A Survey, Analysis, and Evaluation of Holographic Will Statutes

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NOTES

A SURVEY, ANALYSIS, AND EVALUATION OF HOLOGRAPHIC WILL STATUTES

I. INTRODUCTION

Traditionally, a holographic will has been deemed valid when it is "entirely written, dated, and signed" in the handwriting of the testator. While modern statutory provisions may vary, one central feature remains constant—no attesting witnesses are required for valid execution. Thus, the formalities of attestation, which serve important ritualistic, evidentiary, and protective functions, are not


2. See Dean v. Dickey, 225 S.W.2d 999, 1000 (Tex. Civ. App. 1949) (stating the ancient rule that "a will should be valid if entirely 'written, dated, and signed by the hand of the testator.' " (quoting In re Dreyfus' Estate, 175 Cal. 417, 165 P. 941 (1917))).


4. See infra notes 22-58 and accompanying text (surveying the requirements for a valid holographic will).


6. The formal requirements for execution of wills vary from state to state depending primarily upon whether they were modeled after the English Statute of Frauds of 1677, the Wills Act of 1837, or the Uniform Probate Code. The Statute of Frauds required three attesting witnesses, each of whom could attest separately; there was no required place of signature for the testator. Statute of Frauds, 1677, 29 Car. 2, ch. 3, § 5. The Wills Act was stricter—although only two attesting witnesses were required, both had to be present at the time the will was signed or acknowledged, and the testator had to sign at the end of the will. Wills Act, 1837, 1 Vict. 80, ch. 26, § 9. The Uniform Probate Code adopts the less stringent formalities of the Statute of Frauds, but requires at least two attesting witnesses. See UNIF. PROBATE CODE § 2-502, 8 U.L.A. 106-07 (1977).

7. Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 4-5 (1941). The ritual function serves as a ceremonial function for the purpose of impressing upon the testator the seriousness of his actions and the significance of his words, thus justifying the court in determining that the testator deliberately intended the words to be operative in a testamentary sense. Id. at 4. The evidentiary function serves to increase the reliability of proof
essential to the validity of this form of "home-made" document. These formalities are not considered necessary because the purpose of holographic wills is "to allow [the] private disposition of property without the complexities of formal attestation."\(^8\) Legislatures authorize holographic wills as a means of convenience to testators, enabling those who are either unable or unwilling to obtain legal assistance to make a valid will in their own handwriting.\(^9\)

Moreover, holographic wills are a viable alternative to formally attested wills since they perform the same functions.\(^10\) Yet, despite these qualities, serious problems frequently arise when these wills are offered for probate due to the drafter's lack of legal knowledge or professional advice.\(^11\) Holographic wills have consistently spawned litigation.\(^12\)

presented to the court. \textit{Id.} The protective function serves to protect the testator against undue influence, fraud, or other forms of imposition. \textit{Id.} at 4-5. Thus, "[i]f 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." Bird, \textit{supra} note 3, at 632.

The exclusion of holographic wills from the statutory requirements can be justified in terms of the evidentiary function; in other words, the requirement that holographic wills be handwritten by the testator is regarded as an effective substitute for attesting witnesses since it is considered exceedingly difficult to forge such a document in another's handwriting. \textit{Id.} at 609; Gulliver & Tilson, \textit{supra}, at 13.

However, a main criticism of the holographic form is the risk that it may be the product of fraud or duress. Bird, \textit{supra} note 3, at 609. Moreover, the lack of formalistic attestation requirements renders holographic wills more susceptible to forgery than formal wills. \textit{Id.} at 610.

9. \textit{See In re} Estate of Teubert, 298 S.E.2d 456, 460 (W. Va. 1982) (citing Mason v. Mason, 268 S.E.2d 67 (W. Va. 1980)); \textit{see, e.g., Unif. Probate Code} § 2-503 commentary, 8 U.L.A. 109 (1977); \textit{see also} Comment, \textit{supra} note 5, at 272 (stating that holographic wills are inexpensive and convenient because a lay person can execute a valid will by himself without consulting an attorney or obtaining witnesses).
10. Holographic wills may dispose of both real and personal property, appoint an executor or guardian, or revoke or revive a prior will. \textit{See Comment, supra} note 5, at 260; \textit{see also} 2 W. Bowe & D. Parker, \textit{Page on the Law of Wills} § 20.3, at 282-83 (1960) (stating that, like a formal will, a holographic will is revocable, ambulatory, and operates to transfer property at death).
11. \textit{Note, supra} note 8, at 613.
12. \textit{Comment, supra} note 5, at 258. Satirical tales and stories have accompanied the expanding litigation over holographic wills. For example:

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; So we'll send round the wine, and a light bumper fill, To the jolly testator who makes his own will.
While holographic wills have been the subject of much criticism, with some commentators even calling for their abolition, a gradual trend has emerged toward recognizing their validity. Although states authorizing the use of holographic wills have long been in the minority, holographic wills are now authorized in twenty-six jurisdictions. Technical requirements vary, however, and the statutes are by no means uniform. This Note surveys the current holographic will statutes, analyzes and evaluates the essential statutory


Litigation arises due to the fact that, unlike the case of a formal will, a court cannot be certain that the decedent actually executed the will. Furthermore, the court cannot ascertain whether the will represents the decedent's intentions, nor whether the testator was free from coercion and duress when it was executed. Bird, supra note 3, at 632.

13. See, e.g., Bird, supra note 3, at 631-33 (calling for the abolition of holographic wills if it is determined that adoption of the Uniform Probate Code § 2-503 "creates more problems than it solves"); Note, Holographic Wills in Montana—Problems in Probate, 24 MONT. L. REV. 148, 159-60 (1963) (authored by Jacque W. Best) (arguing that holographic wills have outlived their usefulness); Comment, supra note 5, at 272-74 (stating that the use of statutory form wills, which provide simplicity and convenience to the testator, should quickly make holographic wills impractical).

14. In the mid-1950's, only nineteen states had statutes authorizing holographic wills. Hansen, Holographic Wills, 95 TRS. & ESTS. 875, 875 (1956). Today, holographic wills are authorized in twenty-six jurisdictions. See infra note 15 and accompanying text. Moreover, the number of states recognizing holographic wills is likely to increase as states continue to adopt the Uniform Probate Code which makes liberal provision for holographs. Langbein, Substantial Compliance With the Wills Act, 88 HARV. L. REV. 489, 491 (1975).


Two other jurisdictions, Maryland and New York, authorize holographic wills for members of the armed forces during wartime. MD. EST. & TRUSTS CODE ANN. § 4-103 (1974); N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 1984). New York also authorizes holographic wills for "mariners at sea." Id.

