

Memorandum 81-70

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

Attached to this Memorandum is the Commission's Tentative Recommendation relating to Holographic and Nuncupative Wills. This TR has been distributed to the Estate Planning, Trust and Probate Law Section of the State Bar and others for review and comment. We have received seven responses, including the response of the State Bar section. Copies of these responses are attached to this Memorandum as Exhibits 1 through 7.

All of the respondents generally support the proposed legislation, although attorney Blaine T. Romney (Exhibit 3) objects to elimination of the present California requirement that holographic wills be dated. It is the staff's view that the Uniform Probate Code takes the correct position by providing that the absence of a date does not invalidate a holographic will, particularly since a formal, attested will need not be dated. The date would become important only if there were another testamentary instrument--then it would be necessary to determine which was the testator's final testamentary expression. The staff is of the view that this situation is adequately dealt with by the second sentence of proposed new Section 53 of the Probate Code.

Attorney Theodore J. Cranston (Exhibit 2) thinks that the so-called "statutory will" (a proposal currently under development by the State Bar) should be enacted in place of all provisions permitting holographic and nuncupative wills. However, as the State Bar proposal currently stands, under a statutory will property may only be given to the testator's spouse and lineal descendants. The statutory will would therefore not be an adequate substitute for a holographic will in all cases, and attorney Harley Spitler of the Executive Committee of the State Bar section has advised the staff that he agrees with this conclusion.

Attorney Charles Collier, writing on behalf of the State Bar section (Exhibit 1), suggests that the Commission give consideration to the following situations which are not comprehended within the Commission's holographic wills recommendation:

(1) The situation where the testator types a will rather than handwriting it, and signs it.

(2) The situation where the testator dictates a will on a dictabelt or other recording device.

In both of the above situations, the testamentary expression would not be valid as a formal, attested will, and would not be validated as a holographic will either under present California law or under the Commission's recommendation. The staff is of the view that there is merit to Mr. Collier's suggestion that the Commission consider how these situations might best be dealt with. However, the staff does not think that the Commission's recommendation on holographic and nuncupative wills should be delayed for this purpose. The staff will prepare a memorandum for Commission consideration on the issues raised by Mr. Collier as we proceed with the wills study.

In view of the overwhelming support for the Commission's tentative recommendation, the staff recommends that the Commission approve the TR as a final recommendation for printing and submission to the 1982 session of the legislature.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

OF THE STATE BAR OF CALIFORNIA

Exhibit 1

555 FRANKLIN STREET
SAN FRANCISCO 94102
TELEPHONE 561-8220
AREA CODE 415

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1800 Century Park East
Los Angeles, Ca. 90067
October 6, 1981

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LOS ANGELES
JOHN L. McDONNELL, JR., *Vice-Chair*
OAKLAND

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LOS ANGELES

Mr. John DeMouilly
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

RE: Tentative Recommendation relating to Holograph Will
and nuncupative will

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, at its September 26 meeting gave consideration to the tentative recommendation of the Law Revision Commission on holographic and nuncupative wills. The members of the Executive Committee unanimously supported the repeal of the provisions relating to nuncupative wills. Interestingly enough, none of the people on the Executive Committee ever had any dealings with a nuncupative will situation.

With reference to the proposed changes in the requirements of a holographic will, the committee voted to support the changes which are proposed in the tentative recommendation. However, there was an interesting discussion as to whether a holographic will should also be considered if it was typed by the testator and then signed by the testator. One of the people on the Executive Committee had had experience with such a situation. One of the Probate Commissioners had recently admitted a will set forth on a tape, that is, a verbal will, to probate. Your Commission might want to consider that type of situation also.

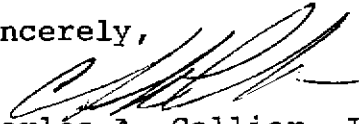
Page Two

Enclosed is a copy of a letter from Harley Spitler and a copy of an article to which he referred with reference to a typewritten holographic will. These are for your consideration.

We had some discussion as to the dating of a holographic will. It was noted that a formal will does not require a date. The provision for establishing the date of a holographic will, if it is significant, seemed satisfactory.

