

Memorandum 81-28

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

A recent article analyzes the California law relating to holographic wills, compares the pertinent provision of the Uniform Probate Code, and recommends either that the holographic will be abolished entirely or that the UPC provision be enacted to make holographic wills more useful. See Bird, Sleight of Handwriting: The Holographic Will in California, 32 Hast. L.J. 605 (1981). A copy of this article is attached to this memorandum as Exhibit 1.

The California statute on holographic wills (Probate Code Section 53) provides:

Probate Code § 53. Holographic will

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.

The early California cases tended to take a strict approach to the requirement that a holographic will be "entirely written, dated and signed" by the testator, invalidating wills where the day and month were in the testator's hand but the year was preprinted, where the will was written on letterhead stationery, and where dispositive provisions of the will were handwritten on a printed will form. Later cases have relaxed some of the rules, but have engaged in "tortured logic and purely semantic distinctions." Bird, supra at 633.

The UPC provision (Section 2-503) would validate many holographic wills which are invalid under present California law. The UPC section and Comment provide:

UPC § 2-503. Holographic will

2-503. A will which does not comply with Section 2-502 [attested wills] is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

UPC COMMENT

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 (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.

By requiring only the "material provisions" of a holographic will to be in the testator's handwriting and thus permitting nonessential printed matter to be disregarded, the UPC represents a codification of the "surplusage theory" in its most liberal form. Bird, supra at 629. The weight of scholarly opinion seems to favor getting rid of the hyper-technical California rules and replacing them with something along the lines of the UPC. Professor Perry Evans (the draftsman of the 1931 Probate Code) has urged that Section 53 "be liberalized so as to ignore any word or phrase not in the handwriting of the decedent which makes no difference in the meaning of the will" Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 609 (1931). Professor Russell Niles (one of the Commission's consultants on probate law) has said, "[I]f a holographic will is permitted, the statutes should not contain traps that a reasonable layperson would not anticipate." Niles, Probate Reform in California, 31 Hast. L.J. 185, 212 (1979). Professor Susan French (also a consultant to the Commission on probate law) has said that whether the UPC provision that only the "material provisions" of a holographic will must be in the testator's handwriting "will prove adequate may itself not be so certain, but it surely promises for something better than what has been the California experience." French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 341 (1976). Professor Jesse Dukeminier (one of the Commission's consultant's on probate law) has written to the Commission that the California statute should be repealed and replaced by the UPC provision.

Professor Bird suggests that serious consideration be given to whether holographic wills should be abolished entirely, for the following reasons:

(1) Holographic wills engender litigation.

(2) By not requiring the ritual of an attested will, the holographic will may fail to impress the seriousness of the transaction upon the testator.

(3) By not requiring witnesses, the holographic will does not sufficiently protect the testator from duress or undue influence.

(4) Holographic wills are more susceptible to forgery than witnessed wills.

See Bird, supra at 608-10, 631-33.

However, the staff is persuaded by the argument that the holographic will should be preserved because it dates from Roman days, serves the policy of favoring testacy over intestacy, and permits self-help, particularly for persons of modest means. See Bird, supra at 606, 631-32. Twenty-four American jurisdictions now recognize holographic wills, although two of them limit the use of holographic wills to members of the armed forces. Id. at 607 n.10.

In its 1973 critique of the Uniform Probate Code, the State Bar appeared to have no problem with revising California law as the UPC would do to require only that the "material provisions" of a holographic will be in the testator's handwriting. See State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973). The State Bar did object, however, to the UPC's elimination of the requirement that a holographic will be dated, "since it is often difficult to determine when a holographic will was executed and whether it predates or postdates other wills." Id. This criticism has been made by other commentators as well. See Bird, supra at 630 n.129. Although a formal, attested will need not be dated, the date of execution may be proved by testimony of the witnesses (State Bar of California, supra); since a holographic will is not witnessed, such testimony would be unavailable to prove the date of execution.

The Joint Editorial Board for the UPC has responded to this criticism as follows:

The date of a will is frequently important, and no one would dispute that it is advisable for a will to be dated. But, it is another thing to advocate that statutory law should invalidate a holographic will merely because it is undated. . . . UPC 2-503 does not make the date of a will irrelevant, nor prevent the denial of probate where lack of a date causes fatal indefiniteness regarding the relationship of a holographic statement to another will.

Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 11 (1974).

Professor John Langbein has urged that a modified date requirement be retained for holographic wills, saying that "[t]he main reason for requiring dating is to establish the sequence of instruments if the testator leaves multiple conflicting wills." Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 512 (1975). He points to the German solution to this problem as affording a useful compromise. The German statute provides that if a holographic will "does not contain a statement as to the time of its execution and if such failure results in doubts as to the validity of the instrument, the testament is to be held invalid unless the time of its execution can be established by extrinsic evidence." Id. Professor Langbein concludes by saying:

The German statute shows that useful formal requirements such as dating need not be eliminated if the proponents are permitted to validate a defective instrument by proving that the defect is functionally harmless. The UPC has confused the formality with the formalism, and needlessly sacrificed the former for failure to remedy the latter.

Id.

The staff is of the view that the UPC provision would be improved by incorporating Professor Langbein's suggestion. The staff therefore recommends that Section 53 of the California Probate Code be replaced by the UPC provision with the addition of a second sentence to incorporate Professor Langbein's suggestion:

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 time of its execution and if such failure results in doubts as to the validity of the

instrument, it is invalid unless the time of its execution can be established by other evidence.

Although such legislation would not eliminate litigation, it would probably reduce it, and would validate many holographic wills which would be invalidated under present California law on purely technical grounds. See Bird, supra at 630, 633.

Respectfully submitted,

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Exhibit 1

Sleight of Handwriting: The Holographic Will in California

By GAIL BOREMAN BIRD*

The holographic will is the simplest testamentary form.¹ Its chief virtue is convenience: without involving lawyers or witnesses, the testator can simply put pen to paper, and then rest easy, assured that his or her final wishes will be given effect. Or will they? Unknown to the testator, an apparently inconsequential factor, such as the choice of stationery, may have a decisive effect on the validity of a testamentary disposition. If the testator has the foresight or luck to select a perfectly plain piece of paper, and not bother with stamps and seals, he will likely be successful; but should letterhead be selected, the testator's chances diminish; and the testator who chooses a preprinted form, encircled "Last Will and Testament" at the top, in script not his own, will doubtlessly die intestate. Conversely, testators who write casual letters to a friend, or who nonchalantly scribble changes on the face of a formally attested will, may discover (from beyond the grave) that they have executed a valid holographic will or codicil.

This Article examines the definitional requirement that a holographic will be entirely written by the hand of the testator, and the extent to which the presence of nonhandwritten matter will invalidate the will. Theories of validation and invalidation fre-

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1. The word "holograph" is derived from the Greek *ολος* (whole) *γραφ* *ελυ* (written); the variant spelling "olograph" is seen in the older cases. The term "holographic" may be used loosely to describe any will that happens to be handwritten. In this Article, however, the term will be used only in its technical sense to describe a distinct type of will that is given validity because of its handwritten character. See 2 W. BOWE & D. PARKER, *PAGE ON WILLS* § 20.1-2, at 281 (3d ed. 1960) [hereinafter cited as BOWE & PARKER]. It could be argued that the nuncupative or oral will is technologically simpler than the holographic, merely because no writing is required; however, the former requires the presence of witnesses, which may be regarded as a complicating factor.

quently used by the courts, including intent, surplusage, integration, and incorporation by reference, are examined critically. The scope of the Article is limited primarily to California law. Analysis of existing case law is followed by a discussion of possible alternatives to the California rule. The Article concludes that the California rule is based on tortured logic and purely semantic distinctions, and that the legislature should abolish the holographic form entirely or substitute Uniform Probate Code section 2-503.

Origins of the Holograph

The more remote origins of the holographic will are obscure; however, scholars are sure that it is a fairly ancient legal device, with its roots in civil rather than common law. The holographic testament was recognized under certain circumstances in Roman law;² by the seventh century, the Visigoths had developed a form substantially identical to the modern version.³ Thereafter, the holograph dropped out of use for several centuries, reappearing in the customary law of France.⁴ It found its way into the *Code Napoleon*,⁵ and thence to the New World, where it initially surfaced in Louisiana⁶ and Virginia.⁷

The holographic will never achieved distinction at common law. Although ecclesiastical and common law originally permitted

2. Parker, *History of the Holograph Testament in the Civil Law*, 3 JUR. 1, 1-5 (1943). See generally W. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 582-90 (1938); F. MACKELDEY, *HANDBOOK OF THE ROMAN LAW* §§ 689-701, at 514-20 (Dropsie trans. and ed. 1883).

It is reported that under ancient Roman law, the testament of a soldier written in bloody letters on a shield or in the dust of the battlefield with a sword was valid as a military testament. Comment, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293, 294 n.11 (1967).

