

Memorandum 81-53

Subject: Study L-603 - Probate Code (Holographic and Nuncupative Wills)

At the July meeting, the Commission decided to adopt a modified UPC provision to eliminate some technical requirements for a holographic will and thus to make the holographic will more useful to lay persons who make home-drawn wills without the benefit of a lawyer, and to abolish nuncupative (oral) wills in California. The Commission directed the staff to prepare a separate tentative recommendation on these subjects for distribution for comment, with a view toward submitting legislation to the 1982 session of the Legislature.

Attached to this memorandum is a staff draft of a Tentative Recommendation relating to Holographic and Nuncupative Wills. If the Commission approves it for distribution for comment, it will be sent to the State Bar Estate Planning, Trust and Probate Law Section and other interested persons for review and comment.

The staff has made further revisions to the second sentence of the holographic wills provision (proposed new Section 53 of the Probate Code on page 5 of the Tentative Recommendation) in order to prevent an undated holographic will from being completely invalidated where there is another will which is only partially inconsistent with the holographic will. If there is only a partial inconsistency between the two instruments, the holographic will should be saved to the extent of effectuating its provisions which are not inconsistent with the other will and which could therefore be given effect even though the undated holograph may have been executed earlier than the other will. The staff revisions to the language as approved by the Commission at the July meeting are as follows:

If such a will does not contain a statement as to the time date of its execution and if such failure results in ~~doubts~~ doubt as to whether ~~it was executed before or after~~ its provisions or the inconsistent provisions of some other instrument having testamentary effect are controlling, ~~it~~ the will is invalid to the extent of such inconsistency unless the time date of its execution can be established by other evidence to be after the date of execution of the other instrument.

Respectfully submitted,

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TENTATIVE RECOMMENDATION

relating to

HOLOGRAPHIC AND NUNCUPATIVE WILLS

California recognizes two types of wills that need not satisfy the formal requirements for an attested will.¹ One is the holographic will which must be entirely in the handwriting of the testator.² The other is the nuncupative (oral) will which, although authorized by statute, apparently is unused in California.³ This recommendation deals with these two types of wills.

Holographic Wills

The Uniform Probate Code section on holographic wills provides that a will which does not comply with the formal requirements for an attested will "is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator."⁴ The Commission recommends that this provision with a clarifying addition be substituted for the existing California provision on holographic wills.⁵

1. See 7 B. Witkin, Summary of California Law Wills and Probate § 92, at 5610 (8th ed. 1974).
2. Probate Code § 53. Section 53 of the Probate Code provides:
 53. A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will.
3. See notes 14-17 infra.
4. Uniform Probate Code § 2-503. Section 2-503 of the Uniform Probate Code provides:
 - 2-503. A will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.
5. Prob. Code § 53.

By requiring that a holographic will be "entirely written, dated and signed" by the testator,⁶ the existing California statute results in the invalidation of handwritten wills because nonessential parts of the will are not in the testator's handwriting.⁷ Thus, the courts have invalidated handwritten wills where the day, month, and last two digits of the year were in the testator's hand but the first two digits of the year were printed,⁸ and where the will was written on letterhead stationery.⁹ This frustrates the testator's intent by causing intestacy with no corresponding benefit in terms of reducing fraud.

The UPC, on the other hand, merely requires "the signature and the material provisions" of the will to be in the testator's handwriting¹⁰ and thus permits nonessential printed or stamped matter such as the date or introductory wording to be disregarded.¹¹ Adoption of the UPC provision would validate some holographic wills which are invalid under present California law.

To the extent that a holographic will and another will (or other instrument having testamentary effect) both affect the same property or otherwise have inconsistent provisions, the instrument last executed ordinarily supersedes the earlier instrument. But the lack of a date in the holographic will may make it impossible to determine whether the holographic will was executed before or after the other instrument having testamentary effect.¹² To deal specifically with this situation, the Commission recommends that a clarifying provision be added to the UPC provision to require either that the holographic will be dated or that the date of its execution be shown by other evidence when necessary to determine whether it or some other testamentary instrument is to be given effect. If the date of execution of the holographic will cannot

6. Id.

7. For a complete discussion of the California cases, see Bird, Sleight of Handwriting: The Holographic Will in California, 32 Hastings L.J. 605, 612-18 (1981), reproduced as an exhibit to this recommendation.

8. See, e.g., In re Estate of Francis, 191 Cal. 600, 217 P. 746 (1923).

9. See, e.g., In re Estate of Bernard, 197 Cal. 36, 239 P. 404 (1925).

10. Uniform Probate Code § 2-503, supra note 4.

11. Official Comment to Uniform Probate Code § 2-503; Bird, supra note 7, at 629.

12. State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973).

be established by a date in the will or by other evidence, the holographic will would be invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other instrument is to be given effect.¹³

