

Memorandum 91-23

Subject: Study L-603 - Self-Proving Will

Attached is a staff draft of a *Tentative Recommendation Relating to Self-Proving Will*. The TR proposes a statutory form of attestation clause for a self-proving will that will be deemed to satisfy the proponent's burden of proof of due execution. A self-proving will simplifies proof of execution, because it may be admitted to probate without the need to find a subscribing witness to attest to its execution.

This suggestion came from attorney Harold Boucher of San Francisco. A copy of his letter is attached as Exhibit 1.

Mr. Boucher reports that courts in various counties impose their own requirements for self-proving attestation clauses. Thus there is no one form acceptable statewide. The staff has reviewed local probate rules. The situation is as Mr. Boucher describes. Excerpts from pertinent local probate rules are set out in Exhibit 2.

The staff asked Mr. Boucher to review this *Tentative Recommendation*. Mr. Boucher wants the statute to prescribe an attestation clause that will be the only acceptable form. The staff draft does not go so far. Instead, the staff draft provides a safe harbor: If the drafter includes the language provided in the statute, that will be deemed to satisfy the requirements for making the will self-proving. The staff is opposed to precluding drafters from adding other language to the attestation clause they think is desirable. There is no need to go so far.

California Statutory Will

In an article entitled "The Statutory Will Revisited" in the *Estate Planning, Trust & Probate News* (vol. 8, no. 2, winter 1988), Sterling Ross reported that Los Angeles and San Diego courts were not accepting California statutory wills as self-proving, even though Probate Code Section 6221.5 appears to require it. Accordingly, the attached draft revises Section 6221.5 to encourage courts to accept California statutory wills as self-proving.

The State Bar is sponsoring legislation in SB 271 to revise the attestation clause in California statutory wills. The staff-proposed amendment to Section 6221.5 (to be recodified as Section 6222 in SB 271) is consistent with this effort.

The staff recommends the Commission approve the attached draft for distribution for comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Memo 91-23

EXHIBIT 1

Study L-603

February 22, 1991

Dear Mr. DeMouly

I have written a book about Estate Planning. A book for laymen.

**ESTATE PLANNING - WHAT YOU SHOULD KNOW ABOUT ESTATE
PLANNING BEFORE YOU SEE AN ESTATE PLANNING LAWYER.**

My book contains comments about problems that some Probate Judges and their staffs have created with respect to clauses designed to make a will "self-proving." A copy of the comments is enclosed.

Rich Stevens of CEB says that some Judges, County Clerks, Judges' Staffs, whatever or whoever, have deliberately printed what purport to be Judicial Council Forms that contain matter that is not in the Official Judicial Council Forms.

I ask, who is going to stop Probate Judges and their staffs from printing bogus Judicial Council forms and writing Probate Rules of their own liking?

Years ago my California State Bar Forms Committee tried to get the courts to accept a Uniforma Probate Policy Manual for the entire state.

What happened? Nothing. Who pays for printing all that garbage in the guise of Probate Policy Manuals? The taxpayer.

I hope what I say in my book delivers a message.

Harold I. Boucher

Harold I. Boucher

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Below is a Form of an Execution and Attestation Clause. My comments about its provisions will appear on the page to follow.

=====

I sign my name to this Will at _____, California
on _____ 19__

John Doe

On the date written below, the Testator, *John Doe*, declared to us, the undersigned, that this instrument, consisting of six pages, including this page, was the Testator's will and asked us to witness it. The Testator then signed this will in our presence, all of us being present at the same time. At the Testator's request, we now, in the Testator's presence and in the presence of each other, subscribe our names as witnesses.

We believe that the Testator is over eighteen (18) years of age, is of sound mind and is under no constraint or undue influence whatsoever.

_____ Residing at _____

_____ Residing at _____

_____ Residing at _____

We declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ 19__

at _____, California.

_____ Residing at _____

_____ Residing at _____

_____ Residing at _____

COMMENTS about Execution and Attestation Clauses of a Will.

The example above is a copy of a form drafted by experienced Lawyers who have thoroughly studied the matter.