3. Visigoth law required that the document be entirely written, dated and signed by the testator. The handwriting and signature had to be authenticated after the testator's death. Parker, *History of the Holograph Testament in the Civil Law*, 3 JUR. 1, 8 & n.35 (1943).

4. Parker, *History of the Holograph Testament in the Civil Law*, 3 JUR. 1, 13-15 (1943). Professor Parker suggests that the holographic will is not derived directly from Roman or Visigoth law, but rather "re-originated customarily among the people and was, as a recognized custom, written into the compilations of customary law." *Id.* at 15 (emphasis omitted). See also Comment, *Holographic Wills and Their Dating*, 28 YALE L.J. 72, 72 (1918).

5. C. CIV. art. 970 (1973-1974) (France).

6. LA. CIV. CODE art. 103 (1808) (current version at LA. CIV. CODE ANN. art. 1588 (West 1952)).

7. 1 REV. CODE ch. 104, § 1 (1819) (current version at VA. CODE § 64.1-49 (1950)).

wills of both realty and personalty by an unwitnessed writing, the enactment of the Statute of Frauds in 1676 effectively limited unattested wills to bequests of personalty.⁸ The Wills Act of Victoria, passed in 1837, extended the attestation requirements to wills of personalty. No exemption was provided for wills entirely in the handwriting of the deceased.⁹

Today the holographic will is exclusively a creature of statute. In the absence of express statutory validation, the fact that a will is entirely in the testator's handwriting is of no special significance. A substantial minority of American jurisdictions, however, have statutes permitting holographic wills.¹⁰ The drafters of the Model Probate Code saw fit to recognize the holographic will,¹¹ and the Uniform Probate Code specifically authorizes the form.¹²

The California statute on holographic wills, enacted initially in 1872, is derived directly from the *Code Civil*.¹³ The California statute provides:

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.¹⁴

8. Statute of Frauds, 29 Car. 2, c. 3 (1676). See generally 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 314-56 (2d ed. 1893).

9. 7 Will. 4 & 1 Vict., c. 26 (1837). The Reports of the Real Property Commissions and Ecclesiastical Commissioners indicate that the holographic form was considered and rejected. The Commissioners determined that no document needs the protection afforded by attestation as much as a will, and concluded that the opinions of handwriting experts were not an effective substitute for the testimony of persons actually present at the execution of the will. Comment, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293, 304-05 (1937).

10. The legislatures of Alaska, Arizona, Arkansas, California, Idaho, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming have enacted such statutes. New York and Maryland permit holographic wills only for members of the armed forces. P. CALLAHAN, *HOW TO MAKE A WILL, HOW TO USE TRUSTS* 36 (4th ed. 1978); Rees, *American Wills Statutes: I*, 46 VA. L. REV. 613, 634-36 (1960).

11. L. SIMES & P. BAYSE, *Model Probate Code*, § 48, in *PROBLEMS IN PROBATE LAW* 82 (1946).

12. *UNIFORM PROBATE CODE* § 2-502.

13. Article 970 of the *Code Civil* provides that "[a] holographic testament shall not be valid if it is not written entirely, dated and signed by the hand of the testator. It is subject to no other form." (Author's trans.).

14. CAL. PROB. CODE § 53 (West 1956). The final sentence was added in 1931, as a codification of existing California case law. See *Estate of Bower*, 11 Cal. 2d 180, 187-83, 78

The Holographic Rationale

The holographic will does not differ intrinsically from the formally attested will. Whichever form is employed, the testator must act with the requisite testamentary intent and have testamentary capacity.¹⁵ Like the formal will, the holographic will is revocable, ambulatory, and operates to transfer property on death.¹⁶ The fundamental difference between the two types of wills lies in the formalities required for execution: the formally attested will must be signed or acknowledged by the testator in the presence of at least two competent witnesses.¹⁷ The function of the attestation requirement is basically threefold: ritual, protective, and evidentiary.¹⁸ The prerequisite that the document be witnessed serves to impress the seriousness of the transaction upon the testator, and tends to preclude the possibility that he or she was acting in a casual fashion, without testamentary intent. The presence of witnesses may also protect the testator from duress or undue influence. At the subsequent probate proceedings, the witnesses to the will can inform the court of the facts and circumstances of the will's execution, including the crucial fact that the instrument was indeed signed by the testator. Probate is essentially a postmortem procedure: the testator is dead and unable to testify.¹⁹ The requirement of attestation "provides a ready source for what the testator said and did, whether he had the requisite testamentary capacity and intent, and whether the will offered for probate is the same will the testator executed and the witnesses signed."²⁰

P.2d 1012, 1016 (1938). See also Evans, *Comments on the Probate Code of California*, 19 CALIF. L. REV. 602, 609-10 (1931).

15. Estate of French, 225 Cal. App. 2d 9, 36 Cal. Rptr. 908 (1964).

16. 2 BOWE & PARKER, *supra* note 1, § 20.3, at 282-83.

17. See, e.g., CAL. PROB. CODE § 50 (West 1956).

18. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941). See also Langbein, *Substantial Compliance With The Wills Act*, 83 HARV. L. REV. 493, 492-98 (1975) [hereinafter cited as Langbein].

19. A few jurisdictions have developed an antemortem probate procedure in order to minimize will contests. Testamentary capacity, freedom from undue influence, and due execution are established during the testator's lifetime by an action for declaratory judgment brought by the testator. Once such a judgment is entered, the will cannot be contested in a postmortem proceeding. For a discussion of this relatively new concept, see Alexander & Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979); Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934); Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978).

20. Comment, *An Analysis of the History and Present Status of American Wills*

Exemption of the holographic will from the attestation requirement is most frequently justified on the grounds that requiring the will to be entirely in the decedent's handwriting is an effective substitute for the evidentiary function performed by witnesses:

From time immemorial, letters and words have been written with the hand by means of pen and ink or pencil of some description, and it has been a well-known fact that each individual who writes in this manner acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself and which, in most cases, renders his writing easily distinguishable from that of others by those familiar with it or by experts in chi-rography who make a study of the subject and who are afforded an opportunity of comparing a disputed specimen with those admitted to be genuine. The provision that a will should be valid if entirely "written, dated, and signed by the hand of the testator," is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that, therefore, the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character.²¹

The drafters of the original California statute averred rather cryptically that the holographic will "obviates many difficulties and annoyances, [and] may not, and indeed, it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will making and disposition of property as where it does not exist; simply because the testator's intentions are unknown."²²

The holographic form has been criticized. Even if the will is proved to be entirely in the testator's handwriting, there is no guarantee that it was not achieved by means of fraud or duress.²³

Statutes, 28 OHIO ST. L.J. 293, 304 (1967).

21. *Estate of Dreyfus*, 175 Cal. 417, 419, 165 P. 941, 941 (1917).

22. CAL. CIV. CODE § 1277 (1872) (current version at CAL. PROB. CODE § 53 (West 1956)). See also *Estate of Zeile*, 5 Coffey 292, 293-94 (1910). Other rationales given for the recognition of the holographic will include the fact that "[a] dying person who wishes to dispose of his property, may find it impossible to resort to a notary and witnesses in order to make it in authentic form. Moreover, to refuse to a sick person the faculty of making a testament in the olographic form is to encourage all those interested in seeing that he does not make any dispositions, to prevent him from doing so illegally, as it were. Finally, it is advisable to allow testators the necessary time to examine their testaments well, to read and re-read them at leisure, and to modify or reform them when they deem it proper to do so." AUBREY & RAU, *DROIT CIV. FRANCAIS*, 3 Civ. L. Trans. 135 n.1 (C. Lazarus trans. 1969).

23. "A holographic will is obtainable by compulsion as easily as a ransom note." Gul-

Moreover, the absence of ritual enables informal writings to be offered for probate, giving rise to serious questions concerning the maker's intent and the purpose, nature, and meaning of the document.²⁴ Finally, the lack of an attestation requirement makes holographic wills more susceptible of forgery than formal wills: "Most bogus wills are holographic."²⁵

In a more general sense, the policy underlying the recognition of holographic wills is probably derived from the atavistic desire to give effect to the last wishes of a decedent, however informally expressed.²⁶ Thus, despite the attendant dangers, the sole requirement for a valid holographic will in California is that it be entirely written, dated and signed by the hand of the testator.²⁷ The remainder of this Article will focus on the application and interpretation of this requirement by the California courts.

"Entirely Written, Dated and Signed"

The requirement that the will be entirely written by the hand of the testator presents two problems: What is meant by "written" and the definition of "entirely." The first issue has presented few special difficulties. The term "written" is interpreted strictly to mean handwritten, precluding the use of typewriters or "any sort of printing by the use of type, whether on a printing press or placed at the end of a rod manipulated by keys."²⁸ The language of the statute indicates that a will made in the handwriting of another, even at the express direction of the testator, will not qualify.²⁹ The rationale underlying the strict interpretation of the writing requirement is that it is the testator's handwriting which

liver & Tilson, *Classification Of Gratuitous Transfers*, 51 YALE L.J. 1, 14 (1941).