16. See infra notes 22-58 and accompanying text (surveying the requirements for a valid holographic will). Interestingly, the only requirement common to all holographic will statutes is the testator's signature. See infra notes 44-50 and accompanying text (discussing the signature requirement). Even that requirement, however, may be subject to qualification. Some jurisdictions require the signature to appear at the end of the will. See infra notes 44-46 and accompanying text.
requirements, and suggests approaches for legislatures to take in providing for holographic wills. Relevant case law is discussed to examine judicial construction of the statutory requirements and to demonstrate the problems which typically arise.

II. A Survey of Holographic Will Statutes

A survey of the various holographic will statutes reveals five different types of provisions which are regarded as essential formalities of execution: (1) "writing" requirements, (2) dating requirements, (3) signature requirements, (4) requirements concerning proof of the holographic will, and (5) "valuable papers or effects" requirements. As will be demonstrated, however, particular statutory requirements vary from jurisdiction to jurisdiction.

A. "Writing" Requirements

There are two basic types of statutory "writing" requirements, with the states recognizing holographic wills closely divided as to the appropriate form. Thirteen jurisdictions require holographic wills to be "entirely" or "wholly" handwritten by the testator, while another thirteen jurisdictions require only that the "material provisions" of the will be handwritten.

17. See infra notes 22-36, 59-149 and accompanying text.
18. See infra notes 37-43, 150-89 and accompanying text.
19. See infra notes 44-50, 190-228 and accompanying text.
20. See infra notes 51-57, 229-49 and accompanying text.
21. See infra notes 58, 250-62 and accompanying text.
The language of the statutes enacted by the twelve states requiring "entirely handwritten" wills varies extensively. In general, the statutes are patterned after either the Louisiana statute or the Virginia statute. The "Louisiana type," followed in Arkansas, Louisiana, Nevada, North Carolina, Oklahoma, South Dakota, and Wyoming, creates and defines a distinct kind of will (i.e. a holographic will). On the other hand, the "Virginia type," followed in Kentucky, Mississippi, Texas, Virginia, and West Virginia, does not create a new category of will; rather, it sets forth the requirements for wills generally, then dispenses with the requirement of attestation if

25. See infra notes 27-28 (comparing the statutory language employed by different states).


27. Id. The Louisiana statute provides, "The olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State." LA. CIV. CODE ANN. art. 1588 (West 1987)

   The Oklahoma statute similarly 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 may be made in or out of this State, and need not be witnessed." OKLA. STAT. ANN. tit. 84, § 54 (West 1974). Note that the Oklahoma statute adds an affirmative provision dispensing with the need for attestation. See id.


   The Nevada statute also utilizes the same language as Oklahoma, but additionally provides (as if to legitimize further the existence of holographic wills):

1. 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 may be made in or out of this state and need not be witnessed.

2. Every person of sound mind, over the age of 18 years, including married women, may, by last holographic will, dispose of all of his or her estate, real or personal, the same being chargeable with the payment of the testator's debts.

3. Such wills shall be valid and have full effect for the purpose for which they are intended.

   NEV. REV. STAT. ANN. § 133.090 (Michie 1986).

   The North Carolina statute provides that "(a) A holographic will is a will . . . [w]ritten entirely in the handwriting of the testator . . . . (b) No attesting witness to a holographic will is required." N.C. GEN. STAT. § 31-3.4 (1984).

   The Arkansas statute provides that "the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator . . . notwithstanding there may be no attesting witnesses to such will." ARK. STAT. ANN. § 60-404 (1971).

   The Wyoming statute provides, "A will which does not comply with [the statute governing execution of formally attested wills] is valid as an holographic will, whether or not witnessed, if it is entirely in the handwriting of the testator and signed by the hand of the testator himself." WYO. STAT. § 2-6-113 (1980). Although Wyoming has made separate provision for holographic wills and has been categorized as a "Louisiana type" statute for the purposes of description, the Wyoming statute bears more resemblance to the Uniform Probate Code § 2-503. See infra note 31 (setting forth § 2-503 of the Uniform Probate Code).
the instrument is entirely handwritten by the testator. Such categorization, however, is only useful for purposes of description, and has no bearing on judicial construction of the "entirely handwritten" requirement.

A unique provision in North Carolina deals with instances in which nonhandwritten matter appears on the holographic instrument. Thus, although a holographic will in North Carolina is one which is entirely handwritten by the testator:

when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will . . . .

This language represents a codification of a judicial doctrine known as the "surplusage theory." For those states which require the testator to write the "material provisions" of the will in his own handwriting, section 2-503 of the Uniform Probate Code has been an important model. Alaska, Arizona, California, Colorado, Idaho, Maine, Montana, New Jersey,

28. Note, supra note 13, at 148. The Virginia statute provides:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, if it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary . . . .

VA. CODE § 64.1-49 (Supp. 1988).

The West Virginia statute utilizes the same language as the Virginia statute, except that in the case of formally attested wills, the witnesses must also subscribe the will in the presence of each other." W. VA. CODE § 41-1-3 (1982).

The statutes of Kentucky, Mississippi, and Texas follow a similar pattern, setting forth the requisites of wills generally, then dispensing with the attestation requirement if the will is not "wholly" handwritten. See KY. REV. STAT. § 394.040 (Michie/Bobbs-Merrill 1985); Miss. CODE ANN. § 91-5-1 (1972 & Supp. 1985); TEX. PROB. CODE ANN. § 59 (Vernon 1956). Section 60 of the Texas statute also dispenses with the attestation requirement in cases "where the will is written wholly in the handwriting of the testator . . . ." Id. § 60. However, none of these statutes expressly mentions a "holographic will."


30. For a discussion of the surplusage theory, see infra notes 81-90 and accompanying text.

31. UNIF. PROBATE CODE § 2-503, 8 U.L.A. 109 (1977). Section 2-503 provides, "A will which does not comply with Section 2-502 [the statute governing execution of formally 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." Id.
North Dakota, and Utah utilize the same language as the Uniform Probate Code in providing for holographic wills.\textsuperscript{32} The statutes of Michigan, Nebraska, and Tennessee, moreover, are similar in terminology.\textsuperscript{33} All these statutes are analogous to the "Louisiana type" statutes in that they recognize the holographic will as a distinct form of will with its own requirements for valid execution.\textsuperscript{34} Section 2-503 of the Uniform Probate Code has accompanying commentary to explain the purpose and meaning of the section;\textsuperscript{35} however, only the statutes of California, Idaho, Maine, North Dakota, and Utah have similar commentary.\textsuperscript{36}


The Nebraska statute provides, "An instrument which purports to be testamentary in nature but does not comply with [the statute governing execution of formally attested wills] is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator . . . ." Neb. Rev. Stat. § 30-2328 (Supp. 1984).

