

Memorandum 82-23

Subject: Study L-608 - Probate Law (Custody and Deposit of Wills)

Section 2-901 of the UPC permits the testator to deposit his or her will with the court for safekeeping, with procedural detail to be supplied by rules of court. (Section 2-901 is attached to this memorandum as Exhibit 1.) California has no comparable provision.

Both California and the UPC have similar provisions which require the person having custody of the testator's will to deliver it after the testator's death to an appropriate person. Prob. Code § 320; UPC § 2-902. (These two sections are attached to this memorandum as Exhibit 2.)

These two issues are discussed below.

Deposit of Will With Court in Testator's Lifetime

The UPC provision for deposit of a will in court during the testator's lifetime (Section 2-901--Exhibit 1) was drawn from a similar provision in Model Probate Code of 1946, and from legislation which already had been enacted in a number of states before the Model Probate Code. Non-UPC states which still have such a statute include New York and Ohio. See N.Y. Surr. Ct. Proc. Act § 2507 (McKinney 1967 & Supp. 1981-1982); Ohio Rev. Code Ann. § 2107.07 (Page Supp. 1980). New Hampshire had such a statute dating back to 1883, but repealed it in 1977.

The State Bar objected to this feature of the UPC because of "the obvious costs of storage, handling, and record keeping of the wills that may be deposited and the minimal benefits to be gained." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 60-61 (1973). In its response, the UPC's Joint Editorial Board came close to conceding the point:

The criticism is understandable in view of California's unfamiliarity with the idea of ante-mortem deposit. 2-901 was included to accommodate the large number of states that presently have legislation of this sort. The provision could be omitted without difficulty.

Joint Editorial Board for the Uniform Probate Code, *Response of the Joint Editorial Board* 19 (1974).

It would be unwise to include a provision in any legislation recommended by the Commission which would require the bill to contain an appropriation. Although the UPC provision does not require a fee for

deposit of a will, leaving the matter instead to court rule, the section could be revised to require a fee of sufficient amount to make the deposit system self-supporting, and thus not to require an appropriation.

However, in view of the expressed opposition of the State Bar and the lukewarm response of the Joint Editorial Board, the staff is inclined to recommend that UPC Section 2-901 not be included in the Commission's draft legislation.

Duty of Custodian of Will to Deliver It After Testator's Death

A comparison of Probate Code Section 320 and UPC Section 2-902 (both set forth in Exhibit 2) shows that they are similar. The substantive differences between the two sections are the following: (1) California law requires the custodian to deliver the will after "being informed" of the testator's death, while the UPC requires the custodian to do so only after a "request" by an interested person; (2) California law requires the will to be delivered "within 30 days" after the custodian is informed of the testator's death, while the UPC requires the will to be delivered "with reasonable promptness;" (3) California law requires the will to be delivered either to the clerk of the superior court having jurisdiction of the estate or to the executor named in the will, while the UPC requires it to be delivered to any person able to secure probate--that is, to any "interested person" (see UPC §§ 3-301, 3-401).

The staff finds the California provision preferable to the UPC provision in each of the three foregoing respects. It seems useful to have a statutorily-set time limit for delivery of the will (30 days), and the UPC requirement of a "request" seems superfluous. The UPC provision that the will shall be delivered to any person interested in the estate seems too open-ended; the executor seems to be the logical person to receive the will as under California law. Accordingly, the staff recommends retaining Probate Code Section 320 in preference to UPC Section 2-902.

Respectfully submitted,

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EXHIBIT 1

UNIFORM PROBATE CODE § 2-901

Section 2-901. [Deposit of Will With Court in Testator's Lifetime.]

A will may be deposited by the testator or his agent with any Court for safekeeping, under rules of the Court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the Court shall notify any person designated to receive the will and deliver it to him on request; or the Court may deliver the will to the appropriate Court.

COMMENT

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to Court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it

prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by Court rule.

It is suggested that in the near future it may be desirable to develop a central filing system regarding the presence of deposited wills, because the mobility of our modern population makes it probable that the testator will not die in the county where his will is deposited. Thus a statute might require that the local registrar notify an appropriate official, that the will is on file; the state official would in effect provide a clearing-house for information on location of deposited wills without disrupting the local administration.

The provision permitting examination of a will of a protected person by the conservator supplements Section 5-427.

EXHIBIT 2

PROBATE CODE § 320

§ 320. Custodian of will; delivery to clerk or executor

The custodian of a will, within 30 days after being informed that the maker thereof is dead, must deliver the same to the clerk of the superior court having jurisdiction of the estate, or to the executor named therein. Failure to do so makes such person responsible for all damages sustained by any one injured thereby.

(Stats.1981, c. 281, § 320.)

UNIFORM PROBATE CODE § 2-902

Section 2-902. [Duty of Custodian of Will; Liability.]

After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate Court. Any person who wilfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who wilfully refuses or fails to deliver a will after being ordered by the Court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of Court.

COMMENT

Model Probate Code Section 63, registrar or clerk, be a universal slightly changed. A person authorized by a Court to accept delivery of a will from a custodian may, in addition to a successor or other person authorized under the law of another nation to carry out the terms of a will.