

## Fifth Supplement to Memorandum 82-9

Subject: Study L-603 - Probate Law (Holographic Will)

At the hearing on Assembly Bill No. 2331 (the bill to effectuate the Commission's Recommendation relating to Holographic and Nuncupative Wills), the bill's provision concerning holographic wills was amended at the suggestion of the Minority Consultant to the Assembly Judiciary Committee. This provision has also been included with the recommended wills provisions attached to the basic Memorandum (Memo 82-9) which should be revised to reflect the Assembly amendments.

The amendment to the section and a revised comment are set forth below:

Probate Code § 53 (added). Holographic will

53. (a) 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 the will's execution can be established by other evidence to be after the date of execution of the other instrument.~~

(b) If a holographic will does not contain a statement as to the date of its execution and:

(1) If such failure results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of such inconsistency unless the time of its execution is established to be after the date of execution of the other will.

(2) If it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity.

Comment. Subdivision (a) 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."

Subdivision (b) of Section 53 is not found in the Uniform Probate Code. Paragraph (1) of subdivision (b) is a clarifying provision designed to deal with the situation where the holographic will and another will have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, paragraph (1) requires either that the holographic will be dated or that the time of its execution be shown to be after the date of execution of the other will. 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 will, 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 will is to be given effect. Where the conflict between the holographic will and other will 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 will does not affect the validity of the holographic will as to other property. Paragraph (1) also covers the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter; in such a case, Section 53 applies to both wills. If it cannot be established that one of the holographic wills was executed after the other, neither will is valid insofar as the two wills are inconsistent; but, in such case, the validity of the consistent provisions of the two wills is not affected by the failure to establish time of execution.

Paragraph (2) of subdivision (b) applies to the situation where the testator lacked testamentary capacity at any time during which the holographic will might have been executed. Thus, if the testator lacks testamentary capacity at the time of his or her death and the holographic will is found with the testator's personal effects, the will is invalid unless it is established that the will was executed at a time when the testator did have testamentary capacity. This could be established, for example, by witnesses who saw the testator make the holographic will and can testify as to the date of its making and that the testator had testamentary capacity at that time. Likewise, where a testator lacked testamentary capacity for a period prior to death and the undated holographic will is found in the testator's safe deposit box, it could be established that the will was executed at a time when the testator did have testamentary capacity if it were shown that the testator did not have access to the safe deposit box at any time after the testator lost the capacity to execute a will.

Paragraph (2) does not invalidate a holographic will if it could not have been executed at a time when the testator lacked testamentary capacity. For example, if the testator becomes ill and requires hospitalization, develops testamentary incapacity and dies during the hospitalization period, and the testator's holographic will is found at his or her home, the will must have been executed before the testator's hospitalization and therefore at a time when the testator had testamentary capacity.

Respectfully submitted,

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