

First Supplement to Memorandum 91-23

Subject: Study L-603 - Self-Proving Will

Attached to the basic memo is a staff draft of a *Tentative Recommendation relating to Self-Proving Will*. The draft was suggested by attorney Harold Boucher of San Francisco.

Mr. Boucher reviewed the draft with attorneys Richard Kinyon and Irving Kellogg. They believe the self-proving attestation clause provided in the draft should be strengthened so it will have conclusive effect if the will is uncontested. They believe the draft is too weak by allowing the court to reject an attestation clause if the will "has been altered or other good cause exists to require additional evidence." They prefer a draft like the one in Exhibit 1 attached to this Supplement, which provides that an attestation clause in the statutory form "conclusively establishes" that the will was validly executed.

Should Draft Attached to This Supplement be Adopted in Place of Draft Attached to Basic Memo?

The draft attached to this Supplement is preferred by attorneys Boucher, Kinyon, and Kellogg. The staff thinks they have made a persuasive case that the draft attached to the basic memo, which allows the court to refuse to accept a will as self-proving for "good cause," creates an exception that may nearly swallow up the proposed new rule that would make admission mandatory. If so, the draft attached to the basic memo will not achieve its purpose of overcoming judicial resistance to admitting wills as self-proving.

The provision in the draft attached to this Supplement that a self-proving attestation clause "conclusively establishes" that the will was validly executed only affects admission of an uncontested will to probate. If the will has been altered or is suspicious-looking, the court will have to rely on an interested party to contest it. If such a will is not contested and thus is admitted to probate, a contestant still has 120 days to petition for revocation of probate. Prob. Code § 8270.

For these reasons, the staff prefers the draft attached to this Supplement.

Should the Proposed Statute Be Narrowed So A Self-Proving Will Must Be Signed by the Testator in the Presence of the Witnesses?

Both the draft attached to the basic memo and the draft attached to this Supplement permit a will to be self-proving that is first signed by the testator or by some other person in the testator's presence and by the testator's direction, and then is later acknowledged to the witnesses by the testator. Should this provision be deleted?

The Uniform Probate Code provides for a self-proving will in Section 2-504 (set out in Exhibit 2). Under the UPC, a self-proving will is executed before a notary public, and contains an affidavit by the testator and an affidavit by the witnesses. For a self-proving will, the UPC adds three additional execution formalities not required for other wills: (1) The testator must "declare" to witnesses that the instrument is his or her will; (2) the witnesses must see the signing of the will (an acknowledgment will not suffice); (3) the witnesses must sign in the testator's presence and hearing.

But a self-proving will has more drastic effect under the UPC than under California law. In informal probate under the UPC, all wills may be admitted without testimony of witnesses, whether or not self-proving. See Uniform Probate Code § 3-303; Comment to Uniform Probate Code § 2-504. But in formal testacy proceedings under the UPC, a self-proving will may be admitted without testimony of witnesses, even if the will is contested. In other words, if the will is self-proving, compliance with signature requirements for execution is deemed satisfied as a matter of law. Uniform Probate Code § 3-406(b); Comment to Uniform Probate Code § 2-504. (The will may be contested on other grounds, such as revocation, undue influence, lack of testamentary capacity, fraud, or forgery. L. Averill, Uniform Probate Code in a Nutshell, § 9.02, at 80 (West 1978).)

In 1982, the staff recommended that the Commission propose the self-proving will provisions of UPC Section 2-504 (Memo 82-10). The staff noted that the self-proving will provisions were popular even in states that declined to adopt the UPC as a whole. In 1973, the State Bar found the self-proving will provisions of the UPC to be good "in the absence of objections to probate." State Bar of California, The Uniform Probate Code: Analysis and Critique 45 (1973).

The Commission decided not to recommend the self-proving will provisions of the UPC. The Commission was concerned that the conclusive presumption of proper execution might preclude attack in meritorious cases, and that to include a notarization procedure might have the practical effect of requiring attorneys to have all wills notarized as a precautionary measure. The Commission thought the existing California provision for testimony of a subscribing witness to be presented by affidavit in uncontested cases (Prob. Code § 8220) was satisfactory.

Neither the staff draft attached to the basic memo nor the draft attached to this Supplement (Exhibit 1) affects contested proceedings. They merely require the court to accept an uncontested will in the proper form.

