

Memorandum 83-102

Subject: Study L-653 - Notice of Will

Mr. Clifford Cate, Vital Statistics, Inc., has requested that he be given an opportunity to make a presentation to the Commission concerning the Commission's notice of will recommendation. We have scheduled his presentation for Saturday because he could not attend the meeting on Friday when the other probate materials are scheduled for discussion.

It is our understanding that Mr. Cate is involved in a privately owned service that records and provides information concerning wills. We have asked Mr. Cate to provide additional information we can send you prior to the meeting.

You will recall that the Commission plans to recommend legislation to the 1984 Legislature to establish a voluntary registration system whereby a notice of a will may be filed with the Secretary of State. This registration system is comparable to that now used for registration of international wills in the office of the Secretary of State. A copy of the Commission's recommendation is attached. The purpose of the registration is to discover wills that otherwise might not be found. The experience in British Columbia supports the voluntary system.

The notice of wills provisions were included in the legislation recommended to the 1983 session. These and other provisions were removed from the 1983 legislation before enactment to permit further study of the provisions. The State Bar Section on Estate Planning, Trust and Probate Law has not supported a registry system. On the other hand, the Probate Law Committee of the Los Angeles County Bar Association has written a letter to the Commission in strong support of the proposal. The Santa Clara County Bar Association Probate Law Committee reports that 80 percent of its members present when a vote was taken on the Commission's proposal supported it.

A key feature of the Commission recommended scheme is a provision that after January 1, 1990, it would be necessary to file a certificate of the Secretary of State in any proceeding where the existence of a will is relevant. Like filings under the registry system for international wills, the information filed must be kept in strict confidence until the death of the testator.

The State Bar Section has taken the view that there is no demonstrated need for a will registry system and that such a system, even though voluntary, imposes an additional cost on clients. Other local bar associations take the view that the modest cost of the system (\$10.00 for registration of a will and \$10.00 for a certificate for filing in the probate proceeding) is justified by the likelihood that wills will be discovered that otherwise would not be discovered. With the great popularity of the California statutory will, it appears that there will be thousands of wills that are executed without a lawyer being involved. A registry system would facilitate the location of these wills as well as those executed with a lawyer involved.

The Commission has considered whether private enterprise would be able to provide the same service and concluded it could not for a number of reasons:

(1) There is no assurance that a private registry system would remain in existence forever. The business might be discontinued because it was not profitable or for some other reason. This was a major reason the Commission decided to provide for a public registry system.

(2) A public registry system can more easily be operated under the controls established by statute. The statute can provide for strict confidence of the information filed. The statute can provide for a certificate from the office of the Secretary of State which will be admissible under the official records exception to the hearsay rule. The fee can be established by statute, and the volume of filings and records maintained by the office of the Secretary of State will keep fees low. Any individual can file a notice of will.

(3) The system can be useful for discovering wills if it is a public registry. This is because the statute can require the production in any probate proceeding of a certificate from the office of the Secretary of State as to whether there is a notice of will on file.

(4) International wills are already registered with the Secretary of State although the number of filings is very low.

These are some of the reasons the Commission decided to recommend the registry system in the office of the Secretary of State.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

RECOMMENDATION

relating to

NOTICE OF WILL

After a person dies it is necessary to determine whether the person made a will and, if so, where it is located.¹ Even if the existence and location of a will are known, it is still necessary to search for codicils and any later wills. To assist in this process, the Law Revision Commission recommends establishment of a voluntary registration system whereby notice of a will may be filed with the Secretary of State.² Under this scheme, for a small fee a person may choose to file identifying information and the location of a will, but not the will itself. The information in the notice is kept in strict confidence until the death of the testator. After the death of the testator, a certified copy of the notice on file or a certificate reporting that no notice is on file must be obtained from the Secretary of State and then filed in any proceeding in which the existence of a will made by the testator is relevant. The proposed scheme also permits the testator to file additional notices to change any relevant information or to give notice that a will has been revoked. Neither the failure to file nor the filing of any notice has any effect on the validity of a will.

The Commission anticipates that this notice of will registry, involving a relatively modest cost,³ will result in finding wills that otherwise might not be found. This view is supported by British Columbia's experience with a similar system for registration of will notices in place since

¹ See Farrand, *Immediate Arrangements*, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

² A registry system is not unknown to California since the Uniform International Wills Act (Prob. Code §§ 60-60.8, to be superseded by Prob. Code §§ 6380-6388, operative January 1, 1985) permits filing of information with the Secretary of State concerning an international will. Use of an international will is intended to facilitate proving the validity of a will in countries that are signatories to the international convention. The registry established by the Uniform International Wills Act applies only to wills that are executed in conformity with the Act.

³ The fee for filing the notice of will or for requesting a certificate is \$10.

1945.⁴ The Law Reform Commission of British Columbia has reported the following:⁵

The surprisingly high volume of registrations in the Wills Registry belies criticisms of voluntary systems. In 1971 there were 19,250 notices of wills filed. Four years later this figure had doubled to 37,275, and in 1978 46,217 notices were filed with the Registry. These figures are impressive in light of the relatively small population of the Province and the fact that the scheme is not advertised. Another significant statistic is the number of positive responses to searches. The Wills Registration Division of the Vital Statistics Branch has indicated that in 1971 there were four times as many negative as positive responses issued. In 1978 the office issued 12,450 negative certificates and 7,255 positive certificates. One expects that in the future the number of positive responses will continue to increase.

The requirement that a certified copy or a certificate of the Secretary of State be filed in proceedings where relevant would apply only after January 1, 1990. This delay will allow time for a sufficient number of filings to be made to justify searching the records.