The italicized paragraph in the Form, "*We believe that the Testator is over eighteen (18) years of age, is of sound mind and is under no constraint or undue influence whatsoever,*" is a paragraph that is presently required in at least California County in order for the will to qualify as "self-proving."

It is thought by some that the statement could be useful if there is any reason to expect a later contest. I wonder why that thought.

You will note that the Form has three witnesses, although the Probate Code specifies that there be "at least two persons." It seems to be common practice now among Lawyers to have three witnesses to a will.

Also note that in this Form the witnesses sign immediately below the italicized paragraph, and sign again below the paragraph, "We declare under penalty of perjury..." The reason for constructing the Form in that manner is because some Probate Courts in California do not accept the will as "self-proving" unless the declaration under penalty of perjury is completely distinct from the Attestation Clause, the clause above the declaration under penalty of perjury.

Only when the Legislature amends the Probate Code to mandate the use of a Form that the Probate Courts **must accept**, will Lawyers stop wasting time and energy in the attempt to draft THE PERFECT BULLET PROOF FORM. And who pays for that wasted time and energy?

However, let's not be critical of Lawyers in this matter. The rules that Lawyers complain about come from California Probate Judges and their staffs, not from Lawyers, not from Bar Associations.

Compare the FORM above to the Attestation Clause in the Sample "Short Witnessed Will" on page 4 of this Section, to the Attestation Clauses in both California Statutory Wills and in the Sample "Pour-Over Will" in Trusts - Section IV.

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SELECTED LOCAL RULES OF COURT
From California Local Probate Rules
(Cal. Cont. Ed. Bar, 12th ed. 1991)

Alameda County Probate Policy Manual

Rule 12.1(2)(b). Proof of Uncontested Wills/Codicils.

1. If the original will or codicil is on file and is "self-proving" (i.e., the will or codicil contains an affidavit that includes or incorporates the attestation clause which evidences that the will or codicil was executed in all particulars as required by law), the Court may admit the will or codicil to probate without further proof (Probate Code Section 8220) if there have been no alterations made to the will or codicil. If any alterations appear, additional evidence may be required to prove when the alterations were made and whether they are valid.

Los Angeles County Probate Policy Memorandum

Rule 7:11.01. Formal Wills. In uncontested will proceedings, if the attestation clause is signed under penalty of perjury, the will is self-proving and can be admitted to probate without an affidavit or declaration.

Merced County Probate Rules

Rule 406(d). Self-proving wills need no additional proof unless requested by the Court.

Orange County Probate Policy Memorandum

Rule 3.11. If the attestation clause in a formal will contains allegations that satisfy the provisions of Probate Code Section 6113 and is signed under penalty of perjury in accordance with Code of Civil Procedure Section 2015.5, then the will is self-proving in uncontested proceedings and can be admitted to probate without an affidavit or declaration by a subscribing witness. If any alterations appear on the will, evidence of when they were made and by whom must be presented.

In uncontested proceedings, wills that are not self-proving must be proved by use of the Judicial Council form rather than by testimony.

Riverside County Probate Policy Memoranda

Rule 6.0204. In proving a will in any uncontested proceeding, the petitioner shall in every case utilize the Judicial Council Testimony of Subscribing Witness form. The Court will not accept oral testimony.

Notwithstanding the concept of self-proving wills, this Court requires that where a subscribing witness can be located, that evidence of the subscribing witness can be located, that evidence of the subscribing witness by declaration be furnished to the Court. Where no subscribing witness can be located, a proof of handwriting must be presented as prescribed in Section 8221 of the Probate Code.

Sacramento County Probate Policy Manual

Rule 309(d). Self-proving wills need no additional proof unless requested by the court.

San Joaquin County Probate Rules

Rule 4-106. PROOF OF SUBSCRIBING WITNESS -- WHEN NOT REQUIRED

The filing of a "Proof of Subscribing Witness" will not be required in the event that the attestation clause to the Will being offered for probate contains all of the following statements:

1. The Testator declared in the presence of both witnesses that he/she had signed the document as his/her Last Will and Testament.