Under California law, a will is validly executed if after the will is signed the testator takes the will to the witnesses and acknowledges either the signature on the will or that the signed instrument is his or her will. Prob. Code § 6110. The signature on the will may either have been made by the testator or by some other person in the testator's presence and by the testator's direction. *Id.*

The Uniform International Wills Act is the same: The testator may acknowledge the will to the witnesses after it has been signed. Prob. Code § 6382(c).

Subdivisions (d), (e), and (f) in proposed Section 8220.5 (Exhibit 1), and the draft attached to the basic memo, make the will self-proving if the witnesses declare under penalty of perjury that the testator made one of the required acknowledgments. If the testator does this without guidance of a lawyer, is it more likely that there may be a defect in the execution ceremony? For example, another person may sign the will for the testator but not in the testator's presence. If the testator acknowledges the signature to the witnesses, or acknowledges that the instrument is the testator's will, the witnesses may attest that this has been done. In such a case, the will is self-proving under subdivision (e) or (f), even though technically defective.

If the execution ceremony is supervised by a lawyer, it seems unlikely that the lawyer would permit the acknowledgment procedure to be used. For example, the C.E.B. practice book notes that in 1982, the

execution requirements for wills were substantially relaxed, but cautions that "good practice, however, may lead the practitioner to continue their observance." California Will Drafting Practice Supp. § 2.21, at 17 (Cal. Cont. Ed. Bar 1990). Thus, it seems that the acknowledgment procedure will usually be used when the testator is not guided by counsel.

Despite these questions, the staff is inclined to keep the provisions in the draft that make an acknowledged will self-proving. The substantive section (Section 6110) permits a will to be authenticated by acknowledgment. The procedural rules should probably conform to the substantive rules.

Although the Uniform Probate Code does not permit an acknowledged will to be self-proving, a self-proving will under the UPC is conclusively deemed to have been properly executed, even in a contested case. A California self-proving will, on the other hand, may be contested after its admission to probate.

Respectfully submitted,

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Prob. Code § 8220.5 (added). Attestation clause for self-proving will

8220.5. (a) This section does not apply if there is a contest of the will.

(b) If the testator signs the will in the presence of the witnesses, an attestation clause in the will that is signed by two or more subscribing witnesses and is in substantially the following form conclusively establishes that the will was executed in all particulars as prescribed by law:

"The testator signed this will in our presence, all of us being present at the same time. We understand that this instrument is the testator's will, and we now sign below as witnesses. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____, at _____
(Date) (City and state)

Sign here: _____ Address _____
Print your name
here: _____

Sign here: _____ Address _____
Print your name
here: _____"

(c) If the testator's name is signed by some other person in the testator's presence, by the testator's direction, and in the presence of the witnesses, an attestation clause in the will that is signed by two or more subscribing witnesses and is in substantially the following form conclusively establishes that the will was executed in all particulars as prescribed by law:

"The testator's name was signed by some other person in the testator's presence, by the testator's direction, and in our presence, all of us being present at the same time. We understand that this instrument is the testator's will, and we now sign below as witnesses. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____, at _____
(Date) (City and state)

Sign here: _____ Address _____
Print your name
here: _____

Sign here: _____ Address _____
Print your name
here: _____ "

(d) If the testator acknowledges to the witnesses that the signature on the will is the signature of the testator, an attestation clause in the will that is signed by two or more subscribing witnesses and is in substantially the following form conclusively establishes that the will was executed in all particulars as prescribed by law:

"The testator acknowledged to us, all of us being present at the same time, that the signature on the will is the signature of the testator. We understand that this instrument is the testator's will, and we now sign below as witnesses. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____, at _____
(Date) (City and state)

Sign here: _____ Address _____
Print your name
here: _____

Sign here: _____ Address _____
Print your name
here: _____ "

(e) If the testator acknowledges to the witnesses that the testator's name was signed on the will by some other person in the testator's presence and by the testator's direction, an attestation clause in the will that is signed by two or more subscribing witnesses and is in substantially the following form conclusively establishes that the will was executed in all particulars as prescribed by law:

"The testator acknowledged to us, all of us being present at the same time, that the testator's name was signed by some other person in the testator's presence and by the testator's direction. We understand that this instrument is the testator's will, and we now sign below as witnesses. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____, at _____
(Date) (City and state)

Sign here: _____ Address _____
Print your name
here: _____

Sign here: _____ Address _____
Print your name
here: _____"

(f) If the testator acknowledges to the witnesses that the instrument is the testator's will, an attestation clause in the will that is signed by two or more subscribing witnesses and is in substantially the following form conclusively establishes that the will was executed in all particulars as prescribed by law:

"The testator acknowledged to us, all of us being present at the same time, that this instrument is the testator's will. We understand that this instrument is the testator's will, and we now sign below as witnesses. We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____, at _____
(Date) (City and state)

Sign here: _____ Address _____
Print your name
here: _____

Sign here: _____ Address _____
Print your name
here: _____"

(g) Nothing in this section precludes receipt of evidence of execution of a will by affidavit pursuant to Section 8220, even though the affidavit is not substantially in the form prescribed by this section.

Comment. Section 8220.5 is new, and sets out a form of attestation clause for a will that establishes conclusively, in the absence of a will contest, that the will was validly executed. This makes the will "self-proving." The language in Section 8220.5 that the attestation clause conclusively establishes "that the will was executed in all particulars as prescribed by law" is taken from Section 8220. See also Section 6221.5 (California statutory will).

Section 8220.5 provides that an attestation clause "substantially" in the form provided in the section gives the will self-proving effect. Thus the inclusion of additional language in an attestation clause not inconsistent with the language provided by this section does

not deprive the attestation clause of self-proving effect.

Subdivision (g) recognizes that a will may be self-proving under Section 8220, even though the affidavit of subscribing witnesses does not conform to this section. However, this section does provide a "safe harbor," compliance with which ensures self-proving effect.

For the requirements for the execution and witnessing of a valid will, see Section 6110.

Section 8220.5 supersedes inconsistent local court rules. See Section 1001.

The form of declaration provided in Section 8220.5 is consistent with the general form for declarations. See Code Civ. Proc. § 2015.5.

Prob. Code § 6221.5 (amended). Execution of attestation clause

6221.5. The Unless there is a contest of the will, execution of the attestation clause provided in the California statutory will by two or more witnesses satisfies ~~Section 8220~~ conclusively establishes that the will was executed in all particulars as prescribed by law.

Comment. Section 6221.5 is amended to make clear that the attestation clause provided in Sections 6240 and 6241 makes the will self-proving. For the requirements for the execution and witnessing of a valid will, see Section 6110.

The language added to Section 6221.5 that the attestation clause conclusively establishes "that the will was executed in all particulars as prescribed by law" is taken from Section 8220, and replaces the former cross-reference to Section 8220.

In providing that the attestation clause provided in a California statutory will conclusively establishes valid execution unless there is a will contest, Section 6221.5 goes beyond Section 8220, which is permissive. Section 6221.5 supersedes inconsistent local court rules. See Section 1001.

As used in Section 6221.5, "California statutory will" includes both a California statutory will and a California statutory will with trust. Section 6222(a).

Note. Section 6221.5 would be repealed and reenacted with identical language as Section 6222 by the State Bar proposal in SB 271 (Kopp).

Section 2-504. Self-Proved Will.

(a) A will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, _____, the testator, sign my name to this instrument this ____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that ~~the testator signs and~~ executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

The State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____,
the testator, and subscribed and sworn to before me by _____, and
_____, witness, this ____ day of _____.

(Seal)

(Signed) _____

(Official capacity of officer)

(b) An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of _____

County of _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator

was at that time **eighteen years** or age or older, of sound mind, and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ____ of _____.

(Seal)

(Signed) _____

(Official capacity of officer)

(c) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.

COMMENT

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently from a will not self proved. Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will is limited to formal testacy proceedings because Section 3-303, which deals with informal probate, dispenses with the necessity of testimony of witnesses

even though the instrument is not self proved under this section.

A new subsection (c) is added to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will in cases where the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, *Self-proving Affidavits and Formalism in Wills Adjudication*, 63 Wash.U.L.Q. 39 (1985); *Estate of Ricketts*, 773 P.2d 93 (Wash. Ct. App. 1989).