Thank you for forwarding the tentative draft to us for our review and comments.

Sincerely,



Charles A. Collier, Jr.

CAC:gd

Enc.

cc: John McDonnell, Jr., Esq.

Harley Spitler, Esq.

Ms. Mary Yen

Exhibit 2

GRAY, CARY, AMES & FRYE

ATTORNEYS AT LAW

GORDON GRAY (1877-1967)
W. P. CARY (1882-1943)
WALTER AMES (1893-1980)
FRANK A. FRYE (1904-1970)

FRANK KOCKRITZ
STERLING HUTCHESON
THOMAS C. ACKERMAN, JR.
EUGENE L. FREELAND
R. REAVES ELLEDGE, JR.
KARL ZOBELL
JOSIAH L. NEEPER
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RICHARD ALEXANDER BURT
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T. KNOX BELL
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WILLIAM N. KAMMER
RICHARD A. PAUL
CHRISTOPHER C. CALKINS
CHRISTOPHER B. NEILS
VICTOR A. VILAPLANA
DENNIS A. SCHOVILLE
SHIRLEY L. KOVAR
BRIAN L. FORBES
EDWARD J. MSINTYRE
J. TERENCE O'MALLEY
JEFFREY M. SHOHEI
WILLIAM MSECURINE, JR.
MARILYN L. HUFF
JAN S. GONNERMAN
SHIRLI FABBRI WEISS
DAVID WESTON
ELISABETH EISNER
MERRILL F. STORMS, JR.

PAUL J. DOSTART
WILLIAM A. JOHNSON, JR.
RICHARD F. LUTHER
RICHARD D. CHRISTY, JR.
STEPHEN T. LANDUYT
DON G. RUSHING
L. JEAN SHANNON
PAULA L. LEHMANN
DAVID L. OSIAS
MELITTA FLECK
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THOMAS B. MSAFFEE
JAMES E. HOFFMANN
DAVID E. HERTZEL
DAVID S. PORTER
DOUGLAS H. BARKER
LOUIS BERT EDLESON
MARCELLE E. MIHAILA
ERIC GEORGATOS
W. ALAN LAUTANEN
ROBERT A. LEVY
MARK E. ZATT
KEN SOBEL

OF COUNSEL
JOSEPHINE IRVING
JOHN M. CRANSTON

1200 PROSPECT STREET
SUITE 575
LA JOLLA, CALIFORNIA 92037
(714) 454-9101

OTHER OFFICES
IN
SAN DIEGO
EL CENTRO

October 5, 1981

California Law Revision Commission
400 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Tentative Recommendation Relating to
Holographic and Nuncupative Wills

Gentlemen:

I have reviewed your tentative recommendation relating to holographic and nuncupative wills. In general, I think that the proposal is an improvement over the present state of the law.

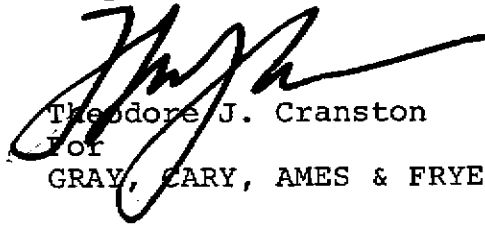
I am writing because I have also reviewed proposals by the State Bar concerning statutory wills. A discussion draft of the proposal was submitted to members of the State Bar recently, and although I have some reservation about any program which encourages laymen to write their own wills, I felt on balance that the statutory will proposal had merit.

It seems to me that there should be some coordination between efforts concerning holographic wills and a statutory will system. Both of these efforts concern rules governing wills drawn by laymen. Although I have not given it a great deal of thought, my initial reaction is that both sets of rules should not exist side-by-side. I believe I would favor the enactment of the statutory will provisions and the repeal of all provisions permitting holographic or nuncupative wills.

California Law Revision Commission
October 5, 1981
Page Two

I think this area of the law is in need of revision,
and I applaud the efforts of the Commission in the work that
has been done so far.