2. The Testator requested the witnesses to sign as witnesses to the signature.

3. The witnesses and the Testator signed in the presence of each other and saw each other sign.

4. The Testator is of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence of any person whomsoever.

5. The witnesses are over the age of 18 years.

6. The Testator is over the age of 18 years.

7. The witnesses signed under penalty of perjury.

An attestation clause which meets these requirements is:

"The foregoing instrument, consisting of (number) pages, including this page, was, at the date hereof, signed as, and declared to be, (his/her) Will, in the presence of each of us, who, at (his/her) request, and in (his/her) presence, and in the presence of each other, have subscribed our names as witnesses thereto. Each of us observes the signing of this Will by (name of Testator) and each other, as subscribing witnesses, and knows that each signature is the true signature of the person whose name was signed. Each of us is now more than 18 years of age and a competent witnesses [sic].

We are acquainted with (name of Testator). At the date hereof, (he/she) is over the age of 18 years, and to the best of our knowledge, (he/she) is of sound and disposing mind and memory and is not acting under duress, menace, fraud, misrepresentation, or undue influence of any person whomsoever.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____, 19____, at _____,
California."

San Luis Obispo County Probate Rules

Rule 11.305. PROOF OF WILL

(a) Unless there is a contest of a will, proof of a will shall conform to the requirements of Probate Code § 8220 et seq.

(b) In uncontested will proceedings, if the attestation clause is signed under penalty of perjury and meets the requirements of Probate Code § 6110 et seq., the will is self proving and may be admitted to probate without an affidavit or declaration. Otherwise, if the will or codicil is witnessed, the moving party shall file a Proof of Subscribing Witness with a copy of the will or codicil attached.

Solano County Probate Rules

Rule 7.18. Proof of Wills

a. Formal Wills. In uncontested Will proceedings, if the attestation clause is signed under penalty of perjury, the Will is self-proving and can be admitted to probate without an affidavit or declaration. . . .

Stanislaus County Probate Policy Manual

Rule 106. . . . In uncontested will proceedings, if the attestation clause is signed under penalty of perjury, the will is self-proving and may be admitted to probate without an affidavit or declaration. The attestation clause must contain the following statements:

1. The testator requested the witnesses to sign as witnesses to the signature.
2. The witnesses and the testator signed in the presence of each other.
3. The testator is of sound mind and is not acting under duress, menace, fraud, misrepresentation, or undue influence of any person whomsoever.
4. The witnesses signed under oath or penalty of perjury. Probate Code § 6240.
5. The witnesses are over the age of 18 years.
6. The testator is over the age of 18 years.
7. The witnesses signed under oath or penalty of perjury [sic].

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TENTATIVE RECOMMENDATION
relating to
SELF-PROVING WILL

An uncontested will may be admitted to probate without the need to find a subscribing witness if the attestation clause, signed by the subscribing witnesses under penalty of perjury, shows that all legal requirements for execution of the will were satisfied.¹ This is called a self-proving will.²

A self-proving will greatly simplifies the problem of the person seeking to have the will admitted to probate: If the will is not self-proving, a subscribing witness must be found to make a declaration that the will was executed as required by law.³ The proponent of the will must make a reasonable search for witnesses, or a reasonable inquiry.⁴ If a subscribing witness cannot be found, the proponent must present proof of the handwriting of the testator and additional corroborating evidence.⁵

1. See Prob. Code § 8220(b); Code Civ. Proc. § 2015.5 (declaration in lieu of affidavit).

2. Coombs, *Petition for Letters and Qualification*, in 1 California Decedent Estate Practice § 7.63 (Cal. Cont. Ed. Bar 1990).

3. See Prob. Code § 8220(b). The declaration of the subscribing witness is made on Judicial Council Form DE-131 (new January 1, 1985). A photocopy of the will is attached to the declaration. See Prob. Code § 8220(b). If the will is contested, subscribing witnesses, if available, must be produced and examined in court; if no subscribing witness is available, other witnesses must be called to prove due execution of the will. Prob. Code § 8253; Payne & Sallus, *Will Contests*, in 3 California Decedent Estate Practice § 22.59 (Cal. Cont. Ed. Bar 1990).

4. Coombs, *Petition for Letters and Qualification*, in 1 California Decedent Estate Practice § 7.65 (Cal. Cont. Ed. Bar 1990).