24. 2 BOWE & PARKER, *supra* note 1, § 20.2-.3, at 282-83.

25. Harris, *Genuine or Forged?*, 32 CAL. ST. B.J. 658, 660 (1957). Harris reports that one "favorite trick" of forgers is "to take a signed fly leaf from a book and write a will above the signature." *Id.*

26. "The human desire of men for a time clothed with judicial power to comply with the wishes of those who have gone to Hamlet's 'undiscovered country from whose bourn no traveller returns . . .'" Estate of McNamara, 119 Cal. App. 2d 744, 747, 260 P.2d 182, 184 (1953).

27. CAL. PROB. CODE § 53 (West 1956).

28. Estate of Dreyfus, 175 Cal. 417, 419, 165 P. 941, 942 (1917). In *Dreyfus*, the fact that the testator personally typed his will was held not to validate the will under the holographic will statute. The case has been criticized on the ground that the Civil Code defines "writing" to include printing and typewriting. See 5 CALIF. L. REV. 503 (1917).

29. See Estate of McNamara, 119 Cal. App. 2d 744, 260 P.2d 182 (1953).

provides the hallmark of authenticity.³⁰ The second issue, however, involving the meaning of the word "entirely," has given rise to much litigation over the years, resulting in "a large and ugly case law."³¹

The requirement that the will be written, dated and signed entirely by the hand of the testator raises two interrelated questions: (1) What portions of the will must be in the testator's handwriting for the will to achieve validity, and (2) To what extent will the presence of nonhandwritten matter destroy an otherwise valid holograph? A literal reading of the statute might lead one to reply simply "all and any." The response of California courts to these questions, however, has been less than simple or even consistent over the years. The next section of this Article will attempt to describe that response. For purposes of description, the cases have been grouped into the following categories: signature cases, date cases, letterhead cases, printed form cases, and interlineation cases.

Signature Cases

Probate Code section 53 directs that a holographic will be "entirely written, dated and signed by the hand of the testator."³² In the 19th century this requirement was recast by the courts to mandate that the instrument be entirely written, entirely dated and entirely signed by the testator.³³ The "entirely signed" requirement has never posed a serious problem. Cases involving this requirement generally have turned on whether the decedent's name was written as an "executing signature."³⁴ No reported California case has dealt with the problem of a stamp or seal used in lieu of a handwritten signature, but by analogy to the date cases,³⁵ such a

30. *Id.* at 748, 260 P.2d at 184-85.

31. Langbein, *supra* note 18, at 519.

32. CAL. PROB. CODE § 53 (West 1956).

33. Estate of Billings, 64 Cal. 427, 1 P. 701 (1884); Estate of Hazelwood, 249 Cal. App. 2d 263, 265, 57 Cal. Rptr. 332, 334 (1967).

34. The statutory requirement that attested wills be signed by the testator "at the end thereof" has never been held applicable to holographic wills. The "signature" in a holographic will may appear at any place on the document, provided that "the testator wrote his name there with the intention of authenticating or executing the instrument as his will." Estate of Bloch, 39 Cal. 2d 570, 572-73, 248 P.2d 21, 22 (1952). Moreover, the signature need not be complete; the use of initials has been held to constitute an effective signing of the will. Estate of Morris, 268 Cal. App. 2d 638, 640, 74 Cal. Rptr. 32, 33 (1969).

35. See text accompanying notes 41-50 *infra*.

"signature" would surely render the will invalid.³⁶

Date Cases

A holographic will must be entirely dated by the hand of the testator. Although abbreviations of words or figures are acceptable,³⁷ the date must be a complete date, specifying month, day, and year.³⁸ Moreover, the date must appear on the face of the instrument; it cannot be supplied by extrinsic evidence.³⁹ However, the date need not be correct.⁴⁰

The interpretation of "entirely dated by the hand of the testator" has changed over the years. In *Estate of Billings*,⁴¹ the date, "April 1st, 1880," was complete and appeared on the face of the will. The testator, however, had the misfortune to use a piece of office stationery upon which the year "1880" was already printed. He simply filled in "April 1st" and proceeded to write and sign his will. The California Supreme Court rather summarily invalidated the will on the grounds that the *whole* date was not written by the decedent. Emphasizing that the entire date must be in the testator's handwriting, the court did not discuss the other possible grounds for invalidity, namely, that the mere presence of the printing destroyed the holographic nature of the document.⁴²

36. Whether a holographic will could be effectively signed by a mark is open to doubt; it is clear that a mark is generally an effective signature, but Civil Code § 14 requires that the testator's name be written near the mark, "by a person who writes his own name as a witness." CAL. CIV. CODE § 14 (West 1954). See generally *Estate of Mangeri*, 55 Cal. App. 3d 76, 127 Cal. Rptr. 438 (1976). Arguably the matter written by the witness would invalidate the holograph, because the instrument is no longer entirely in the testator's hand.

37. See *Estate of Vance*, 174 Cal. 122, 162 P. 103 (1916); *Estate of Lakemeyer*, 135 Cal. 28, 66 P. 961 (1901); *Estate of Moody*, 118 Cal. App. 2d 300, 257 P.2d 709 (1953).

38. See *Estate of Hazelwood*, 249 Cal. App. 2d 263, 57 Cal. Rptr. 332 (1967); *Estate of Schiffmann*, 16 Cal. App. 2d 650, 61 P.2d 331 (1936); *Estate of Maguire*, 14 Cal. App. 2d 388, 53 P.2d 209 (1936). But see *Estate of Rudolph*, 112 Cal. App. 3d 81, 169 Cal. Rptr. 126 (1980) (date "Monday 26, 1978" held sufficient on the rationale that the court could take judicial notice that in the year 1978 "only once did the 26th day of a month occur on a Monday: in June").

39. *Estate of Wunderle*, 30 Cal. 2d 274, 181 P.2d 874 (1947); *Estate of Fritz*, 102 Cal. App. 2d 385, 227 P.2d 539 (1951).

40. See *Estate of Fay*, 145 Cal. 82, 78 P. 340 (1904); *Estate of Wilkinson*, 113 Cal. App. 645, 298 P. 1037 (1931). For a general discussion of this problem, see Schmulowitz, *The Execution of Wills in California*, 5 CALIF. L. REV. 377, 391-94 (1917).

41. 64 Cal. 427, 1 P. 701 (1884).

42. *Id.* A slight factual variation was presented in *Estate of Plumel*, 151 Cal. 77, 90 P. 192 (1907). The will in *Plumel* was entirely written, dated and signed by the hand of the decedent, with the exception of the figures "190" printed in the date January 12, 1904. The will itself was adjudged invalid under *Billings*. The testator, however, had inscribed a codicil

The latter issue, concerning the effect of the mere presence of printed matter, was squarely confronted by the court in *Estate of Francis*.⁴³ There the first two figures of the year "1919" were printed. The balance of the date and of the will was in the decedent's hand. The court conceded that if the date had contained the last two figures only, it would have met the statutory requirement. The printed figures, however, although unnecessary to the sufficiency of the date, were nonetheless a part of it; hence it was held that the will was not entirely in the testator's handwriting and was therefore invalid.⁴⁴

As a result of these decisions, the early California rule with respect to the date requirement was hardline: not only must all essential components of the date be in the testator's handwriting, but even unnecessary printed figures would destroy the holographic character of the document. The courts emphasized that strict compliance with the statutory requirements was imperative.

The hard line began to waver several years later with *Estate of Whitney*,⁴⁵ and in *Estate of Durlwanger*⁴⁶ the court performed a volte-face. The *Whitney* will contained two different dates—one partially printed at the top and one entirely handwritten towards the end of the document. The court suggested that the first date was probably not intended by the decedent as the date of the instrument and ruled that its mere presence did not destroy the holographic nature of the document.⁴⁷ *Durlwanger* involved only one date, and it was identical in format to the date in *Francis*; the first two figures of the year were printed, and the balance was in the decedent's handwriting. The *Durlwanger* court stated that "[s]ubstantial compliance with the statute, and not absolute precision is all that is required,"⁴⁸ and upheld the will on the theory

on the reverse side of the will; the codicil met the statutory requirements, being entirely written, dated and signed by the decedent. The will, although invalid, was given effect by application of the doctrine of incorporation by reference. See notes 103-18 & accompanying text *infra*.

43. 191 Cal. 600, 217 P. 746 (1923).

44. *Id.* at 601, 217 P. at 746. The will in *Francis* was contained in an envelope that the testator had dated entirely in his own hand. The court concluded that even if the envelope were viewed as part of the will, "the fact that the testator twice dated the will would not constitute a holographic will where one date was not in the testator's handwriting." *Id.*

45. 103 Cal. App. 577, 284 P. 1067 (1930).

46. 41 Cal. App. 2d 750, 107 P.2d 477 (1940).

47. 103 Cal. App. at 583, 284 P. at 1069-70.