Very truly yours,



Theodore J. Cranston
For
GRAY, CARY, AMES & FRYE

TJC:sd

Exhibit 3

LAW OFFICES

ROMNEY, ROMNEY & ONSTOT
137 NORTH TENTH STREET
POST OFFICE BOX 912
SANTA PAULA, CALIFORNIA 93060
(805) 525-7701 • (805) 647-4583

BLAINE T. ROMNEY
PHILLIP H. ROMNEY
W. STEPHEN ONSTOT

October 7, 1981

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

Re: Proposed Amendments Concerning Holographic
and Nuncupative Wills

Gentlemen:

As an attorney who for many years has practiced primarily in the probate field, I heartily agree with your proposed changes in the law applicable to holographic and nuncupative wills, except for the provision which provides holographic wills need not in all cases be dated by the testator. I object to that provision because I believe it would further overburden our already overburdened courts, and will be vulnerable to perjury as are nuncupative wills.

Very truly yours,


Blaine T. Romney

BTR/b

Exhibit 4

UNIVERSITY OF CALIFORNIA, DAVIS



BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

October 13, 1981

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

Ladies and Gentlemen:

I teach Wills and Trusts at the above law school. I endorse the Commission's tentative recommendation relating to holographic and nuncupative wills.

Please advise me of when you hope to seek the passage of the revised § 53. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Joel C. Dobris".

Joel C. Dobris
Professor of Law

JCD:esg

Exhibit 5



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RETIRED
TEACHERS
ASSOCIATION



AMERICAN
ASSOCIATION
OF RETIRED
PERSONS

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October 28, 1981

John H. DeMouly, Executive Secretary
California Law Revision Commission
4000 middlefield Road, Room D-2
Palo Alto, California 94306

Re: CLRC Tentative Recommendation
relating to
Holographic and Nuncupative Wills

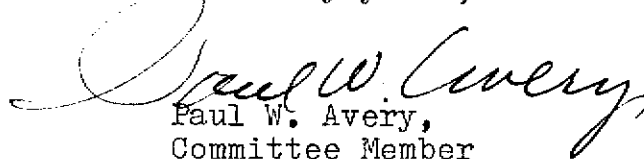
Dear Mr. DeMouly:

After considerable deliberation and thoughtful discussion with other folks it is my opinion and recommendation that our committee approve the conclusions set forth in your report of September 14, 1981.

Since these matters are within the scope of my assignment, you may accept this as an affirmation.

Inasmuch as I/we intend to devote a considerable amount of time during the coming year on the Uniform Probate Code, would you be kind enough to prepare for me a resume of pros and cons we might encounter? Confidentially, of course.

Sincerely yours,


Paul W. Avery,
Committee Member

Milfred I. Moore
President, NRTA

Olof J. Kaasa
President, AARP

Cyril F. Brickfield
Executive Director

Exhibit 6



National Notary Association • 23012 Ventura Blvd. • Woodland Hills, CA 91364 • USA • (213) 347-2035 • Cable: NOTARIAN

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Milton G. Valera
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October 9, 1981

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

Dear Mr. De Mouley:

Thank you for copies of the Commission's tentative recommendations relating to unperformed real property sales contracts, rights of entry and possibilities or reverter, and holographic and nuncupative wills.

We have no objections to any of the recommendations.

We found the proposal relating to holographic and nuncupative wills to be of particular interest. We have received inquiries from Notaries wanting to know if and how they could notarize handwritten (holographic) wills. We have advised them not to notarize such wills on the understanding that any markings on the will not in the testator's own writing could possibly invalidate the document.

However, The Commission's proposal that only "the signature and the material provisions" of the will, "whether or not witnessed," must be in the testator's handwriting would eliminate this danger.

Please keep us informed of any future proposed statute changes involving notarization.

Sincerely,

Milton G. Valera
Vice President

MGV:ss
020401

MEMORIAL HOSPITAL MEDICAL CENTER

October 1, 1981

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

Re: Tentative Recommendation Relating To Holographic and
Nuncupative Wills

Dear Sir:

After review of the above recommendation, I approve the
tentative recommendation and support the revocation of
this troublesome clause.