Nuncupative Wills

The Commission recommends the repeal of the California provisions permitting nuncupative (oral) wills.¹⁴ A nuncupative will may not dispose of real property, and the personal property bequeathed may not exceed \$1,000 in value.¹⁵ This and the other limitations on nuncupative wills and the procedural requirements that must be satisfied to probate such a will¹⁶ have as a practical matter precluded the use of a nuncupative will in California.¹⁷ Moreover, courts have historically looked upon such wills with disfavor because of the opportunity for fraud and perjury.¹⁸ A number of commentators have called for the abolition of nuncupative wills.¹⁹ Following the modern view, the UPC does not permit nuncupative

13. For further discussion of this proposal, see Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 512 (1975).
14. Prob. Code §§ 54, 55, 325.
15. Prob. Code § 55.
16. A nuncupative will may be made only by (1) a person in actual military service in the field or doing duty on shipboard at sea who is in actual contemplation, fear, or peril of death, or (2) a person (military or civilian) who is in expectation of immediate death from an injury received the same day. It must be proved by two witnesses who were present when the testator uttered it, one of whom must have been asked by the testator to bear witness that the utterance was his or her will. Prob. Code § 54. The testator's words must be reduced to writing within 30 days after they were spoken, and probate must be sought within six months. Prob. Code § 325.
17. There are no reported appellate decisions in California involving the use of nuncupative wills.
18. 2 W. Bowe & D. Parker, Page on the Law of Wills § 20.14, at 303 (rev. ed. 1960); see 79 Am. Jur.2d Wills § 724 (1975).
19. See, e.g., Niles, Probate Reform in California, 31 Hastings L.J. 185, 211 (1979); Rheinstejn, The Model Probate Code: A Critique, 48 Colum. L. Rev. 534, 550 (1948).

wills.²⁰ If as recommended by the Commission holographic wills are to be less frequently invalidated on technical grounds, there seems to be little reason to keep nuncupative wills.²¹

RECOMMENDED LEGISLATION

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

An act to repeal Sections 54, 55, and 325 of, and to repeal and add Section 53 of, the Probate Code, relating to wills.

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

101/171

Probate Code § 53 (repealed). Holographic will

SECTION 1. Section 53 of the Probate Code is repealed.

~~53. A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will.~~

Comment. Former Section 53 is superseded by new Section 53.

20. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 343 (1976).

21. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 211 (1979).

Probate Code § 53 (added). Holographic will

SEC. 2. Section 53 is added to the Probate Code, to read:

53. A will which does not comply with the requirements for an attested will is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. If such a will does not contain a statement as to the date of its execution and if such failure results in doubt as to whether its provisions or the inconsistent provisions of some other instrument having testamentary effect are controlling, the will is invalid to the extent of such inconsistency unless the date of its execution can be established by other evidence to be after the date of execution of the other instrument.

Comment. The first sentence of Section 53 is the same in substance as Section 2-503 of the Uniform Probate Code. See the Uniform Probate Code Comment to UPC Section 2-503.

The second sentence of Section 53 is not found in the Uniform Probate Code. This sentence is a clarifying provision designed to deal with the situation where the holographic will and another will (or other instrument having testamentary effect) have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, the sentence requires either that the holographic will be dated or that the date of its execution be shown by other evidence when necessary to determine whether it or some other testamentary instrument is to be given effect. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other instrument, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent instrument is to be given effect. Where the conflict between the holographic will and other instrument is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other instrument does not affect the validity of the holographic will as to other property.

Section 53 provides a more liberal rule for determining the validity of a holographic will than former Section 53 which it supersedes. Former Section 53 required that a holographic will be "entirely" in the handwriting of the testator and had the effect of invalidating wills because immaterial provisions of the will were not in the testator's handwriting.

Note. The Comment to Section 2-503 of the Uniform Probate Code reads: "This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the 'material provisions' to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be 'entirely' in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated

and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate."

405/876

Probate Code § 54 (repealed). Nuncupative will; persons who may make; witnesses

SEC. 3. Section 54 of the Probate Code is repealed.

54. A nuncupative will is not required to be in writing. It may be made by one who, at the time, is in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or by one who, at the time, is in expectation of immediate death from an injury received the same day. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.

Comment. By the repeal of Sections 54, 55, and 325, nuncupative wills are abolished in California.

405/875

Probate Code § 55 (repealed). Personal property disposable by nuncupative will

SEC. 4. Section 55 of the Probate Code is repealed.

55. A nuncupative will may dispose of personal property only, and the estate bequeathed must not exceed one thousand dollars in value.

Comment. See the Comment to former Section 54.

405/874

Probate Code § 325 (repealed). Proof of nuncupative will

SEC. 5. Section 325 of the Probate Code is repealed.

325. No proof shall be received of a nuncupative will unless it is offered within six months after the testamentary words were spoken, nor unless the words, or the substance thereof, were reduced to writing within 30 days after they were spoken, and such writing is filed with the petition for the probate thereof. Notice of such petition shall be given, and subsequent proceedings in administration had, as in the case of a written will.

Comment. See the Comment to former Section 54.

405/851

Transitional provision

SEC. 6. This act shall not apply in any case where the person whose will is offered for probate died before the operative date of this act. Such cases continue to be governed by the law in effect immediately before the operative date of this act.

Comment. Section 6 is to prevent this act from possibly interfering with rights which may have vested prior to the operative date of this act.