5. Prob. Code § 8221; Coombs, *Petition for Letters and Qualification*, in 1 California Decedent Estate Practice § 7.65 (Cal. Cont. Ed. Bar 1990). The additional corroborating evidence must be one of the following: (1) proof of the handwriting of any one subscribing witness, (2) a writing in the will bearing the signatures of all subscribing witnesses, or (3) an affidavit or declaration of a person with personal knowledge of the circumstances of the execution. Prob. Code § 8221; Code Civ. Proc. § 2015.5 (declaration in lieu of affidavit).

The proponent of a will has the burden of proving that the will was executed as required by law.⁶ The following are the requirements for execution of a will on which the proponent has the burden of proof:

(1) The will must be signed by the testator, or be signed in the testator's name by some other person in the testator's presence and by the testator's direction.⁷

(2) The subscribing witnesses must be present at the same time, and must witness either the signing of the will or the testator's acknowledgment of his or her signature or of the will.⁸

(3) The subscribing witnesses must understand that the instrument they sign is the testator's will.⁹

6. Prob. Code § 8252(a); Payne & Sallus, *Will Contests*, in 3 California Decedent Estate Practice § 22.23 (Cal. Cont. Ed. Bar 1990). There are other requirements for making a valid will as to which the contestant has the burden of proof:

(1) The testator must be 18 or more years of age and be of sound mind. Prob. Code § 6100; see also Prob. Code § 6100.5. The contestant has the burden of proving the testator lacks testamentary capacity. Prob. Code § 8252(a); Estate of Goetz, 253 Cal. App. 2d 107, 112-13, 61 Cal. Rptr. 181 (1967); Payne & Sallus, *supra*, § 22.24; 12 B. Witkin, *Summary of California Law Wills and Probate* § 180, at 211-12 (9th ed. 1990).

(2) Execution of the will must not have been procured by duress, menace, fraud, or undue influence. Prob. Code § 6104. The contestant generally has the burden of proving undue influence, fraud, duress, or mistake. Prob. Code § 8252(a). However, unless there are at least two other subscribing witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. Prob. Code § 6112. But this presumption does not prevent the court from admitting the will to probate. See *id.*; see also Payne & Sallus, *supra*, § 22.24. The interested witness takes only such of the devise as does not exceed the person's intestate share. Prob. Code § 6112.

7. Prob. Code § 6110(b).

8. Prob. Code § 6110(c).

9. Prob. Code § 6110(c).

An attestation clause showing that these requirements have been met satisfies the requirements of a self-proving will.¹⁰ Such a will should be admitted to probate unless the will has been altered or other good cause exists for the court to require additional evidence.¹¹

10. The following attestation clause is suggested in Coombs, *Petition for Letters and Qualification*, in 1 California Decedent Estate Practice § 7.63 (Cal. Cont. Ed. Bar 1990):

The testator declared to us, the undersigned, that this instrument consisting of the number of pages indicated below, including the page signed by us as witnesses, was the testator's will.

The testator then signed this will in our presence, all of us being present at the same time.

The testator appears to us to be over eighteen (18) years of age and of sound mind, and we have no knowledge of any facts indicating that this instrument or any part of it was procured by duress, menace, fraud, or undue influence.

We understand that this instrument is the testator's will, and we now subscribe our names as witnesses.

The attestation clause need not recite that the testator "declared" to witnesses that the instrument was his or her will. This requirement of former law was eliminated in 1983. See *Background on Section 6110 of Repealed Code*, in West's Annotated California Codes, Probate Code (1991 Special Pamphlet). It is sufficient that the witnesses "understand" that the instrument they sign is the testator's will. Prob. Code § 6110(c). This requirement is established by the last sentence of the attestation clause set out above. The attestation clause need not recite that the testator is over 18 years of age, of sound mind, and free from duress, menace, fraud, and undue influence. The contestant has the burden of proof on these issues. See *supra* note 6.