Very truly yours,



Robert E. Siemer
Legal Counsel

RES:dk

TENTATIVE RECOMMENDATION

relating to

HOLOGRAPHIC AND NUNCUPATIVE WILLS

California recognizes two types of wills that need not satisfy the strict requirements for execution of a will.¹ One is the holographic will which is handwritten by the testator. The other is the nuncupative will which is made orally in apprehension of death.

Holographic Wills

California law requires that a holographic will be entirely in the handwriting of the testator.² The Uniform Probate Code (UPC) permits a holographic will "if the signature and the material provisions are in the handwriting of the testator."³ The Commission recommends that the UPC provision, with a clarifying addition, be substituted for the existing California provision on holographic wills.

By requiring that a holographic will be "entirely written, dated and signed" by the testator,⁴ the existing California statute may result in the invalidation of a handwritten will because a nonessential part of the will is not in the testator's handwriting.⁵ Thus, the courts have

1. The requirements for execution of a formal will are set forth in Probate Code Section 50.

2. Probate Code Section 53 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. Uniform Probate Code Section 2-503 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.

4. Prob. Code § 53.

5. 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.

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,⁶ and where the will was written on letterhead stationery.⁷ 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 handwriting⁸ and thus permits nonessential printed or stamped matter such as the date or introductory wording to be disregarded.⁹ 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 testamentary instrument.¹⁰ 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 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.¹¹

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6. See, e.g., In re Estate of Francis, 191 Cal. 600, 217 P. 746 (1923).
 7. See, e.g., In re Estate of Bernard, 197 Cal. 36, 239 P. 404 (1925).
 8. Uniform Probate Code § 2-503, supra note 3.
 9. Uniform Probate Code § 2-503, Comment; Bird, supra note 5, at 629.
 10. State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973).
 11. For further discussion of the need for such a clarifying provision, see Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 512 (1975).

Nuncupative Wills

The Commission recommends the repeal of the California provisions permitting nuncupative (oral) wills.¹² A nuncupative will may not dispose of real property, and the personal property bequeathed may not exceed \$1,000 in value.¹³ This and the other limitations on nuncupative wills and the procedural requirements that must be satisfied to probate such a will¹⁴ have as a practical matter precluded the use of a nuncupative will in California.¹⁵ Moreover, courts have historically looked upon such wills with disfavor because of the opportunity for fraud and perjury.¹⁶ A number of commentators have called for the abolition of nuncupative wills.¹⁷ Following the modern view, the UPC does not permit nuncupative wills.¹⁸ The adoption of the Commission's recommendation that the UPC provision on holographic wills be adopted in California will protect against the invalidation of such wills on technical grounds and there will then be little reason to keep nuncupative wills.¹⁹

12. Prob. Code §§ 54, 55, 325.

13. Prob. Code § 55.

14. 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.

15. No reported California appellate decision has been found involving a nuncupative will.

16. 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).

17. See, e.g., Niles, Probate Reform in California, 31 Hastings L.J. 185, 211 (1979); Rheinstein, The Model Probate Code: A Critique, 48 Colum. L. Rev. 534, 550 (1948).

18. 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).

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

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

An act to amend Section 50 of, 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:

32724

Probate Code § 50 (technical amendment). Requirements for valid will

SECTION 1. Section 50 of the Probate Code is amended to read:

50. ~~Every will, other than a nuncupative will, must~~ Except as provided for holographic wills, every will shall be in writing and ~~every will, other than a holographic will and a nuncupative will, must~~ shall be executed and attested as follows:

(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. A person who subscribes the testator's name, by his direction, should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will.

(2) The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time.

(3) The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will.

(4) There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will.

Comment. Section 50 is amended to delete the references to a nuncupative will. The provisions for nuncupative wills (former Sections 54, 55, and 325) have been repealed. As to holographic wills, see new Section 53.

Probate Code § 53 (repealed). Holographic will

SEC. 2. 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.

405/882

Probate Code § 53 (added). Holographic will

SEC. 3. Section 53 is added to the Probate Code, to read:

53. A will which does not comply with Section 50 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. The official Comment to Uniform Probate Code Section 2-503 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."

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.

405/876

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

SEC. 4. 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. 5. 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. 6. 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. 7. 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 7 makes clear that this act does not affect rights that vested prior to its operative date.