The Tennessee statute provides, "No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator . . . ." Tenn. Code Ann. § 3.2-1-105 (1984).

\textsuperscript{34} See supra note 27 and accompanying text.

\textsuperscript{35} The commentary to § 2-503 provides:

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.

B. Dating Requirements

Only seven jurisdictions require the date as an essential element for a valid holographic will. While the Nebraska statute specifies that the testator must write "an indication of the date of signing," and Puerto Rico requires the testator to "state the year, month, and day in which [the holographic will] is executed," the other jurisdictions simply require holographic wills to be "dated," with no further explanation. Although an indication of the date of signing is required by the Nebraska statute, an instrument may still be valid "if such instrument is the only such instrument [offered for probate] or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence." Thus, the date requirement in Nebraska is not a rigid one; holographic wills may still be given effect even though undated.

Utah does not require the date as an essential element of its holographic will statute. Nevertheless, the significance of the date is recognized by the following provision:

If there are several holographic wills in existence with conflicting provisions, the holographic will which is established by date or other circumstances to be the will that was last executed shall control. If it is impossible to determine which will was last executed, the consistent provisions of the several wills shall be considered valid and the inconsistent provisions shall be considered invalid.

Similarly, yet in broader fashion, the California statute (which also does not require the date as an essential element) provides:

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


HOLOGRAPHIC WILLS

(1) If the omission 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 the 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.45

The remaining holographic will statutes do not contain any date requirement and make no provision to deal with its omission.

C. Signature Requirements

Every holographic will statute requires the testator's signature to be handwritten.44 Some jurisdictions, however, address another issue—the location of the signature. Kentucky and Michigan, for example, expressly provide that the testator's signature must appear at the end of the will.45 Moreover, the statutes of Mississippi and Puerto Rico have been judicially construed to require a signing at the end of the instrument.46

The vast majority of statutes do not require the testator to sign at any particular location.47 For example, the North Carolina statutes provides that a holographic will is one which is “[s]ubscribed by the testator, or [has] his name written in or on the will in his own

43. CAL. PROB. CODE § 6111(b) (West 1985).
44. See statutes cited supra note 15.
45. See KY. REV. STAT. ANN. § 446.060 (Michie/Bobbs-Merrill 1985) (requiring that a signature be “subscribed at the end or close of the writing”); MICH. COMP. LAWS ANN. § 700.123 (West 1980) (providing that a holographic will is valid if, inter alia, “the signature appears at the end of the will”).
46. See, e.g., Estate of Giles v. Shannon, 228 So. 2d 594, 596 (Miss. 1969); Castaner v. Superior Court, 81 P.R.R. 841, 843 (1960). The Castaner court reasoned that since the signature is what distinguishes the complete will from the draft of a will, it should conclude or end the will. Id.
handwriting.” Virginia and West Virginia require a holographic instrument to be signed by the testator “in such manner as to make it manifest that the name is intended as a signature.” The remaining statutes require only a “signature” or that such wills be “signed,” with no mention of any location.

D. Requirements Concerning Proof of Holographic Wills

Only five states make special provision for certifying the authenticity of holographic wills. Louisiana requires the testator’s handwriting and signature to be proven by “two credible witnesses.” In Virginia, “[i]f the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses.” Tennessee requires that the testator’s “handwriting must be proved by two (2) witnesses.” Texas likewise provides for proof by “two witnesses,” but the language used by the statute includes the permissive word “may” instead of “must.” Arkansas uses the word “may,” but provides for the “evidence of at least three [3] credible disinterested witnesses to the handwriting and signature of the testator . . . .” The remaining statutes have no specific provision to deal with proof of holographic wills.

49. VA. CODE ANN. § 64.1-49 (Supp. 1988); W. VA. CODE § 41-1-3 (1982).
52. LA. CIV. CODE PROC. ANN. art. 2883 (West 1961 & Supp. 1988). The Louisiana statute provides that the court must determine through interrogation or from written affidavits or depositions that the signature is that of the testator. Id.
53. VA. CODE ANN. § 64.1-49 (Supp. 1988).
55. TEX. PROB. CODE ANN. § 84(b) (Vernon 1956).

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E. The Valuable Papers or Effects Requirement

The “valuable papers or effects” requirement exists only in North Carolina. According to this unique requirement, a holographic will must be:

[found after the testator’s death among his valuable papers or effects, or in a safe-deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some other person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.]

III. Analysis and Evaluation

A. "Writing" Requirements

There are two basic statutory “writing” requirements: in some jurisdictions holographic wills must be “entirely” or “wholly” handwritten by the testator, while in others holographic wills may be valid if only the “material provisions” are handwritten. Because of the absence of an attestation requirement, a legitimate concern with holographic wills is that there be sufficient protection against forgery or fraud. The justification for authorizing holographic wills lies almost exclusively on the grounds that it is exceedingly difficult to counterfeit another’s handwriting and that requiring the will to be handwritten is an effective substitute for the evidentiary function of attesting witnesses. Thus, satisfaction of the applicable “writing” requirement is an integral formality in the execution of a holographic will, providing evidence of the document’s authenticity. If the requirement is not met, the holographic instrument is

STAT. § 30-2328 (Supp. 1984); NEV. REV. STAT. ANN. § 133.090 (Michie 1986); N.J. STAT. ANN. § 3B:3-3 (West 1983 & Supp. 1988); N.C. GEN. STAT. § 31-3.4 (1984); N.D. CENT. CODE § 30.1-08-03 (1976); OKLA. STAT. ANN. tit. 84, § 54 (West 1974); P.R. LAWS ANN. tit. 31, §§ 2143, 2161 (1968); S.D. CODIFIED LAWS ANN. § 29-2-8 (1984); UTAH CODE ANN. § 75-2-503 (1978); W. VA. CODE § 41-1-3 (1982); WYO. STAT. § 2-6-113 (1980).