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 10 (commencing with Section 6360) to Part 1 of Division 6 of the Probate Code, relating to wills.

The people of the State of California do enact as follows:

SECTION 1. Chapter 10 (commencing with Section 6360) is added to Part 1 of Division 6 of the Probate Code, to read:

⁴ See Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).

⁵ Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981).

CHAPTER 10. FILING NOTICE OF WILL

§ 6360. Filing notice of will

6360. (a) A person who has made a will may file a notice of will in the office of the Secretary of State.

(b) The notice of will shall contain the following information:

- (1) The name of the testator.
- (2) The testator's address.
- (3) The testator's social security or other individual-identifying number established by law, if any.
- (4) The testator's date and place of birth.
- (5) A statement that the testator has made a will and the date of the will.

(6) The place where the will is kept.

(c) The notice may include any of the following:

- (1) The name and address of the testator's attorney.
- (2) The name and address of a person who has custody of the will or custody of a copy of the will.

(d) If the testator's name is changed or if the place where the will is kept is changed, the testator may file a new notice of will containing the correct information. The new notice of will may also refer to the earlier notice of will.

(e) The filing of a notice of will, or the failure to file a notice of will, under this section does not affect the validity of the will.

Comment. Section 6360 provides a new voluntary procedure for filing a notice of the existence and location of a will. Registration is voluntary, but a search of the records is required for any proceeding in which the existence of a will is relevant. See Section 6364. Section 6360 does not require or permit the filing of the will itself. The procedure provided by this chapter is distinct from that provided under the International Wills Act. See Section 6389 (registry system for international wills information).

§ 6361. Filing notice of revocation

6361. (a) A person who has filed a notice of will pursuant to Section 6360 and who has revoked the will referred to in the notice may file in the office of the Secretary of State a notice of revocation of will.

(b) The notice of revocation of will shall contain the following information:

- (1) The name of the person who is revoking the will.
- (2) The person's address.
- (3) The person's social security or other individual-identifying number established by law, if any.
- (4) The person's date and place of birth.
- (5) A statement that the will referred to in a notice of will filed by the person pursuant to Section 6360 has been revoked.

(c) The filing of a notice of revocation under this section does not itself revoke the will. The failure to file a notice of revocation under this section does not affect the validity of a revocation of a will. No inference that a will has not been revoked may be drawn from the failure to file a notice of revocation.

Comment. Section 6361 is new. This section is intended to provide information as to the revocation of a will. Subdivision (c) makes clear that the filing or nonfiling of a notice of revocation has no effect on the revocation or validity of a will.

§ 6362. Filing and indexing of notices; fee

6362. Upon presentation of a notice of will or notice of revocation of will for filing and tender of the filing fee to the office of the Secretary of State, the notice shall be filed and indexed. The fee for filing and indexing a notice of will or notice of revocation of will is ten dollars (\$10).

Comment. Section 6362 is new.

§ 6363. Release of information

6363. (a) Information filed pursuant to this chapter shall be kept in strictest confidence until the death of the testator.

(b) After the death of the testator, upon the request of a person who presents a death certificate or other satisfactory evidence of the testator's death, the Secretary of State shall issue a certified copy of any information on file about the testator's will. If no information on the testator's will is on file, the Secretary of State shall issue a certificate stating that fact. The fee for a certified copy or a certificate under this section is ten dollars (\$10).

Comment. Subdivision (a) of Section 6363 is similar to a portion of Section 6389 in the International Wills Act. Subdivision (b) is drawn in part from Section 6389 of the International Wills Act. A certified copy or a certificate from the Secretary of State is necessary in proceedings under this code where the existence of a will is relevant, as provided in Section 6364.

§ 6364. Filing of certificate in probate and other proceedings

6364. (a) A certified copy or a certificate of the Secretary of State issued pursuant to Section 6363 shall be filed with the court:

(1) In proceedings for probate of a will or for administration, at a time before any distribution is made or before the time for filing claims expires, whichever is earlier.

(2) In any other proceeding in which the existence of a will is relevant, promptly after the commencement of the proceeding.

(b) This section becomes operative on January 1, 1990.

Comment. Subdivision (a) of Section 6364 makes clear that a petitioner in any proceeding concerning the disposition of property upon death must file a certified copy or the Secretary of State's certificate relating to whether there is a notice of a will on file. Subdivision (b) delays the application of this requirement to allow time for a significant number of notices to be filed.

§ 6365. Regulations

6365. The Secretary of State may prescribe the form of the notices, certificates, and requests for information under this chapter.

Comment. Section 6365 is similar to authority provided elsewhere. See, e.g., Code Civ. Proc. §§ 488.375, 488.405 (notice of attachment prescribed by Secretary of State).

§ 6366. Destruction of obsolete records

6366. Ten years after the Secretary of State has received a request under this chapter for information accompanied by a death certificate or other satisfactory evidence of the testator's death, the Secretary of State may destroy the information filed pursuant to this chapter by the deceased testator and the record of that information.

Comment. Section 6366 permits destruction of obsolete records. The Secretary of State is permitted, but not required, to destroy the records.

§ 6367. Microfilming notices; destruction of originals

6367. (a) The Secretary of State may microfilm or reproduce by other techniques any notice filed under this chapter and may destroy the original. The microfilming or other reproduction shall be made in the manner and on film or paper that complies with the minimum standards of quality approved by the National Bureau of Standards.

(b) The microfilm or other reproduction of a notice under this chapter shall be deemed to be an original record.

Comment. Section 6367 is new and is drawn from other comparable provisions. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007.