48. 41 Cal. App. 2d at 756, 107 P.2d at 481.

that the printed figures formed no essential part of the document, and were not intended to be part of the instrument.⁴⁹

The present California rule with respect to the date requirement thus may be stated as follows: the essential components of the date—month, day, and year—must be handwritten, but the mere presence of nonessential printed figures will not invalidate the will, at least where the court finds that they were not intended as part of the instrument.⁵⁰

Letterhead Cases

The trend of the letterhead cases has been similar to that of the date cases; however, here the real issue has involved only the latter of the two questions posed initially: to what extent the presence of printed matter invalidates the will.

Estate of Thorn,⁵¹ although not strictly a "letterhead" case, established the guiding principle in this area. The decedent in *Thorn* personally signed and dated a will that was entirely in his handwriting except for the words italicized in the following paragraph:

To this society [California Academy of Sciences] I leave
Cragthorn Park

my country place *Cragthorn* consisting of 241 64/100 acres located about 1¼ mile below Glenwood and about 9¼ miles from the City of Santa Cruz in Santa Cruz County, State of California in Sec. 6 Town. 10 S. Range 1 West. I paid \$3300.00/100 for it in 1883, title U.S. Patent Recorded and I attach a memo, herewith advising the Academy as to what they may do with it *** Balance of my estate and personal property I leave to Academy of Science toward a fund to improve or care for *Cragthorn Park*.⁵²

Each time the name "Cragthorn" was used, the word was in-

49. *Id.* at 756-57, 107 P.2d at 481.

50. The liberalizing trend seen in *Whitney* and *Durlewanger* was sidestepped by the court in *Estate of Goldsworthy*, 54 Cal. App. 2d 666, 129 P.2d 949 (1942), a printed form case. In *Goldsworthy* the date was of the same type as in *Francis* and *Durlewanger*: the numerals "19" were printed; the balance was in the decedent's handwriting. The court noted that under *Durlewanger*, the fact that the figure "19" was printed would not invalidate the will; however, the court went on to find that the date was merely for identification purposes, was not intended as part of the act of execution, and therefore did not meet the statutory requirements. *Id.* at 672-73, 129 P.2d at 952. The reasoning of the court is curious because the primary purpose of the date requirement is supposedly identification. See *Estate of Fay*, 145 Cal. 82, 84, 73 P. 340, 341 (1904).

51. 183 Cal. 512, 192 P. 19 (1920).

52. *Id.* at 513, 192 P. at 19.

serted with a rubber stamp. The California Supreme Court unanimously rejected the will on the grounds that it was not entirely in the handwriting of the decedent. The court recognized that the property could be sufficiently identified without reference to the stamped words, but decided nonetheless that because the testator had deemed the words part of his will, they could not be disregarded.⁵³

In the early letterhead cases, the courts adopted the *Thorn* approach, taking a dim view of the use of hotel or office stationery for holographic wills. For example, in *Estate of Bernard*,⁵⁴ the decedent used hotel stationery, on which was printed the words "Long Beach, California." The date was handwritten "with exactitude" on the same line.⁵⁵ The court found that the printed words were "incorporated in and doubtless were intended to be made a part of the heading of the document" and that they were a "material part and parcel of the will."⁵⁶ Consequently, the court held that the will was not entirely written by the hand of the testator and was therefore invalid.

The requirement was applied less stringently in *Estate of Oldham*⁵⁷ and *Estate of De Caccia*,⁵⁸ both decided in 1928. These cases marked a turning point in the attitude of the courts towards holographic wills, although the underlying theory remained the same. In *Oldham*, the decedent used office stationery on which his name and address were printed. The court distinguished *Bernard*, stating that in the instant case, the printed words were wholly disconnected from the writing and formed no part of the will. The court indicated that the mere presence of printed words should not render the will invalid where the printed matter is not part of the writing and is wholly disassociated from it.⁵⁹

De Caccia presented a more difficult problem. The testator used hotel stationery, on which was printed "Oakland, California." As in *Bernard*, the decedent had written the date "with exactitude" on the same line. The court held that the placement of the date following the printed matter was a factor, which standing

53. *Id.* at 515-16, 192 P. at 20.

54. 197 Cal. 36, 239 P. 404 (1925).

55. *Id.* at 42, 239 P. at 406.

56. *Id.*

57. 203 Cal. 618, 265 P. 183 (1928).

58. 205 Cal. 719, 273 P. 552 (1928).

59. 203 Cal. at 620, 265 P. at 184.

alone, is "so slight that it would not warrant the conclusion that the deceased, by simply writing after the printed words the date of the document, thereby intended to make such printed words any part of the document itself."⁶⁰ The court reiterated the principle established in *Oldham* that the mere presence of printed matter "which forms no part of the written instrument and to which no reference is made, directly or indirectly, in the written instrument, will not destroy the effect of such instrument as a holographic will."⁶¹ The holding of *De Caccia* was ultimately codified in Probate Code section 53: "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."⁶²

The *De Caccia* rule was stretched to its limits in *Estate of Baker*.⁶³ The decedent in *Baker* wrote his will on hotel letterhead, on which the hotel's name and location was printed. The decedent had crossed out the name of the hotel, leaving intact the words "Modesto, California." Again the court found no evidence to support the conclusion that the decedent intended to or did incorporate the two immaterial words. The court declared:

We hold this to be true even if it be inferred that, because decedent's earlier witnessed will and codicil contained the words "Modesto, California," decedent may have believed that designation of locality was necessary in a testamentary document. It would unreasonably advance form over substance to hold that such a mistaken belief, if it existed, would defeat the testator's clearly, and otherwise validly, expressed testamentary intent.⁶⁴

Baker was subsequently followed in *Estate of Londo*,⁶⁵ where the court took the view that "the entire letterhead was surplusage and none of it was incorporated into the will Since the letterhead is not a part of the will and must be disregarded, the will . . . qualifies as a holographic will under Probate Code section 53."⁶⁶

60. 205 Cal. at 726, 273 P. at 555 (quoting *Estate of Oldham*, 203 Cal. 618, 620, 265 P. 183, 184 (1928)).

61. *Id.*

62. Cal. Stats. 1931, ch. 281, § 53, at 590.

63. 59 Cal. 2d 680, 381 P.2d 913, 31 Cal. Rptr. 33 (1963).

64. *Id.* at 685, 381 P.2d at 916, 31 Cal. Rptr. at 36.

65. 7 Cal. App. 3d 8, 86 Cal. Rptr. 443 (1970).

66. *Id.* at 12, 86 Cal. Rptr. at 446.

Printed Form Cases

Printed will forms have long been treated with disfavor by California courts, and in this area, unlike the date and letterhead cases, there has been no discernible softening of the courts' rigid position. "In those cases wherein the decedent has used a printed form on which to express a testamentary disposition, the documents have consistently been rejected as valid holographic dispositions."⁶⁷

In *Estate of Rand*,⁶⁸ decided in 1882, the testator used a printed form. The dispositive provisions, the signature, and part of the date were in his handwriting, but the remainder of the will, including burial instructions and executor provisions, were preprinted. The court rejected the document as a holograph:

The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The Legislature has seen fit to prescribe forms requisite to an olographic will, and these forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should, thereby, in effect, change the statute, and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased.⁶⁹

Similarly in *Estate of Bower*,⁷⁰ a post-*De Caccia* case, the court held that neither *De Caccia* nor the last sentence of Probate Code section 53 was applicable to the use of a printed form, despite the fact that the date, signature and material provisions were entirely in the decedent's handwriting. "It clearly appears . . . from the face of the will itself that the printed matter was intended by the decedent to be incorporated in the will . . . This . . . is fatal to its validity."⁷¹

In 1976, the California Court of Appeal again rejected the printed form will. In *Estate of Christian*,⁷² the testator used a

67. *Estate of Goldsworthy*, 54 Cal. App. 2d 666, 672, 129 P.2d 949, 952 (1942).

68. 61 Cal. 468 (1882).

69. *Id.* at 475.

70. 11 Cal. 2d 180, 78 P.2d 1012 (1938).

71. *Id.* at 187, 78 P.2d at 1016.

72. 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976).

printed form, which was signed and partially dated in his own hand, and in which the dispositive provisions were handwritten; however, the provision naming an executor was largely printed. It was this latter factor that the court found fatal:

Since the nomination of a personal representative to carry out the terms of a will is exceedingly important to a testator, and because the nomination is effective at death and is pertinent to the administration of the testator's estate, it must be deemed a part of the will under the relevancy standard of *Baker* Thus, the nomination of the executrix in the present case cannot be disregarded as surplusage.⁷³

The court also noted "the reluctance of the courts to depart from the requirements of Probate Code section 53,"⁷⁴ and stated that excluding as surplusage any provision not pertinent to the decedent's disposition of his property or essential to the validity of the document as a will "would emasculate the statutory requirement that the will be entirely written in the testator's handwriting."⁷⁵

Interlineation Cases

On at least two occasions, California courts have faced the situation in which a testator, having executed a formally attested will, subsequently makes unattested, handwritten changes on the face of the instrument. In both cases, the handwritten alterations were held to be effective holographic dispositions.