59. See supra notes 22-36 and accompanying text.
60. See Dean v. Dickey, 225 S.W.2d 999, 1000 (Tex. Civ. App. 1949); Harris, Genuine or Forged?, 32 CAL. ST. B.J. 658, 660 (1957) (stating that holographic wills are more susceptible of forgery than formal wills and that “[m]ost bogus wills are holographic.”).
61. Gulliver & Tilson, supra note 7, at 13. But see Bird, supra note 3, at 609 (stating that fraud and duress may still be at issue even if it is proven that a holographic will is entirely handwritten); Gulliver & Tilson, supra note 7, at 14 (stating that “[a] holographic will is obtainable by compulsion as easily as a ransom note.”).
invalidated. 62

As a practical matter, regardless of whether a particular jurisdiction has an “entirely handwritten” or a “material provisions” requirement, if a holographic will is proven to be completely in the testator’s handwriting, 63 it may be admitted to probate, assuming, of course, that all other applicable statutory elements are fulfilled 64 and the court finds that the testator possessed the requisite testamentary intent. 65 The main problem which typically arises in satisfying statutory “writing” requirements occurs when the instrument contains words or figures not written by the testator.

1. The “Entirely Handwritten” Requirement.— Under a literal interpretation of the “entirely handwritten” requirement, if the testator printed, typed, stamped, or otherwise marked any portion of

62. See Scott v. Schwartz, 469 S.W.2d 587, 589 (Tex. Civ. App. 1971) (holding that where a will is partly typewritten and testamentary intent cannot be ascertained from the handwritten portion, the entire will is not admitted to probate); Dean v. Dickey, 225 S.W.2d 999 (Tex. Civ. App. 1949) (holding that a typewritten instrument is not a valid holographic will).

63. Whenever a holographic instrument is offered for probate the handwriting and signature must be authenticated (i.e. proven to be the testator’s). See infra notes 228-49 and accompanying text. Of course, if no part of the instrument is in the testator’s handwriting, the instrument is not entitled to probate as a holographic will. See supra note 62 and accompanying text.

64. See infra note 83.

65. Testamentary intent, or “animus testandi,” is a threshold requirement for valid execution in each jurisdiction. See, e.g., Estate of Blake v. Benza, 120 Ariz. 552, 553, 587 P.2d 271, 272 (Ct. App. 1978); In re Will of Mucci, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975); Smith v. Smith, 33 Tenn. App. 507, 516, 232 S.W.2d 338, 341 (1949). The determination of whether there is a concurrence of testamentary intent with the writing of the holographic instrument can be much more difficult than with formally attested wills, due to the inherently casual nature of holographic wills and the lack of any ritual, such as attestation, which evidences testamentary intent. Note, supra note 13, at 155. The problem is particularly acute when letters are offered for probate as holographic wills. The danger is that casual language and correspondence may not have been intended to be operative as a will. See Note, Wills-Letters as Holographic Wills-Testamentary Intent, 46 Mich. L. Rev. 578, 579 (1948). Thus, unless the letter is labeled a will, or unless recognized words of bequest or devise are used, testators’ intentions often may only be ascertainable by construction of vague and precatory language. Id. Courts, however, have been liberal in finding testamentary intent in holographic wills, recognizing that such wills are often drafted by untrained lay persons who do not use the most ariful or precise language. See Lovskog v. American Nat’l Red Cross, 111 F.2d 88, 91 (9th Cir. 1940) (stating that holographic wills should be liberally construed, and that they do not require testamentary or other technical language, but merely an expression of testamentary purpose in language sufficiently clear to be understood); In re Estate of Teubert, 298 S.E.2d 456, 461 (W. Va. 1982) (stating that no particular form of words is necessary to show testamentary intent—any language which clearly indicates the testator’s intention to dispose of his property to persons named or ascertainable is sufficient); Note, supra note 13, at 149 (finding that courts “recognize the underlying policy of liberality making possible the drafting of holographs by untrained lay persons”).

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the will, or if he wrote the will on letterhead stationery, a printed will form, or even if another person wrote on the will (either with or without the testator's consent), the holographic will would be invalidated, even if testamentary intent were clearly expressed. Given the harshness of such a result and the desire to avoid frustration of testators' intentions, courts have generally given a more liberal construction to the word "wholly" and have developed and employed two alternative theories: the intent theory and the surplusage theory.

Under the intent theory, courts determine on a case-by-case basis whether the testator actually intended to incorporate the non-handwritten matter (i.e. intended to make it a part of the will). If a court finds that the testator intended to incorporate the non-handwritten matter, the entire instrument is invalidated on the theory

66. See In re Towle's Estate, 14 Cal. 2d 261, 93 P.2d 555 (1939) (holding that subsequent changes made in the presence of and with the consent of the testatrix by a bank official vitiated the will); In re Estate of De Caccia, 205 Cal. 719, 273 P. 552 (1928) (holding that no address, date, or other matter written, printed, or stamped upon the document shall not be incorporated if it is not in the handwriting of the decedent). Many courts have rejected the literal interpretation of the "entirely handwritten" requirement. See Toebbe v. Williams, 80 Ky. 661 (1883) (holding that the will ought to have been probated even though the decedent's attorney wrote suggested changes on the instrument after the decedent had signed the will); Heirs of McMichael v. Bankston, 24 La. Ann. 451 (1872) (finding that the presence or absence of two words had no material effect on the meaning or contents of the will); Bell v. Timmins, 190 Va. 648, 654-55, 58 S.E.2d 55, 57-59 (1950) (holding that where a friend of the testator made certain alterations and deletions on the paper at the testator's insistence, the "wholly in the handwriting of the testator" language in the Virginia statute should not be read literally).

67. See, e.g., Bell v. Timmins, 190 Va. 648, 655, 58 S.E.2d 55, 59 (1950) (stating that the word "wholly" is not used in its "absolute, utter, and rigidly uncompromising sense"). But see T. ATKINSON, supra note 22, at 357 (explaining that most statutes require that an unattested holographic will be entirely in the handwriting of the testator).

68. T. ATKINSON, supra note 22, at 357-59; 2 W. BOWE & D. PARKER, supra note 10, § 20.5, at 287-88; Note, supra note 8, at 615. The intent and surplusage theories are discussed at length because they are critical to an understanding of judicial construction of the "entirely handwritten" and "material provisions" requirements.