11. Some court rules permit the court to require additional evidence if a self-proving will has been altered. Alameda County Probate Policy Manual, Rule 12.1(2)(b); Orange County Probate Policy Memorandum, Rule 3.11. Other court rules give the court general authority to require additional evidence, notwithstanding that the will is self-proving. Merced County Probate Rules, Rule 406(d); Sacramento County Probate Policy Manual, Rule 309(d). These rules are reprinted in California Local Probate Rules (Cal. Cont. Ed. Bar, 12th ed. 1991). The statute on self-proving wills is permissive -- it does not require the court to accept proof by this method. See Prob. Code § 8220(b).

Many courts recognize self-proving wills by rule.¹² However, some courts impose requirements for an attestation clause for a self-proving will in addition to what is needed to show the will was executed as required by law: Two courts require the attestation clause to recite that the testator "requested" the witnesses to sign the will.¹³ One court requires the attestation clause to recite that the testator "declared" to the witnesses that the testator signed the document as his or her will.¹⁴ Both of these requirements of former law have been repealed.¹⁵ One court refuses to recognize self-proving wills.¹⁶

12. Alameda County Probate Policy Manual, Rule 12.1(2)(b); Los Angeles County Probate Policy Memorandum, Rule 7:11.01; Merced County Probate Rules, Rule 406(d); Orange County Probate Policy Memorandum, Rule 3.11; Sacramento County Probate Policy Manual, Rule 309(b); San Joaquin County Probate Rules, Rule 4-106; San Luis Obispo County Probate Rules, Rule 11.305; Solano County Probate Rules, Rule 7.18; Stanislaus County Probate Policy Manual, Rule 106. These rules are reprinted in California Local Probate Rules (Cal. Cont. Ed. Bar, 12th ed. 1991).

13. San Joaquin County Probate Rules, Rule 4-106; Stanislaus County Probate Policy Manual, Rule 106. The attestation clause required by San Joaquin County Probate Rules, effective January 1, 1986, is based on the law that was repealed in 1983. See *Background on Section 6110 of Repealed Code*, in West's Annotated California Codes, Probate Code (1991 Special Pamphlet). The San Joaquin County Probate Rules are currently being revised.

14. San Joaquin County Probate Rules, Rule 4-106. The requirement that the testator "declare" to the witnesses that the instrument is his or her will was repealed in 1983. See *Background on Section 6110 of Repealed Code*, in West's Annotated California Codes, Probate Code (1991 Special Pamphlet).

15. See *Background on Section 6110 of Repealed Code*, in West's Annotated California Codes, Probate Code (1991 Special Pamphlet).

16. Riverside County Probate Policy Memoranda, Rule 6.0204. This rule provides:

In proving a will in any uncontested proceeding, the petitioner shall in every case utilize the Judicial Council Testimony of Subscribing Witness form. The court will not accept oral testimony.

Notwithstanding the concept of self-proving wills, this Court requires that where a subscribing witness can be located, that [sic] evidence of the subscribing witness by declaration be furnished to the Court. Where no subscribing witness can be located, a proof of handwriting must be presented as prescribed in Section 8221 of the Probate Code.

Probate practitioners should be able to rely on uniform treatment in California courts of wills they draft. If a court will not admit a self-proving will to probate, either because the attestation clause does not comply with more stringent requirements of that court or because the court does not recognize self-proving wills, the proponent must try to find the subscribing witnesses. If witnesses cannot be found, the proponent must offer proof of the testator's handwriting and other evidence.¹⁷ There is no need to put the proponent to this effort if the will appears regular on its face and is not being contested.

The Commission recommends that the statute provide a form of attestation clause that is deemed self-proving, and thus can be relied on by will drafters. The Commission recommends that courts be required to admit an uncontested self-proving will to probate if the attestation clause contains the recitals specified in the statute, unless the will has been altered or other good cause exists to require additional evidence.¹⁸ Thus, the court may only reject a self-proving will on the facts of the particular case, and not by making a blanket rejection by court rule.¹⁹

17. See *supra* note 5.

18. The Commission recommends enacting a similar rule for California statutory wills. See Prob. Code § 6221.5.

19. See *supra* note 16.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendment and addition:

Prob. Code § 8220.5 (added). Evidence of subscribing witness

8220.5. (a) Except as provided in subdivision (d), an affidavit in the original will signed by at least two witnesses that includes or incorporates the attestation clause provided in subdivision (b) satisfies the proponent's burden of proving that the will was executed in all particulars as prescribed by law.