In *Estate of Atkinson*,⁷⁶ the decedent executed a duly attested typewritten will on November 2, 1911. Some two years later, he drew ink lines through two dispositive clauses, and wrote the following across the typewritten lines:

"July 9 1913
I cut out this part of will
T.G. Atkinson"

In addition he wrote the following across the final dispositive clause:

73. *Id.* at 982, 131 Cal. Rptr. at 845.

74. *Id.* at 953, 131 Cal. Rptr. at 846.

75. *Id.* at 982-83, 131 Cal. Rptr. at 845-46. The California Supreme Court recently granted a hearing in the case of *Estate of Black*, L.A. 31290 (arg. gtd. June 18, 1960). *Black* is a printed form case, factually similar to *Estate of Christian*. In an unpublished opinion, the Court of Appeal affirmed the Superior Court order denying probate of the will. For further discussion of this pending case, see note 160 *infra*.

76. 110 Cal. App. 499, 294 P. 425 (1930).

"July 9th 1913
John Atkinson children are
to get John share in this will.
T.G. Atkinson"

The appellants conceded that the cancellations constituted an effective revocation, and the court further held that the handwritten interlineations constituted a holographic codicil. The court noted that the mere presence of typewritten words upon the paper on which the codicil was written would not invalidate the holographic codicil,⁷⁷ apparently taking the view that the typewritten words formed no part of the codicil and hence could be deemed surplusage with respect to the codicil. The court then gave effect to the will as modified by the codicil, on the grounds that the codicil incorporated the will by reference.⁷⁸

A similar result obtained in *Estate of Nielson*,⁷⁹ recently decided by the court of appeal. Nielson had duly executed a formal typewritten will on February 25, 1969, leaving the bulk of his estate to four named charities in the event his mother predeceased him. Thereafter he drew lines through the dispositive clause, and wrote in the following words by hand:

"Bulk of estate-

1. Shrine Hospital for Crippled Children-Los Angeles. \$10,000-
2. Society for Prevention of Cruelty to Animals (nearest chapter)."

Appearing at the margin were the testator's initials. He had also crossed out the original date of the will and written in "November 29, 1974." At the bottom and top of the typewritten will were the handwritten words "Revised by Lloyd M. Nielson November 29, 1974." As in *Atkinson*, the court held the interlineations constituted a valid holograph and then ruled that the typewritten will was incorporated by reference in the holograph instrument:

[T]he typewritten words are not relevant to the substance of the holograph or essential to its validity as a will or codicil Nor does the word-content of the holograph indicate any intent to integrate the handwriting with the typewritten will. We conclude

77. *Id.* at 502, 294 P. at 426.

78. *Id.* at 502-03, 294 P. at 426. Why the court felt compelled to interject the doctrine of incorporation by reference is unclear. Having determined that there was a valid attested will and a valid holographic codicil, the court could have simply concluded that the codicil modified the will to the extent that the two were inconsistent. See CAL. PROB. CODE § 72 (West 1956).

79. 105 Cal. App. 3d 796, 165 Cal. Rptr. 319 (1980).

no evidence from the face of this document tells us the author intended to "incorporate" directly or indirectly the typewritten will into the provisions which are in his handwriting so as to render the handwriting ineffective as a will or codicil and thereby defeat the author's declared testamentary intent.

We further conclude that the handwriting when viewed as a whole authorizes an inference of an intent to incorporate by reference those portions of the typewritten will not modified or revoked by the holographic codicil and to give validity to . . . the typewritten will as modified by the holograph.⁸⁰

Notably, the courts have used this approach only where the interlineations have been made on a duly attested typewritten will; interlineations on a printed form are not effective. *Estate of Helmar*⁸¹ presented a factual situation midway between these extremes, and the court remained inflexible. The instrument at issue in *Helmar* contained a typewritten caption and introductory clause, which stated that the instrument was the decedent's "LAST WILL AND TESTAMENT." Immediately after this clause, the decedent handwrote the words "as follows." The balance of the will, including all dispositive provisions, date, and signature, was in her handwriting. The court concluded that the typewritten portions were incorporated by the decedent into the handwritten portions and were intended as part of the will:

While it may be that the typewritten portions were not essential to establish testamentary intent in the case at bench and could be disregarded in effecting the testamentary disposition of the property in accordance with decedent's wishes, these portions were nevertheless incorporated by the decedent herself into the document destroying the document's validity as a holographic will. To hold otherwise would require us to further erode the requirements of section 53 under the guise of liberal judicial interpretation of an unambiguous expression of legislative intent. We do not consider such to be appropriate in the instant case.⁸²

Analysis of the California Decisions

An attempt to reconcile the holdings of the foregoing cases is a difficult task, and leads to the following formulation: The presence of printed (that is, nonhandwritten) matter will not invalidate a

80. *Id.* at 804, 165 Cal. Rptr. at 323.

81. 33 Cal. App. 3d 109, 109 Cal. Rptr. 6 (1973).

82. *Id.* at 113-14, 109 Cal. Rptr. at 9.

holographic will in California, provided that no more than the first two digits of the year of the date are printed, and the printed matter appears wholly above or wholly below the handwritten provisions and is not in the same line as any handwritten words, unless the printed matter is an address, in which case juxtaposition is immaterial. The rule, of course, admits of various exceptions; for example, it does not obtain where the printed matter consists of a duly attested will. This "rule" is the product of application of the so-called "intent theory" in conjunction with the doctrine of incorporation by reference.⁸³ This section will analyze the development of these principles and their application in the holographic will setting.

The Intent Theory

American jurisprudence has developed two theories for dealing with printed matter contained in a holographic will: the "surplusage theory" and the "intent theory."⁸⁴ Under the former, any nonholographic matter may simply be disregarded as surplusage, provided that sense can be made of the remaining handwritten provisions taken alone.⁸⁵ The intent theory requires that the court determine whether or not the testator intended the nonholographic material as part of his or her will. If so, the will is invalid; if not, the will, without the nonholographic words, is valid.⁸⁶

83. Earlier attempts to formulate a workable California rule on the basis of existing case law have not been successful. For example, following the decisions in *Oldham* and *DeCaccia*, it was suggested that there were three basic fact patterns that should produce the following results: (1) where the printed matter is isolated and not connected on either side with the part written in the hand of the decedent, such matter does not constitute part of the will and should be disregarded; (2) where the printed matter is connected on both sides with the part written by the hand of the decedent, the printed matter cannot be disregarded, even if trivial or nonessential; (3) where the printed matter is connected on only one side with the part written by the hand of the decedent, the printed matter may be disregarded and the will held valid. Comment, *Wills: Holographic Wills: Printed Surplusage: Sufficiency of Signature*, 17 CALIF. L. REV. 297, 299-301 (1928). Although this rule accurately reflected then existing case law, it had little predictive value, and cannot explain the *Atkinson*, *Nielson*, and *Helmar* decisions. This lack of predictability is not the fault of the commentator, but is inherent in the so-called intent theory followed by California courts. See text accompanying notes 88-99 *infra*.

84. T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 357-58 (2d ed. 1953) [hereinafter cited as ATKINSON]; Mechem, *The Integration of Holographic Wills*, 12 N.C.L. REV. 213, 214 (1934).

85. ATKINSON, *supra* note 84, at 358; 2 BOWE & PARKER, *supra* note 1, § 20.5, at 287-88.

86. ATKINSON, *supra* note 84, at 357-59; 2 BOWE & PARKER, *supra* note 1, § 20.5, at

Although there were some early leanings towards the surplusage theory,⁸⁷ California has long been a proponent of the intent theory.⁸⁸ The surplusage theory was considered and explicitly rejected in *Thorn* on the grounds that it was not consonant with the statutory requirements:

We know of no rational theory upon which it can be held that words deemed by the testator himself essential to a description of the property devised, and inserted by him or under his direction as a part of such description in the dispositive clause of the will devising the property, do not constitute part and parcel of the will itself, notwithstanding that evidence might show the property to be sufficiently identified without the presence of such words . . . [A] portion of the dispositive clause may [not] be disregarded upon the plea that it is not a part of the will.⁸⁹

All subsequent California decisions have purported to follow the intent theory. The earlier cases applied the test strictly, letting the chips fall where they may and the testator's property to pass by intestate succession. If the printed matter was used by the testator as part of the will, even though not essential to the disposition, it was held to vitiate the holographic character of the instrument.⁹⁰ The later cases, beginning with *Oldham* and *De Caccia* in 1928, sought to avoid the harsh results flowing from a rigid application of the intent theory. Emphasis increasingly was placed on the principle that the mere presence of printed words on the face of the instrument would not destroy its holographic character, provided that they were not intended to be integrated by the testator as part of the will. Sufficiency of the evidence to show such intent became the primary question; the "substantial evidence principle"

287-88.