70. See Estate of Black, 30 Cal. 3d 880, 889, 641 P.2d 754, 763, 181 Cal. Rptr. 222, 231 (1982) (Mosk, J., dissenting); T. ATKINSON, supra note 22, at 357-58; 2 W. BOWE & D. PARKER, supra note 10, at 287-88; see, e.g., In re Estate of Thorn, 183 Cal. 512, 192 P. 19 (1920) (invalidating a will as not being written entirely by the testator's hand where the testator inserted a word by rubber stamp); In re Estate of Blain, 140 Cal. App. 2d 917, 295 P.2d 898 (1956) (holding that it is "absolutely essential" that the Probate Code's handwriting requirements be strictly complied with); In re Wolcott's Estate, 54 Utah 165, 180 P. 189 (1919) (invalidating a will under the intent theory where testator filled in the blanks on a stationer's will form). In Estate of Black, the dissenting opinion supported the original decision of the trial court, and in doing so relied on the intent theory:
that the testator clearly did not write the entire will and, hence, did not comply with a mandatory statutory requirement.\(^7\) On the other hand, if a court finds that the testator did not intend to incorporate the nonhandwritten matter, then such matter forms no part of the will. The remaining handwritten portion stands alone, satisfying the "entirely handwritten" requirement and is admitted to probate as the testator's holographic will.\(^7\)

Although developed to lessen the harsh effects of a strict, literal interpretation of the "entirely handwritten" requirement,\(^7\) the intent theory itself has been criticized as being difficult to apply, causing prolific litigation and yielding harsh results.\(^7\) The principal objection is that it is difficult to determine the testator's subjective intent to incorporate nonhandwritten matter; since there are no attesting witnesses, the only evidence is usually the instrument itself.\(^7\) Yet, such a determination constitutes the very essence of the intent theory.\(^7\) Consequently, holographic wills are likely to be invalidated\(^7\) under

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[Printed] matter will be deemed incorporated if it appears from the face of the instrument that the testator intended to make it part of his will; and that intent may be either express, e.g., shown by the fact that the handwritten provisions directly refer to the printed matter, or it may be implied, e.g., inferable from the location of the printed matter on the document or from its importance to the testamentary purpose.

30 Cal. 3d at 894, 641 P.2d at 766, 181 Cal. Rptr. at 234.

71. California, see, e.g., In re Estate of Blain, 140 Cal. App. 2d 917, 295 P.2d 898 (1956); In re Towl's Estate, 14 Cal. 2d 261, 93 P.2d 555 (1939); In re McNamara's Estate, 119 Cal. App. 2d 744, 260 P.2d 182 (1953), and Utah, see, e.g., In re Wolcott's Estate, 54 Utah 165, 180, 180 P. 169, 171 (1919), are the two states which have generally adhered to this theory, although recent cases have indicated signs of relenting. See T. Atkinson, supra note 22, at 357-58.

72. T. Atkinson, supra note 22, at 357-59; 2 W. Bowe & D. Parker, supra note 10, § 20.5, at 287-88; see, e.g., In re Estate of De Caccia, 205 Cal. 719, 724-26, 273 P. 552, 554-55 (1928) (stating that the fact that the printed address was on the same line as the handwritten date is not evidence of an intent to include the address as part of the will); In re Estate of Durlewanger, 41 Cal. App. 2d 750, 756-57, 107 P.2d 477, 480-81 (1940) (stating that where the testator wrote the date "May 3, _, 24" surrounding the number "19," there was no evidence that the printed numbers were intended as part of the date); In re Yowell's Estate, 75 Utah 312, 333, 285 P. 285, 295 (1930) (upholding a holographic will written upon a "billhead" based upon the theory that a holographic will may be valid, despite the presence of written or printed matter not in the testator's handwriting, if such matter was not intended by the testator to form any part of the will).

73. See supra notes 66-68 and accompanying text.

74. See Mechem, The Integration of Holographic Wills, 12 N.C.L. Rev. 213, 216 (1934).

75. See Comment, supra note 5, at 267.

76. See supra notes 69-72 and accompanying text.

77. See Estate of Black, 30 Cal. 3d 880, 890-98, 641 P.2d 754, 763-68, 181 Cal. Rptr. 222, 231-36 (1982) (Mosk, J., dissenting) (discussing the caselaw in California under the in-
the intent theory based on a conjectural determination of the testator's intent which borders on guess-work. Furthermore, in invalidating such wills, courts make no objective inquiry into whether the nonhandwritten matter is even necessary or essential for the validity of an understanding of the will. The results derived under the intent theory, while generally harsh, are especially severe when printed will forms are utilized, with the usual result being invalidation.

Under the rival doctrine, the surplusage theory, courts determine on a case-by-case basis whether the nonhandwritten matter appearing on the instrument is necessary or essential to the "meaning" or validity of the will. To make this determination, courts

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78. See T. Atkinson, supra note 22, at 358; 2 W. Bowe & D. Parker, supra note 10, § 20.5, at 288; Comment, supra note 5, at 267.
79. See, e.g., In re Yowell's Estate, 75 Utah 312, 285 P. 285 (1930).
80. See Bird, supra note 3, at 617 (discussing the rigid treatment accorded printed form holographic wills in California under the intent theory). For a thorough discussion of the "entirely handwritten" requirement in California, prior to the state's adoption of the Uniform Probate Code's "material provisions" requirement, see Bird, supra note 3, in which the author states that judicial treatment of this problem in California can be characterized as "less than simple or even consistent over the years." Id. at 611. Moreover, it is difficult to reconcile the holdings, and any general rule would be laden with exceptions. Id. at 621. In all, there is a lack of predictability under the intent theory. Id. at 621 n.83.
81. The prevailing view is that the "meaning" or "substance" of the will, in this context, refers to the testamentary portion of the will (i.e. the dispositive provisions). See, e.g., In re Morrison's Estate, 55 Ariz. 504, 510, 103 P.2d 669, 672 (1940) (stating "the testamentary part of the will [must] be wholly written by the testator"). In Morrison, the addition of an attempted attestation to a holographic will did not invalidate the will because attestation was not necessary to the will's validity and did not affect the meaning of the dispositive provisions. Id. at 510, 103 P.2d at 671; see also Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982) (holding that testamentary intent does not encompass the probate procedures utilized to implement that intent and relates only to those provisions affecting the distribution of one's estate), overruling Estate of Christian, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976) (holding that the "substance" of the will pertains to provisions dealing with the administration of one's estate, such as the nomination of an executor). One commentator has suggested that the "substance" of the will should include not just the dispositive provisions, but also those provisions material to the administration of one's estate, such as the nomination of an executor or the appointment of a guardian. See Comment, supra note 5, at 269-70. In support of this position the author criticizes the result reached in Black, where the clause on a printed will form which purported to nominate an executor was disregarded and held irrelevant to the substance of the will; the clause did not contain enough handwritten words to make
examine the handwritten portion in isolation to determine whether it is "complete and entire in itself." In order for the handwritten portion to be valid standing alone, it must satisfy all essential elements of the statute and must demonstrate the requisite testamentary intent. Moreover, the nonhandwritten matter must not be found to any sense without the aid of the nonhandwritten matter and, consequently, the testator's attempt to appoint an executor was frustrated. Id. at 267-72. Although the author argues convincingly that such administration clauses are important or "material" to a testator, sometimes even the most important function of the will, id. at 270, there are certain problems with such an approach.

