First Supplement to Memorandum 83-54

Subject: Study L-650 - Execution of Witnessed Will

The Commission's Tentative Recommendation Relating to Execution of Witnessed Wills was distributed to interested persons and organizations for review and comment. A copy of the tentative recommendation is attached to Memorandum 83-54 (sent July 22, 1983).

This tentative recommendation recommended (1) that the present-at-the-same-time requirement be eliminated for witnesses and (2) that acknowledgment before a notary public be permitted in lieu of two witnesses.

Three officers of the Probate and Trust Law Section of the Los Angeles County Bar Association (not speaking for the Section) opposed both aspects of the tentative recommendation. See Exhibit 1 attached.

Charles A. Dunkel, Vice President and Trust Officer, Crocker National Bank, opposed elimination of the requirement that both witnesses be present at the same time but approved permitting acknowledgment before a notary public as an alternative to having the will witnessed by at least two persons. See Exhibit 2.

Professor Jesse Dukeminier, our consultant, wrote to indicate his approval of the elimination of the requirement that both witnesses be present at the same time. He notes that this requirement was eliminated in England by the English Administration of Justice Act 1982, Part IV. See Exhibit 3.

Attorney Alvin G. Buchignani, Exhibit 4, approves eliminating the requirement that both witnesses be present at the same time but opposes permitting an acknowledgment before a notary public in lieu of having two witnesses.

Henry Angerbauer, a private citizen (Exhibit 5), approves the tentative recommendation.

The staff recommends that the Commission approve this recommendation for printing and submission to the 1984 legislative session. We believe that the present-at-the-same-time requirement clearly causes more harm than it does good and note with interest that England has just eliminated the requirement, thus joining the great majority of the states in the United States. We believe that the opposition to permit-

ting an acknowledgment before a notary public in lieu of two witnesses is based primarily on the fear that the notary public will be giving legal advice in connection with the will. We do not believe that this is a sound objection to the proposal.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Exhibit 1
1st supp Memo 83-54

1801 Century Park East
Suite 740
Los Angeles, California 90067
August 31, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Tentative Recommendations
F-600, F-640 and L-627

Dear Sirs:

The undersigned officers of the Probate and Trust Law Section of the Los Angeles County Bar Association, speaking as individuals rather than officially on behalf of the Section, wish to comment on these Tentative Recommendations. Our individual practices reflect the experiences of city and suburb, large and small law firms, the wealthy and those with low and middle incomes.

L-627, Execution of Witnessed Wills

A.B. 25, submitted to the legislature by the Law Revision Commission, contained provisions substantially identical to the provisions in this report. Members of the Los Angeles County Bar Association, including ourselves, and others criticized these provisions. Because of the almost universal negative reaction of the Bar, A.B. 25 was amended during the legislative process. It appears that A.B. 25 will soon become law in a form which takes into account the numerous comments of California lawyers acting individually and through their bar associations. We see no need for further change.

While there is no doubt that some wills have been invalidated in cases where there was no doubt that the testator intended the instrument to be a will and there was no suspicion of fraud, these cases are not numerous. There are other situations where the presence of more than one disinterested witness helps to insure the lack of fraud, duress or undue influence and provides valuable evidence of testamentary capacity. While some states may not have the requirement of two witnesses, other jurisdictions have the same requirements or ones which are more strict than ours.

With a growing aged population, separated from close family by distance, the opportunity for abuse and fraud by caretakers or others will increase. It is in the public interest to encourage the solemnity of those occasions when a person provides for disposition of property to take effect at death. The chances for abuse are most present when the testator is not wealthy.

Local practice among middle and lower income clients makes the attorney aware of the opportunities for fraud and deception not seen by "high powered law firms" and which wealthy clients are not exposed to. Since the erosion of the disinterested witness rules is already likely to be enacted with the enactment of A.B. 25, we believe it is much better for the State to see how the new provisions work and whether substantial justice or injustice is served before further eroding these safeguards.