87. For example, in *Estate of Soher*, 78 Cal. 477, 21 P. 8 (1889), the testator executed a proper holographic will, but unfortunately had it attested by one witness—unnecessary under holographic will requisites, but not sufficient to qualify as an attested will. The court upheld the instrument as a valid holographic will, declaring that "[t]he witness clause is not, under the circumstances, to be considered as a portion of the will." *Id.* at 479, 21 P. at 9. It should be noted that the issue before the court was not actually framed in terms of surplusage, but rather, whether the testator intended to execute a holographic will or an attested will. The court, in opting for the holographic mode, presumed "that the intention of the testator was that of a reasonable and prudent man under the circumstances" and stated that it would not adopt a strained construction to defeat the desire of the testator. *Id.* Thus *Soher* may be regarded as a variation on the intent theory.

88. See *Estate of Rand*, 61 Cal. 468 (1882).

89. *Estate of Thorn*, 183 Cal. 512, 516-17, 192 P. 19, 20-21 (1920).

90. See *Estate of Bernard*, 197 Cal. 36, 239 P. 404 (1925); *Estate of Francis*, 191 Cal. 600, 217 P. 746 (1923).

of appellate review did not apply, because in the absence of parol, the reviewing court was empowered to interpret the instrument anew.⁹¹ As a result of this looser interpretation of the statutory requirements, the rule developed that the mere juxtaposition of printed material with handwritten material was *not* evidence of an intent to make such material part of the will.⁹² Thus, in *De Caccia*, the fact that the printed address "Oakland, California" was on the same line as the handwritten date was not deemed evidence of an intent to include the address as part of the will.⁹³ The juxtaposition rule was mechanically applied in *Durlewanger*, where the court concluded that the fact that the testator wrote the date "May 3—24" surrounding the numeral "19" was not evidence that the printed figures were intended as part of the date (an essential component of the will).⁹⁴ The court failed to indicate what evidence would show an intent on the part of the testator to include the printed matter.

Despite its dubious logic, *Durlewanger* was subsequently approved by the California Supreme Court in *Estate of Baker*,⁹⁵ where the intent theory was reformulated as an objective test. The court was less concerned with the subjective intent of the testator than with whether the printed matter should reasonably be viewed as relevant or essential: would a reasonably prudent testator, having in mind the requisites of Probate Code section 53, have intended that these obviously insignificant printed words be a part of his or her will? Of course not; the will is therefore valid.⁹⁶ The "objective intent" theory was subsequently followed in *Lando*, where the fact that the testator had carefully made corrections on a printed address was held not to evidence an intent to incorporate that address.⁹⁷

The reluctance of the courts to find an intent to integrate or incorporate printed matter has never appeared in the printed form

91. See *Estate of Baker*, 59 Cal. 2d 680, 683, 381 P.2d 913, 914, 31 Cal. Rptr. 33, 34 (1963). Little deference was paid to the findings of the trial court. *Id.* See also *Estate of De Caccia*, 205 Cal. 719, 273 P. 552 (1928); *Estate of Durlewanger*, 41 Cal. App. 2d 750, 107 P.2d 477 (1940).

92. 205 Cal. at 724-26, 273 P. at 554-58.

93. *Id.*

94. 41 Cal. App. 2d at 756-57, 107 P.2d at 480-81.

95. 59 Cal. 2d 680, 381 P.2d 913, 31 Cal. Rptr. 33 (1963).

96. *Id.* at 685-86, 381 P.2d at 916, 31 Cal. Rptr. at 36. For a brief criticism of *Estate of Baker*, see 36 S. CAL. L. REV. 626 (1963).

97. 7 Cal. App. 3d 8, 86 Cal. Rptr. 443 (1970).

cases, even though the reasoning of *Durlewanger* and *Baker* could validate such wills. The rationale proffered for this unreceptive attitude towards printed forms is that an extension of the *Durlewanger-Baker* approach would be tantamount to adoption of the surplusage theory, which in turn would "emasculate the statutory requirement that the will be entirely in the testator's hand-writing."⁹⁸ Commentators have suggested that the surplusage rule makes "hash of the statute,"⁹⁹ but it is submitted that the California intent theory, particularly where applied in conjunction with the doctrine of incorporation by reference, is hash.¹⁰⁰

Incorporation by Reference

Probate Code section 53 directs that a valid holographic will must be entirely written, dated and signed by the hand of the testator. In attempting to determine what it is that must be entirely in the testator's hand, the courts have distinguished the signature and date on the one hand, and the dispositive provisions on the other. It has been repeatedly held that the essential components of the date—month, day, and year—must be in the decedent's hand-writing and must appear on the face of the instrument itself.¹⁰¹ The same rule applies to the signature; it, too, must appear on the face of the will.¹⁰² The dispositive provisions, however, need not appear on the face of the instrument, and moreover, they need not

98. *Estate of Christian*, 60 Cal. App. 3d 975, 982, 131 Cal. Rptr. 841, 845 (1976).

99. ATKINSON, *supra* note 84, at 357; 2 BOWE & PARKER, *supra* note 1, § 20.5, at 288. By contrast, Professor Mechem suggests that "[i]n none of the cases operating under [the surplusage theory] does there seem to have been a gross violence done to the statute." He cautions, however, that such a case could be "readily imagined." Mechem, *The Integration of Holographic Wills*, 12 N.C.L. Rev. 213, 218-19 (1934).

100. In *Estate of Black*, L.A. 31279 (arg. gtd. June 18, 1980), the California Supreme Court will have the opportunity to review California law on this question. Whether the court will clearly disapprove and abandon the intent principle, substituting the surplusage theory, or merely extend the *Baker* "objective intent" theory to cover the printed form situation is not now known. If the intent theory is laid to rest, testators will certainly rest easier; however, judicial adoption of the surplusage theory could be viewed as usurpation of the legislative function. "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion." *Southern Pac. Co. v. Jansen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

101. See, e.g., *Estate of Wunderle*, 30 Cal. 2d 274, 181 P.2d 874 (1947); *Estate of Vance*, 174 Cal. 122, 162 P. 103 (1916); *Estate of Hazelwood*, 249 Cal. App. 2d 263, 57 Cal. Rptr. 332 (1967).

102. The courts have been extremely liberal with respect to the placement of the signature, finding valid signatures which have appeared variously at the beginning, end, or somewhere in the middle of a holographic will. See note 34 *supra*.

be in the testator's handwriting. This anomaly is the result of the uneven application of the doctrine of incorporation by reference by California courts.

The judicially created doctrine of incorporation by reference is a magical process by which a document not complying with testamentary formalities is given testamentary effect. The doctrine probably originated in late 18th century England, when Justice Wilson declared:

I believe, it is true, and I have found no case to the contrary, that, if a testator in his will refers expressly to any paper already written, and has so described it, that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it; because words of relation have a stronger operation than any other.¹⁰³

The doctrine thus arose in an attested will situation, and in that context it is recognized by the great majority of American jurisdictions.¹⁰⁴ Judicial response to the use of the doctrine in holographic will cases has been mixed,¹⁰⁵ but California courts have consistently taken the position that although a holographic will may not incorporate printed matter, it may incorporate printed matter by reference.¹⁰⁶ The distinction is slippery at best. It is probably drawn from the theoretical difference between integration and incorporation by reference. Integration, as a term of art, refers to the process of determining what writings physically constitute the will.¹⁰⁷ By contrast, incorporation by reference permits a document to be considered as part of the will for only certain purposes.¹⁰⁸ It is theoretically possible for a document to be "unintegrated" so that it does not constitute part of the will and at the same time be given testamentary effect by being incorporated

103. *Habergham v. Vincent*, 30 Eng. Rep. 595, 607 (Ch. 1793). For a discussion of the history of the doctrine, see A. REPPY & L. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 31-32 (1928).

104. ATKINSON, *supra* note 84, at 385.

105. 2 BOWE & PARKER, *supra* note 1, § 20.5, at 286-87.

106. See *Estate of Nielson*, 105 Cal. App. 3d 796, 803-04, 165 Cal. Rptr. 319, 323 (1980); *Estate of Caruch*, 139 Cal. App. 2d 178, 189, 293 P.2d 514, 521 (1956); *Estate of Martin*, 31 Cal. App. 2d 501, 597, 88 P.2d 234, 237 (1939).