The approach in Christian seems unduly narrow in that a holographic will which is otherwise entirely handwritten may be invalidated because nonhandwritten matter appears solely in an executor clause. The testator's dispositive intentions would then be defeated, as well as his intentions with respect to the administration of his estate. Under the Black approach, however, which represents the prevailing view, the dispositive provisions would be given effect provided enough remained in the testator's handwriting to constitute a valid holographic will. Although the testator's intended executor may not be appointed in such a case, the court will appoint an administrator. See Comment, supra note 5, at 270. Of course, if the clause not given effect by the court pertained to the appointment of a guardian for a couple with small children, the frustration would seem more severe. Nevertheless, while such a result exemplifies the danger to a testator who fails to write the will in its entirety, it does not lend credence to the superiority of the Christian approach. Under Christian, the testator's administrative intentions would likewise be frustrated in such circumstances, but, more significantly, the testator's dispositive intentions would not be given effect either.

82. See, e.g., Pounds v. Litaker, 235 N.C. 746, 748, 71 S.E.2d 39, 40-41 (1952) (finding that where the handwritten portion of a will is sufficient to constitute a last will and testament, the fact that non-essential words appear which are not in that handwriting does not defeat the intention of the deceased); In re Lowrance's Will, 199 N.C. 782, 783, 155 S.E. 876, 877 (1930) (holding that where printed words appear on a will, such words may be stricken and the will admitted to probate if the remainder of the will clearly expresses the decedent's testamentary intent); In re Estate of Teubert, 298 S.E.2d 456, 460 (W. Va. 1982) (stating that "where a holographic will contains words not in the handwriting of the testator, such words may be stricken if the remaining portions of the will constitute a valid holographic will.").


84. See In re Estate of Teubert, 298 S.E.2d 456, 459 (stating that "[u]nder the surplusage theory, nonhandwritten material in a holographic will may be stricken with the remainder of the instrument being admitted to probate if the remaining provisions make sense standing alone."); see, e.g., Fairweather v. Nord, 388 S.W.2d 122, 124 (Ky. Ct. App. 1965) (holding that the handwritten portion, standing alone, was sufficient to constitute a testamentary disposition of the testatrix' property).

85. Succession of Burke, 365 So. 2d 858, 860 (La. Ct. App. 1978). For example, if the date is a required element of the statute, the testator must include the date in his own handwriting. But if the testator uses a typewriter or rubber stamp or otherwise does not write the date, the "entirely handwritten" requirement is not satisfied and the holographic will is invalidated. See supra notes 37-43 and accompanying text (discussing the six states that impose a date requirement as an essential element for a valid holographic will); infra notes 150-68 and accompanying text (discussing problems which arise in satisfying the date requirement).

86. See Succession of Burke, 365 So. 2d at 860 (holding that the language used by the
change or affect the testamentary meaning of the handwritten portion or to defeat the testator's testamentary intent otherwise clearly expressed. If these conditions are satisfied, the handwritten portion is admitted to probate and the nonhandwritten portion is disregarded as surplusage. If the conditions are not met, the entire instrument

testator in her holographic will clearly exhibited testamentary intent to leave property to her sisters).

87. The testamentary meaning of the will must be the same without the nonhandwritten matter as it is with it. Baker v. Brown, 83 Miss. 793, 799, 36 So. 539, 541 (1904). In Baker, two words not in the testator's handwriting, even though found in the dispositive portion of the will, were held to be “surplusage [because] the will's meaning, without them, [was] precisely what it meant with them.” Id. The court stated that only if the meaning and purpose of the will were in some manner materially affected would the “entirely handwritten” requirement not be satisfied. Id.; see also In re Estate of Mulkins, 17 Ariz. App. 179, 181, 496 P.2d 605, 607 (1972) (holding that printed words on a stationer's will form were not essential to the meaning of the handwritten words and could not be held to defeat the testator's intent which was otherwise clearly expressed); Maul v. Williams, 69 S.W.2d 1107, 1110 (Tex. Civ. App. 1934) (stating that nonhandwritten matter must not be necessary to complete the instrument in holographic form and must not affect its testamentary meaning).

88. See, e.g., Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982); Estate of Bennett, 324 P.2d 862 (Okl. 1958); Bell v. Timmins, 190 Va. 648, 58 S.E.2d 55 (1950); In re Estate of Teubert, 298 S.E.2d 456 (W, Va. 1982).

In Estate of Black, the testatrix filled in the blanks on a printed will form. 30 Cal. 3d at 882, 641 P.2d at 755, 181 Cal. Rptr. at 223. Nevertheless, the court disregarded the printed words as surplusage, holding that they were neither material in substance nor essential to the instrument's validity as a testamentary disposition. Id. at 886, 641 P.2d at 757, 181 Cal. Rptr. at 225. Specifically, the court regarded a printed preamble to the will as superfluous to the identification of the instrument as a will and the testatrix as the maker; the handwritten portion already accomplished these tasks. Id. Other printed portions pertaining to the appointment of an executor, the designation of the locality of execution, and attestation by witnesses were likewise deemed irrelevant to the will’s “substance” (i.e. the dispositive provisions) and unnecessary to its validity. Id.

In Estate of Bennett, the testatrix wrote her will on letterhead stationery. 324 P.2d at 863. The court held that the mere presence of printed matter did not destroy the instrument's validity as a holographic will. Id. at 864. The printed words, which included the testatrix's name and address, were disregarded as surplusage and formed no part of the will. Id. In reaching this decision the court noted that no reference was made directly or indirectly to the printed matter, and that the printed matter was neither necessary nor essential to the validity or dispositive meaning of the will. Id. at 864-65.

In Bell v. Timmins, certain punctuation marks, deletions, and other changes were made by a trust officer with the consent of the testatrix. 190 Va. at 657, 58 S.E.2d at 60. Although these changes were clearly not in the handwriting of the testatrix, the court did not invalidate the will. Rather, the court held that the changes were “immaterial and de minimis,” and as such did not affect the dispositive plan or alter the otherwise clearly expressed testamentary intent. Id. As a result, the will, as originally written by the testatrix, was admitted to probate. Id. at 664, 58 S.E.2d at 63.

In In re Estate of Teubert, typewritten words appearing on a holographic instrument, which purported to revoke all prior wills and to appoint an executor, were held to be surplusage. 298 S.E.2d at 458. The court reasoned that the typewritten words were not necessary or essential to the meaning of the will because the act of making a will in itself revokes prior
is invalidated. As under the intent theory, the portion actually admitted to probate must satisfy the "entirely handwritten" requirement.

