Vollmer's early drafts contained that definition and I suggested to him that it should be corrected. It has not been corrected. The wording of your Item 18 is the same as Item 18 in the Bar's present draft.

I know many lawyers who have drafted Revocable Living Trust for clients. None of those clients "has a problem or disability." We can write a better explanation for "What is a trust?" - an explanation that will give the reader an accurate picture of a trust and not discourage him from executing one for fear that he will be thought of as a person with "a problem or disability."

Sincerely,

Harold I. Boucher

Harold I. Boucher

cc: Prof. Gerry W. Beyer
Irving Kellogg, Esq.
Francis J. Collin Jr. Esq.

ST. MARY'S UNIVERSITY

NOV 02 1990
RECEIVED

October 28, 1990

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

As per your request, I have reviewed the staff recommendations for the California Statutory Will as contained in Memorandum 90-123. Before I make my specific comments, I would like to commend you and your staff for an excellent analysis of the California Statutory Will. I am confident that your efforts will result in a greatly improved form with concomitant benefits to California citizens.

REVISION OF PROPERTY DISPOSITION PROVISIONS TO PERMIT GIFTS OF SPECIFIC PROPERTY

I am very pleased to see the staff's form providing the testator with increased opportunities for individualization. This may be the most significant and most beneficial revision.

You may wish to consider adding a specific section to dispose of any real estate that the testator was using as a home at the time of death. The family home is a very important part of the testator's estate should not relegated to the residual clause nor should reliance be placed on the testator to devise it specifically.

The staff recommended version of clause 3, choice four, requires that the testator treat all takers of household and personal items equally. The testator would have greater flexibility if choice four permitted the testator to indicate percentages. The following language could be used:

> **Choice Four:** To the following persons equally, unless I indicate a specific percentage. If I indicate specific percentages and they do not add up to 100%, the named persons take equally. (INSERT EACH PERSON'S NAME.)

I appreciate that authorizing percentages may lead to increased complexity and opportunity for error. However, I believe that the form will be more useful to testators if percentages may be specified. Instead of the interpretation rule that the named persons take equally if the percentages do not add up to 100%, the rule could be that the named persons take in proportion to the percentages. Of course, there would be additional problems if the testator gave percentages for some beneficiaries but not

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for others. Accordingly, it may be better to presume equality if indicated percentages fail to add to 100%.

DISPOSITION OF BALANCE OF ESTATE

The staff recommended version of clause 5 requires the testator to treat all takers of the residue equally. The statutory form is of little use to a testator who wishes to divide the residue (often the bulk of the estate) to individuals, such as children, in an unequal manner. The testator would have greater flexibility if choice three permitted the testator to indicated percentages. The same language suggested above would be appropriate.

SPECIAL PROVISIONS FOR PERSONS UNDER 25

I believe it is difficult to make boilerplate provisions for how a testator would want property to be distributed to adult beneficiaries who are under twenty-five years of age and I appreciate the reasons the staff did not approve of the State Bar's revision. Nonetheless, I recommend that you give the Bar's provision, or one similar to it, serious consideration. The wisdom behind the Bar's provision is that it forces the testator to think about the issue and make his intent known with respect to gifts to young adults. The testator must decide whether or not the gift is outright, and if not outright, the age at which the beneficiary is entitled to unrestricted use. The staff recommendation leaves the whole matter in the hands of the executor without obtaining evidence of the testator's intent. To alleviate the fear that testators would not understand the provision, a longer (but still concise) explanation could be included.

IMPROVED WORDING OF ATTESTATION CLAUSE

The benefits of a self-proving will make it imperative that the attestation clause be in proper form. Whatever steps are necessary to comport with California law should be taken.

ADMISSION OF "TECHNICALLY DEFECTIVE" STATUTORY WILL TO PROBATE

I am excited to see proposed § 6270 which allows a statutory will to stand even though it was not properly executed in situations where the likelihood of fraud or undue influence is small. I have several questions about the proposed statute:

- Does it matter *where* the testator signed the statutory will?
- What caliber of proof is sufficient to "satisfy" the court (preponderance, clear and convincing, beyond reasonable doubt)?
- What type of proof is needed for the court to determine that the maker's intent is "clear"?

- Does the Commission wish to consider extending this rule to all wills?

You may wish to read an excellent law review article discussing Australia's harmless error statutes; Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 Colum. L. Rev. 1 (1987).

EFFECT OF ADDITIONS OR DELETIONS ON STATUTORY FORM

I think the staff recommendation to consider additions or deletions on the face of the statutory will as contained in proposed § 6269 is excellent. It is Draconian to ignore all changes made to the form fearing that they are unauthorized even when it is evident that the testator made the changes and intended them to be effective. The only concern I have with the statute is that it should indicate the quantity of evidence needed before the court may determine that the testator's intent is "clear."

PROVIDING INFORMATION TO PERSON EXECUTING THE FORM

I like the question and answer format suggested by the State Bar but I also agree with the staff that individuals are prone to skip lengthy material. If the staff's bifurcated approach is retained, I would urge that the numbered items in the notice and instructions be given headings. The headings are more likely to catch a person's attention then is a page of relatively solid text. For example,

1. **Requirements to Sign this Will** — You must be at least 18 years old and of sound mind to sign this will.

5. **Taxes** — This will is not designed to reduce taxes. You may want to discuss tax matters with a tax advisor.

I recommend that you reword the explanation of a trust in question 18; it is misleading to limit trust beneficiaries to those who are young, immature, elderly, or who have a problem or disability.

You should renumber the questions (there is no number 17) and include a blank line in between each question.

IDENTIFICATION OF FAMILY MEMBERS

Whenever I prepare a will, I list family members such as children, spouse, parents, and siblings along with their current status (e.g., dead or alive, residence if alive). I agree with the State Bar that this information is helpful to show capacity (testator knew natural objects of bounty). However, the information needed varies from individual to individual and I agree with the staff's conclusion that requiring such information may be more trouble than its worth.

If I may be of any further assistance to you or the California Law Revision Commission, please do not hesitate to call or write. I would appreciate your keeping me posted on any developments with the California Statutory Will.

Best regards.

Sincerely,

Gerry W. Beyer

Gerry W. Beyer
Professor of Law

GWB:pc