107. See *Estate of Wunderle*, 30 Cal. 2d 274, 281, 181 P.2d 874, 878 (1947).

108. *Id.* See also ATKINSON, *supra* note 84, at 385; Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COLUM. L. REV. 879, 883 (1925).

by the will.¹⁰⁹

In the holographic setting, *integration* of nonhandwritten material into a will is usually fatal, but the will may *incorporate* that same material by reference, thereby giving effect to the printed words and at the same time retaining its holographic character.¹¹⁰ Where the holographic will or codicil and the nonhandwritten material consist of two separate documents, use of the incorporation doctrine may be defensible. For example, suppose the testator makes a formal will, but it is defectively executed. Thereafter, the testator executes a holographic codicil to that will; the codicil meets all the requirements of Probate Code section 53. If the codicil incorporates the typewritten will by reference without physically integrating it, effect may be given to the will as modified by the codicil, thereby carrying out the testator's intentions.¹¹¹ Where, however, the holographic will or codicil consists of interlineations made on the face of a typewritten will, to say that the typewritten words were not intended to be integrated into the will but were intended to be incorporated by reference takes us through the looking glass.¹¹²

The sole justification for using the doctrine of incorporation by reference in interlineation cases is that it gives effect to what are clearly the last wishes of the testator and comports with the judicial preference for testacy over intestacy. The doctrine is never used to defeat testamentary intention and frequently validates

109. ATKINSON, *supra* note 84, at 385.

110. See *Estate of Martin*, 31 Cal. App. 2d 501, 507, 88 P.2d 234, 237 (1939). See also ATKINSON, *supra* note 84, at 392. This result understandably confounds some commentators. See Evans, *Incorporation by Reference, Integration, and Non-Testamentary Acts*, 25 COLUM. L. REV. 879 (1935). "California, curiously enough, has allowed an incorporation of an instrument not entirely holographic into a subsequent testamentary paper . . ." *Id.* at 882. Professor Mechem views it as logically impossible: "If we call 'x' the process by which the attempt to use ('incorporate') a printed word or figure invalidates the whole will, and 'y' that by which the will may validate ('incorporate') printed words or figures, how to know whether to use 'x' or 'y'?" Mechem, *Integration of Holographic Wills*, 12 N.C.L. REV. 213, 228 (1934). See Note, *Holographic Codicils Incorporating By Reference And Republishing Invalid Non-Holographic Documents*, 44 Ky. L.J. 130 (1955). "[T]o permit a brief holographic will to incorporate a lengthy non-holographic instrument would seem to be in the teeth of the sole legislative safeguard that serves to guarantee the validity of such a will." *Id.* at 136-37. See also Dobie, *Testamentary Incorporation by Reference*, 3 VA. L. REV. 593, 593-94 (1916); 8 VAND. L. REV. 924, 926-27 (1955).

111. The doctrine has been used in this fashion in a number of California cases. See, e.g., *Estate of Plumel*, 151 Cal. 77, 90 P. 192 (1907); *Estate of Dobrzensky*, 105 Cal. App. 2d 134, 232 P.2d 836 (1951); *Estate of Sullivan*, 94 Cal. App. 674, 271 P. 753 (1928).

112. See notes 76-80 & accompanying text *supra*.

wills that would otherwise fall through the cracks. The problem is that use of the doctrine in the holographic will context not only circumvents the statute, but is also lacking in predictability. It is impossible to know with any degree of certainty what wills may be salvaged by application of the doctrine.

A few trends are nevertheless discernible. Effect will be given wherever possible to interlineations made on the face of an attested will;¹¹³ however the doctrine will not be used to validate interlineations on a printed will form.¹¹⁴ The unspoken rationale for this distinction probably lies in the fact that in the former situation there are, in a metaphysical sense, two separate instruments contained in a single document, and each instrument, if taken separately, complies with the statutorily prescribed formalities — the typewritten will has been duly attested and the interlineations are holographic. The problem is that viewed realistically, there are not two separate and independent instruments. The holographic interlineations were clearly intended to be read in conjunction with the typewritten provisions of the will, making it difficult to distinguish this from the printed form situation. The doctrine is also frequently used to save defectively executed wills by incorporating them into a valid holographic codicil.¹¹⁵

By contrast, the doctrine will not be employed to supply a missing date or signature in an otherwise valid holographic will.¹¹⁶ Here the courts demand "strict compliance" with Probate Code section 53. This attitude is easier to justify with respect to the sig-

113. See, e.g., *Estate of Nielson*, 105 Cal. App. 3d 796, 165 Cal. Rptr. 319 (1980); *Estate of Atkinson*, 110 Cal. App. 493, 294 P. 425 (1930). In *Estate of Caruch*, 139 Cal. App. 2d 178, 293 P.2d 514 (1956), the court refused to treat handwritten interlineations as a holographic codicil incorporating by reference an attested will on the ground that "a holographic codicil may not integrate a typewritten will without violating the rule that a holographic will must be wholly written, dated and signed in the hand of the testator." *Id.* at 189-90, 293 P.2d at 521 (citations omitted). However, the court gave effect to the interlineations by finding that they could have been made prior to the execution of the formal will despite the fact that the interlineations were dated *after* the execution of the will: "While a [handwritten] date . . . appears at the top of the will, there is nothing on the face of the document to show, without question, that the holographic changes thereafter appearing were written on that date. Obviously, the holographic changes could have been added to the typewritten will before it was executed. If so, of course, they became part of the witnessed will." *Id.* at 190, 293 P.2d at 521.

114. See, e.g., *Estate of Bower*, 11 Cal. 2d 180, 78 P.2d 1012 (1938); *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 541 (1976); *Estate of Goldsworthy*, 54 Cal. App. 2d 666, 129 P.2d 949 (1942).

115. See cases cited in note 111 *supra*.

116. See *Estate of Wunderle*, 30 Cal. 2d 274, 181 P.2d 874 (1947).

nature requirement than the date requirement. The purpose of a signature is to ensure that the testator intended to give effect to the document as his or her will. Thus, where there is an unsigned holographic instrument that makes reference to a signed nonholographic document, it may well be that the maker of the instrument did not intend it to be operative. Because the purpose of a date is primarily for identification, if the date can be supplied by reference to another document, it would appear that the purpose has been fulfilled.¹¹⁷ California courts, however, have invalidated wills meeting all statutory requirements save a date, even where the date could be supplied by reference to another document.¹¹⁸ The argument advanced in support of this position is that the statute demands a date entirely written in the testator's hand. Yet the statute also requires that the will be entirely in the testator's hand, and as we have seen, this requisite frequently has been circumvented.

Alternatives

Various other approaches have been broached with respect to the problem of printed matter in holographic wills. The surplusage theory has been alluded to briefly.¹¹⁹ The substantial compliance doctrine advocated by Professor Langbein presents another possibility. Legislative solutions include the adoption of Uniform Probate Code section 2-503 and the abolition of the holographic will altogether. Each of these solutions has its attendant drawbacks, but it is believed that any of them would be preferable to the present California "rule."

The Surplusage Theory

The surplusage theory permits any nonessential printed matter contained in a holographic will to be disregarded; only the handwritten provisions are deemed to constitute the will. The theory has been used from time to time to validate wills in other jurisdictions, including Louisiana,¹²⁰ North Carolina,¹²¹ and

117. See Langbein, *supra* note 18, at 512.

118. See, e.g., *Estate of Wunderle*, 30 Cal. 2d 274, 280-82, 181 P.2d 874, 878-80 (1947).

119. See notes 84-85 & accompanying text *supra*.

120. See *Succession of Burke*, 365 So. 2d 858 (La. 1978); *Jones v. Kyle*, 168 La. 727, 123 So. 306 (1929); *McMichael v. Bankston*, 24 La. Ann. 451 (1872).

Virginia.¹²² A liberal application of the theory can result in the validation of printed form wills, provided that the signature, date, and dispositive provisions are handwritten and complete in themselves. The printed provisions are simply disregarded.¹²³ The primary advantage of the surplusage theory is that it does not involve "the hazards and guess work of a conjectural determination of the deceased's intent";¹²⁴ however, it does require the court to make a determination as to whether particular printed matter is necessary to the meaning of the will or may be safely disregarded. What is surplusage to one court may be essential to another.¹²⁵

Uniform Probate Code Section 2-503

The Uniform Probate Code provision regarding holographic wills¹²⁶ represents a codification of the surplusage theory in its most liberal form.¹²⁷ It requires only that the material provisions of the will and the signature be in the testator's handwriting. The date requirement is completely eliminated. The comment to section 2-503 states that under this rule, "[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."¹²⁸

121. *In re Person's Will*, 207 N.C. 584, 178 S.E. 78 (1935); *Will of Lowrance*, 199 N.C. 782, 155 S.E. 876 (1939).

122. *Gooch v. Gooch*, 134 Va. 21, 113 S.E. 873 (1922).

123. *Id.* at 23, 113 S.E. at 876.

124. 2 BOWE & PARKER, *supra* note 1, § 20.5, at 238.

125. "The difficulty is to tell what is surplusage." 5 G. COSTIGAN, *CASES ON THE LAW OF PROPERTY* 133 n.7 (2d ed. 1929).