In contrast to the intent theory, the surplusage theory deems the testator's intent to incorporate nonhandwritten matter irrelevant. Even if the testator intended to incorporate words not in his own handwriting, courts examine the instrument to determine whether enough remains in the testator's handwriting to satisfy statutory requirements. Under the intent theory, however, upon an initial determination that the testator intended nonhandwritten matter to form a part of his will, the entire instrument is invalidated and courts refuse to construe the document. Because the surplusage theory is a more liberal doctrine than the intent theory, it allows a greater number of holographic wills to be probated.

Inconsistent wills and because there was no reference to the typewritten words in the handwritten portion. \textit{Id.} at 460. The court observed, however, that a different result might occur where the printed words form part of the testamentary pattern. \textit{Id.} at 460 n.2.

90. \textit{See, e.g., Succession of Burke, 365 So. 2d 858, 860 (La. Ct. App. 1978).} \textit{Burke} involved a holographic will written on a printed will form, where the statute required such wills to be "wholly" written by the testator. \textit{Id.} at 859. Although many words were disregarded as surplusage, the court found that enough handwritten words remained for a valid holographic will. \textit{Id.} at 860.

91. \textit{See supra} notes 81-89 and accompanying text. Thus, the surplusage theory relieves the court from subjective determinations of the decedent's intent. \textit{See Comment, supra} note 5, at 267.

92. \textit{See, e.g., Succession of Burke, 365 So. 2d at 860.}

93. \textit{See, e.g., In re Estate of Dobson, 708 P.2d 422, 426 (Wyo. 1985) (holding that the will was not entitled to probate where "marks, interlineations and changes" were made on the will by a third party in the presence and with the permission of the testatrix); see supra notes 69-72 and accompanying text (discussing the intent theory).}

94. The greater liberality of the surplusage theory is exemplified by comparing the following two cases. In \textit{In re Estate of Dobson, 708 P.2d 422 (Wyo. 1985)}, a trust officer made certain marks and changes on the holographic will with the knowledge and consent of the testatrix. \textit{Id.} at 424. The court, employing the intent theory, invalidated the will upon a finding that the testatrix intended to incorporate the nonhandwritten matter. \textit{Id.} at 425. In reaching this conclusion the court stated that it was not readily apparent whether the notations affected the dispositive scheme of the will in any material way because that would require construction of the will, which the court refused to undertake. \textit{Id.} at 426. However, in \textit{Bell v. Timmins, 190 Va. 648, 58 S.E.2d 55 (1950)}, a trust officer made similar notations also with the consent of the testatrix, and the court proceeded to construe the will under the surplusage theory even though it was apparent that the testatrix intended to incorporate the notations of the trust officer. \textit{Id.} at 657, 58 S.E. at 60. The will, as originally written by the testatrix, was subsequently admitted to probate. \textit{Id.}

Note that despite the harsh treatment in \textit{Dobson}, the court indicated that if the will had been marked up by someone without the testatrix's consent or knowledge, the will as originally
The trend in favor of the more liberal surplusage theory is illustrated by judicial application of the doctrine in a number of jurisdictions.\textsuperscript{95} Moreover, California and Utah, formerly staunch advocates of the intent theory,\textsuperscript{96} have shown preference for the surplusage theory in recent years.\textsuperscript{97}

A number of policy considerations may also be set forth in favor of the surplusage theory. Although both the intent and surplusage theories were founded upon notions of substantial compliance with holographic will requirements,\textsuperscript{98} the surplusage theory involves a more objective inquiry\textsuperscript{99} and, hence, better serves this policy. It validates a greater number of holographic wills yet maintains adequate protection against forgery by only admitting handwritten words to probate.\textsuperscript{100} The purpose behind admitting holographic wills to probate is satisfied, it is argued, where the handwritten portion contains every required element of the statute and clearly evidences testamentary intent, and where the nonhandwritten portion does not affect the meaning of the handwritten portion.\textsuperscript{101} No sound purpose or policy is served by invalidating holographic wills in such instances due merely to the presence of nonhandwritten matter.\textsuperscript{102} Furthermore, the surplusage theory frustrates testator's intentions in fewer cases executed, without the alteration, would be entitled to probate. 708 P.2d at 425-26 (dicta).


\textsuperscript{96} See T. Atkinson, supra note 22, at 357-58; Bird, supra note 3, at 622; Comment, supra note 5, at 260-61.

\textsuperscript{97} See Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982). In response to the holding in \textit{Black}, the California legislature codified the surplusage theory, patterned after the Uniform Probate Code's "material provisions" requirement. See Comment, supra note 5, at 265-66.

\textsuperscript{98} See supra notes 66-68 and accompanying text. The idea is that since legislatures encourage the informal drafting of wills by lay persons with no legal training or professional advice, a policy of substantial compliance is necessary to avoid the frequent frustration of testators' intentions. Note, supra note 8, at 627-28. Substantial compliance, not absolute precision, is all that should be required because "[a]n overly technical application of the holographic will statute to handwritten testamentary dispositions . . . would seriously limit the effectiveness of the legislative decision to authorize holographic wills." \textit{Black}, 30 Cal. 3d at 884, 641 P.2d at 756, 181 Cal. Rptr. at 224.

\textsuperscript{99} See supra notes 70-95 and accompanying text.

\textsuperscript{100} See supra notes 82-95 and accompanying text.

\textsuperscript{101} See \textit{In re} Estate of Mulkins, 17 Ariz. App. 179, 181, 496 P.2d 605, 607 (1972).

\textsuperscript{102} Estate of Black, 30 Cal. 3d at 888, 641 P.2d at 759, 181 Cal. Rptr. at 227.
and the law favors testacy over intestacy.\textsuperscript{108} The policy of the law is toward a construction which conforms with the statutory requirements of a valid will.\textsuperscript{104}

Despite such considerations, judicial application of the surplusage theory is not without criticism. Critics of the theory argue that it makes "hash" of the statutory requirement that holographic wills be entirely handwritten and represents an unauthorized judicial rewriting of the statute.\textsuperscript{106} In addition, while courts may omit nonhandwritten matter on the issue of probate, they may be tempted to give it effect in the construction.\textsuperscript{106} Furthermore, since the surplusage theory requires a case-by-case examination of nonhandwritten matter, "[w]hat is surplusage to one court may be essential to another."\textsuperscript{107}

Courts applying the surplusage theory legitimize their actions by stating that they are not emasculating or relaxing the "entirely handwritten" requirement, but are instead giving it a "sound and fair construction, rigidly insisting upon substantial compliance."\textsuperscript{108} In response to other criticisms, note that under a proper application of the surplusage theory courts should not give effect to nonhandwritten matter in construing the will, and a number of cases indicate that only handwritten words which make sense standing alone are given effect.\textsuperscript{109} Moreover, the argument that courts are likely to dif-