Contrary to the expectations of the drafters, by permitting formal execution of a Will by witnesses at more than one time and place, the chances for invalidating a will may actually increase. The necessity for proving compliance with the formalities on two separate occasions would increase the possibility of failure of proof on one of those two occasions.

Because we consider the presence of at least two witnesses to be important, one notary public is not a sufficient safeguard for testators and their heirs and beneficiaries. The Uniform Probate Code requires two witness and a swearing to a notary public by the testator and both witnesses to have a self-proving will. This is the law in Colorado and we've been told it works well there. If such were enacted here, we might be willing to support the revised language of Section 6110(c)(1).

We urge you to carefully consider our comments. We believe the constructive criticism offered can greatly improve Tentative Recommendation F-640. We believe it would be a mistake, however, for the Law Revision Commission to continue to press for the passage of the provisions in L-627 as currently drafted.

Very truly yours,

Leslie D. Rasmussen

Leslie D. Rasmussen
Chair

Robert D. Bannon

Robert D. Bannon
Vice-Chair

Valerie J. Merritt

Valerie J. Merritt
Secretary-Treasurer

VJM:par

The Crocker Bank

Charles A. Dunkel
Vice President
Trust Officer

August 22, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: L-627: Execution of Witnessed Wills

Gentlemen:

I object to the proposed first change and concur in the proposed second change set forth in your recommendation relating to the above subject.

It is important to have persons who can testify as to the testator's state of mind at the time the will was executed. I do not believe this is a "marginal benefit".

The requirement of having two witnesses present at the time of execution, or acknowledgment of execution, is not an intolerable burden. Any reasonably informed testator should be aware of this requirement and can easily abide by it.

I do not understand why your recommendation does not include changing this requirement for California Statutory Wills? If the Commission believes in its position, this position should be applicable to all witnessed wills.

I concur in your recommendation that acknowledgment before a notary public be an alternative to having a will witnessed by at least two persons.

Sincerely,

Charles A. Dunkel
Vice President and Trust Officer
(415) 477-2756

CAD:BW:2399

Crocker National Bank
San Francisco Private Capital Banking Center
111 Sutter Street
San Francisco, CA 94104
(415) 477-2756

1st Supp Memo 83-54 Exhibit 3

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

August 18, 1983

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

I am happy to learn that the Commission is recommending that the two witnesses to a will do not have to be present at the same time. Your staff report makes a strong case for your recommendation. You will be interested to learn that the English Administration of Justice Act 1982, part IV, eliminates the requirement that the witnesses be present at the same time. The English decided to act after the tragic cases of Groffman and Colling, cited in your footnotes 7 and 8.

Sincerely,

Jesse Dukeminier
Professor of Law

JD/908/bd

Mst Supp Memo 83-54 Exhibit 4

ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

ASSOCIATED WITH
KNIGHT, BOLAND & RIORDAN

100 PINE STREET, SUITE 3300
SAN FRANCISCO, CA 94111
(415) 362-0684

August 10, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: Recommendation Relating to Execution of Witnessed Wills

I have reviewed the staff draft on the above recommendation, dated July 15, 1983, and suggest the following:

I agree with the proposal to eliminate the necessity that witnesses be present at the same time. As pointed out, the injustice that can be result due to inadvertent non-compliance with the technical requirement for simultaneous presence far outweighs the likelihood of injustice through fraud.

However, I take exception to the proposal to permit a notary public to serve as a sole witness. Such a proposal would invariably lead to the impression that a notary is the proper person to prepare a will, or at least advise regarding its validility or propriety.

I do not see any connection between the requirements for execution of a durable power of attorney for health care and a will. Since any power of attorney must be acknowledged before a notary public, the fact that a durable power of attorney for health care can be acknowledged before a notary does not provide any basis for using such procedure in connection with a will.

Very sincerely

Alvin G. Buchignani

AGB/dg
D60-66

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

8/16/83

California Law Revision Commission

Gentlemen:

I have read and reviewed the Draft of the Recommendation relating to Execution of Witnessed Wills and agree with your views and recommendations.

Best Regards to all of you there in the commission and I want to commend you all on the excellent job you are doing for us all out here.

Sincerely

H