126. UNIFORM PROBATE CODE § 2-503.

127. See UNIFORM PROBATE CODE PRACTICE MANUAL 120-21, 136 (R. Wright ed., 2d ed. 1972). In the second tentative draft (fourth working draft) of the Uniform Probate Code, the National Conference of Commissioners on Uniform State Laws recommended that "holographic wills should be eliminated in the interests of uniformity and simplicity." The Commissioners reasoned: "Holographic wills are not recognized in a majority of the jurisdictions and have occasioned frequent litigation in those states which permit such wills. The simplification of requirements for execution of attested wills under section 2-502 reduces the need for permitting holographic wills; in almost any situation a testator may obtain the signature of two witnesses." UNIFORM PROBATE CODE § 2-502, comment (Tent. Draft No. 2, 1968). Further study of the question resulted in the inclusion of what is now § 2-503 of the Uniform Probate Code on the ground that "for persons of modest means who may anticipate no likelihood of controversy, and for persons who are unable to secure professional assistance, the holographic will may be valuable." UNIFORM PROBATE CODE § 2-503, comment (Working Draft No. 5, 1969).

128. UNIFORM PROBATE CODE § 2-503, Comment.

The major problem with the Uniform Probate Code provision is that, like the surplusage theory, it requires a case by case determination of what is material, and hence is not likely to eliminate litigation in jurisdictions adopting it.¹²⁹ It does eliminate, however, the criticism traditionally leveled at courts using the surplusage theory—abrogation of the statutory requirements.

Substantial Compliance

The doctrine of substantial compliance rests on the premise that the "insistent formalism of the law of wills is mistaken and needless,"¹³⁰ and directs the court to determine in any given case whether the document offered for probate was executed with sufficient formalities to serve the underlying purpose of the Wills Act.¹³¹ If so, the fact that the execution was formally defective in some respect should not invalidate the will. "The substantial compliance doctrine would admit to probate a noncomplying instrument that the court determined was meant as a will and whose form satisfied the purposes of the Wills Act."¹³²

As we have seen, the holographic will is an exceedingly informal document. Traditionally all that is required for validity is that the will be entirely in the testator's handwriting. The purpose of this requirement is simply to ensure that the document is genuine.¹³³ Application of the substantial compliance doctrine in the holographic will context would require only that there be sufficient material in the testator's handwriting to establish the genuineness of the document; if so, the document would be held valid and admitted to probate.¹³⁴

The problem with this approach is that it does not in fact serve the purposes underlying the minimal formalities required for

129. Another criticism leveled at the Uniform Probate Code provision involves its elimination of the date requirement. Professor Langbein believes that this is a useful requirement, not mere formalism, and should be retained, but that only "substantial compliance" should be required. He points with favor to the German solution; under German law, if the testament "does not contain a statement as to the time of its execution and if such failure results in doubts as to the validity of the instrument, the testament is to be held invalid unless the time of its execution can be established by extrinsic evidence." Langbein, *supra* note 18, at 512, 521.

130. *Id.* at 489.

131. See notes 9, 23-25 & accompanying text *supra*.

132. Langbein, *supra* note 18, at 515-16.

133. See text accompanying notes 21-22 *supra*.

134. Langbein, *supra* note 18, at 519-20.

holographic wills. Suppose the following document were offered for probate:

April 1, 1982

This is my will. I leave \$10,000 to my sister, Jane. I leave the rest of my property to *John Doe*.

/s/ Sally Smith"

Let us assume that the document, including date and signature is entirely in the hand of Sally Smith, except for the italicized words "John Doe," which are typewritten. Under the substantial compliance rule set forth by Professor Langbein, once it is established that there is a sufficient handwriting sample to guarantee the authenticity of the document, the entire will, even those provisions not in the decedent's handwriting, is admitted to probate. Yet there is no guarantee that the nonhandwritten provisions were made or even contemplated by the decedent.¹³⁵

This problem does not arise under the intent theory, because it is obvious that the words "John Doe" were intended as an essential part of the will; nor would it arise under the Uniform Probate Code or surplusage theory, because the provision is unquestionably material and could not be ignored. Moreover, under these approaches, immaterial nonhandwritten provisions are stricken as surplusage—they are not admitted to probate.

Abolition of the Holograph

Legislative recognition of the holographic form, abandoning as it does the testamentary formalities, encourages testators to draw their own wills. Those imbued with the do-it-yourself spirit no doubt find this effect salutary, as may some trial lawyers.¹³⁶ Yet

135. Professor Langbein concedes that under his theory, "[t]he remote possibility that a forger could interpolate non-handwritten matter on the holograph would exist." *Id.* at 520 n.115. It is submitted that the possibility is not all that remote. See text accompanying notes 23-25 *supra*.

136. Ye lawyers who live upon litigants' fees,
And who need a good many to
live at your ease,
Grave or gay, wise or witty,
whate'er your degree,
Plain stuff or Queen's Counsel,
take counsel of me:
When a festive occasion your
spirit unbends,
You should never forget the
profession's best friends;

the formalities prescribed by the Statute of Frauds and subsequent Wills Acts are not mere formalism. They serve very basic and necessary purposes. If a document has been executed with the usual testamentary formalities, a court can be reasonably certain that it was actually executed by the decedent; that it was seriously intended as a will; what its contents are; and that the testator was free from at least immediate duress at the time of its execution. Only the first of these functions is served by the holographic wills statute, and even that not very effectively. Because the holographic form does not serve these other essential purposes, it leaves these matters open to doubt and hence to litigation.

Leaving aside the mundane concerns of trial court calendars and the burdens of litigation, there are other factors that mitigate against the use of holographic wills. Admittedly society is in the midst of a consumerist movement, marked by a distrust of professionals in general and lawyers in particular. A self help spirit is on the rise, particularly in the legal sphere.¹³⁷ Yet in a sense, California's make-your-own-will statute is a species of consumer fraud. Its apparent convenience and simplicity mask the very real problems involved in making a coherent and orderly estate disposition. From the standpoint of formalities, it is certainly easier to make a will than to buy a house in California, yet the effects of the former are far more permanent and should be given more serious thought and consideration than the latter. "[A] procedure which supports the attitude that a will is something which can be botched up at home

So we'll send round the wine,
and a light bumper fill
'To the jolly testator who makes
his own will.

Lord Neaves, *The Jolly Testator Who Makes His Own Will*, reprinted in full in W. PROSSER, *THE JUDICIAL HUMORIST* 246 (1952).

137. Witness the plethora of legal manuals now on the market. See, e.g., T. IHARA & R. WARNER, *THE LIVING TOGETHER KIT* (2d ed. 1978); B. KOSEL, *BANKRUPTCY DO IT YOURSELF* (Cal. ed. 1980); D. LOEB, *HOW TO CHANGE YOUR NAME* (Cal. 2d ed. 1979); A. MANCUSO, *HOW TO FORM YOUR OWN CALIFORNIA CORPORATION* (3d ed. 1979); W. MOODY, *HOW TO PROBATE AN ESTATE* (1969); R. SCHWARTZ, *WRITE YOUR OWN WILL* (rev. ed. 1961); C. SHERMAN, *HOW TO DO YOUR OWN DIVORCE IN CALIFORNIA* (8th ed. 1950). The New York Times Book Review, August 10, 1980, at 31, reports that *How to Avoid Probate* by Norman F. Dacey sold 613,169 copies during its 47 weeks on the best seller list, and that the 1980 version, *How To Avoid Probate—Updated*, is selling briskly. Dacey essentially spurns do-it-yourself wills (which may require probate) in favor of do-it-yourself trusts. See also Blum, *It Started with No-fault Divorce*, San Francisco Sunday Examiner & Chronicle, September 21, 1980, California Living, at 39.

. . . needs reform."¹³⁸

Conclusion

If we adopt the premise that the holographic will performs a useful and needed function in our society, then we should eliminate difficulties wherever possible: "If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt, upon purely technical reasoning, a construction which would result in invalidating such wills in half the cases."¹³⁹ The real problem is that given our present statutory requirements, judicial validation of such wills involves tortured logic and purely semantic distinctions. "The statutory requirements of a valid holographic will are too strictly construed by the courts to make it safe for a lay person . . . to undertake to dispose of his estate by this type of will."¹⁴⁰ To date California courts have been loath to adopt the surplusage theory under which most holographic wills could be rationally validated, ostensibly because to do so would involve judicial rewriting of the statute. The solution is therefore legislative; adoption of Uniform Probate Code section 2-503 would alleviate most difficulties, although it does have certain drawbacks and most probably would only reduce, rather than eliminate, litigation in this area. If on the other hand, we determine that the holograph creates more problems than it solves, it should be abolished.

Admittedly, interest in a wholesale reform of the California Probate Code is sadly lacking.¹⁴¹ However, the legislature has given attention to particularly troublesome issues on an ad hoc basis in the past. A critical look at the utility of Probate Code section 53 is long overdue. The legislature should either abolish it entirely or substitute Uniform Probate Code section 2-503.

138. JUSTICE REPORT, HOME-MADE WILLS 4 (1971). See also Bates, *Holographic Wills*, 17 TENN. L. REV. 440, 446 (1942).

139. Estate of Sober, 78 Cal. 477, 482, 21 P. 8, 10 (1889).

140. Bates, *Holographic Wills*, 17 TENN. L. REV. 440, 446 (1942).

141. See generally Niles, *Probate Reform in California*, 31 HASTINGS L.J. 185 (1979).