(b) An attestation clause is sufficient for the purpose of subdivision (a) if it contains in substantially the following language a statement that "We understand that this instrument is the testator's will" and one of the following statements as appropriate:

(1) "The testator signed this will in our presence, all of us being present at the same time."

(2) "The testator's name was signed by some other person by the testator's direction, in the testator's presence and in our presence, all of us being present at the same time."

(3) "The testator acknowledged the signature to us, all of us being present at the same time."

(4) "The testator acknowledged the will to us, all of us being present at the same time."

(c) No other or additional language in an attestation clause than that provided in subdivision (b) is necessary for the purpose of subdivision (a). The presence in an attestation clause of language in addition to that provided in subdivision (b) does not cause the clause to be insufficient for the purpose of subdivision (a).

(d) Subdivision (a) does not apply if either of the following conditions is satisfied:

(1) There is a contest of the will.

(2) The will has been altered or other good cause exists to require additional evidence.

Comment. Section 8220.5 is new. It sets out language for an attestation clause sufficient to establish that the will was validly executed and to make the will self-proving. See Section 6110 (execution and witnessing of will). The language that the attestation clause makes a prima facie case 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). Concerning the proponent's burden of proof in a will contest, see Section 8252(a).

In providing that an attestation clause with the prescribed language satisfies the proponent's burden of proving due execution unless there is a will contest or the will has been altered or other good cause exists to require additional evidence, Section 8220.5 goes beyond Section 8220, which is permissive. Thus, Section 8220.5 provides a "safe harbor" for an attestation clause with the prescribed language, and supersedes inconsistent local court rules. See Section 1001.

Nothing in Section 8220.5 precludes the court from accepting as evidence of due execution of a will an affidavit in some other form if the affidavit establishes that the statutory requirements for execution of the will have been satisfied. See Section 6110.

Under paragraph (2) of subdivision (d), the court may require additional evidence if the will has been altered or other good cause exists for doing so. This requires a determination on the facts of the particular case, and supersedes local court rules that do not recognize self-proving wills. See Section 1001.

Although Section 8220.5 requires an "affidavit," a declaration under penalty of perjury is equally acceptable. See Prob. Code § 1000 (rules of practice); Code Civ. Proc. § 2015.5. Section 8220.5 permits the affidavit (or declaration) to include the attestation clause. Thus there is no need for a declaration under penalty of perjury to be separate and distinct from the attestation clause, with two sets of witnesses' signatures. Rather it may be included in one clause, with one set of witnesses' signatures.

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

6221.5. The (a) Except as provided in subdivision (b), execution of the attestation clause provided in the California statutory will by two or more witnesses satisfies Section 8220 the proponent's burden of proving that the will was executed in all particulars as prescribed by law.

(b) Subdivision (a) does not apply if either of the following conditions is satisfied:

(1) There is a contest of the will.

(2) The will has been altered or other good cause exists to require additional evidence.

Comment. Section 6221.5 is amended to make clear that the attestation clause provided in Sections 6240 and 6241 is sufficient to make the will self-proving. See Section 6110 (execution and witnessing of will). The language added to subdivision (a) that the attestation clause makes a prima facie case 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. Concerning the proponent's burden of proof in a will contest, see Section 8252(a).

In providing that the attestation clause provided in a California statutory will satisfies the proponent's burden of proving due execution unless there is a will contest or the will has been altered or other good cause exists to require additional evidence, Section 6221.5 goes beyond Section 8220, which is permissive. Thus, Section 6221.5 provides a "safe harbor" for the attestation clause in a California statutory will, and supersedes inconsistent local court rules. See Section 1001.

Subdivision (b) is the same as subdivision (d) of Section 8220.5. Under paragraph (2) of subdivision (b), the court may require additional evidence if the will has been altered or other good cause exists for doing so. This requires a determination on the facts of the particular case, and supersedes local court rules that do not recognize self-proving wills. 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).