\textsuperscript{103} Id. at 883, 641 P.2d at 755-56, 181 Cal. Rptr. at 223-24.
\textsuperscript{104} Id. at 883, 641 P.2d at 756, 181 Cal. Rptr. at 223-24 (citing In re Estate of Baker, 59 Cal. 2d 680, 683, 381 P.2d 913, 914, 31 Cal. Rptr. 33, 34 (1963)).
\textsuperscript{105} See, e.g., T. Atkinson, supra note 22, at 358; 2 W. Bowe & D. Parker, supra note 10, § 20.5, at 288. But see Mechem, supra note 75, at 218-19 (arguing that the surplusage theory does not appear to do gross violence to the statute, but noting that such a result could be readily imagined).
\textsuperscript{106} T. Atkinson, supra note 22, at 358.
\textsuperscript{107} Bird, supra note 3, at 629.
\textsuperscript{108} Bell v. Timmins, 190 Va. 648, 657, 58 S.E.2d 55, 59-60 (1950). The safeguards of the statute governing execution "of wills are designed to prevent forgery and imposition; they are not designed to make the execution of wills a mere trap and pitfall, and their probate a mere game." Id. at 657, 58 S.E.2d at 59; see also Estate of Black, 30 Cal. 3d at 883, 641 P.2d at 756, 181 Cal. Rptr. at 224 (stating that "[s]ubstantial compliance with the statute, and not absolute precision is all that is required ....") (quoting In re Estate of Baker, 59 Cal. 2d 680, 685, 381 P.2d 913, 913, 31 Cal. Rptr. 31, 31 (1963) (emphasis in original))). At least one commentator has concluded that substantial compliance with the statutory requirements for holographic wills is necessary to assure adequate protection against fraud. See Note, supra note 8, at 628. Since only the handwritten portion may be admitted to probate under the surplusage theory, see supra notes 81-94 and accompanying text, adequate protection is presumably accorded.
\textsuperscript{109} See, e.g., Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982); Fairweather v. Nord, 388 S.W.2d 122 (Ky. 1965). In each of these cases the testator...
fer as to what is essential and what is surplusage is not well supported by existing case law.110

2. The "Material Provisions" Requirement.—The statutes which require that the "material provisions" of the will must be handwritten do not define the term "material."111 Nevertheless, the ostensible intent of such legislatures has been to codify the surplusage theory through such terminology.112 Most of the statutes are patterned after the Uniform Probate Code,113 which contains official commentary suggesting that codification of the surplusage theory was contemplated by its drafters.114 The legislatures in some states, moreover, have enacted the "material provisions" requirement in the wake of judicial precedent approving the surplusage theory.115 In construing the "material provisions" requirement, even courts have generally utilized the same basic language and engaged in the same type of analysis as that which exists under the judicial surplusage

filled in the blanks on a printed will form, but the handwritten words were given effect under the surplusage theory. In each case, however, the clause purporting to nominate an executor was not given effect because there was not enough in the testator's handwriting to give the clause meaning. In Fairweather, for example, the clause read: "I hereby appoint [a certain person] to be executrix of this my last will and testament." Id. at 123 (the handwritten portion is italicized). Because only a portion of the document was handwritten, the lower court rejected the holographic will for probate and appointed an administrator. See id. at 122. If the court had given effect to the printed words in the process of construction, it certainly would not have reached this result. Although this may have been contrary to the testatrix's intentions, it exemplifies the dangers involved when a holographic will is not entirely handwritten.

110. In applying the surplusage theory, the prevailing judicial view is that nonhandwritten matter is surplusage if it is not necessary or essential to the validity or an understanding of the dispositive provisions. See supra note 81 and accompanying text.

111. See supra notes 24, 31-36 and accompanying text.

112. The commentary to § 2-503 of the Uniform Probate Code states that a valid holographic will can be executed on a printed will form if the printed portion could be eliminated and the handwritten portion evidences the testator's intent. UNIF. PROBATE CODE § 2-503 commentary, 8 U.L.A. 109 (1977). This is a clear example of the surplusage theory. The fact that ten states utilize the exact same language as the Uniform Probate Code and three others are very similar in terminology indicates an intent by these states to codify the surplusage theory. See supra notes 31-33 and accompanying text (listing the state statutes modeled after § 2-503 of the Uniform Probate Code).

113. See Comment, supra note 5, at 269; supra note 112 (discussing the commentary to § 2-503 of the Uniform Probate Code); supra notes 31-33 and accompanying text (listing the state statutes modeled after § 2-503 of the Uniform Probate Code).

114. See supra note 35 (setting forth the relevant portion of the official commentary to § 2-503 of the Uniform Probate Code).

115. See, e.g., Comment, supra note 5, at 265-66 (stating that in response to the California Supreme Court's rejection of the intent theory in favor of the surplusage theory in Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982), the California legislature repealed its old legislation and enacted legislation with a "material provisions" requirement).
The analysis is further complicated, however, because courts sometimes confuse the independence of the surplusage theory and the intent theory, intermingling them into a single "hybrid" form. Thus, nonhandwritten matter on a holographic instrument has been disregarded and held to be immaterial to the provisions of the will because the testatrix did not intend to incorporate it. This "hybrid" approach makes the apparent objectivity of the surplusage theory an illusion—application of the intent theory is simply couched in "surplusage" language.

Furthermore, although the commentary to the Uniform Probate Code states that "a holograph may be valid even though immaterial parts such as date . . . be printed or stamped," the court in In re Estate of Grobman stated that where more than one will is offered for probate the date is material. However, whether this

116. The language utilized by courts is slightly different under the "material provisions" requirement, with the word "material" usually being substituted for the words "necessary," "relevant," or "essential" in judicial phrasing of the surplusage test. See, e.g., In re Estate of Johnson, 129 Ariz. 307, 309-10, 630 P.2d 1039, 1041-42 (Ct. App. 1981); Estate of Phifer, 152 Cal. App. 3d 813, 817, 200 Cal. Rptr. 319, 321 (1984). Thus, even if a testator intended to incorporate nonhandwritten matter, it will be disregarded as surplusage "if it is not material [essential] to the validity of the will." Comment, supra note 5, at 267. Johnson and Phifer were each decided under a "material provisions" requirement, and in each the court employed the same surplusage test as had been applied in prior cases decided under an "entirely handwritten" requirement. The "material provisions" requirement has also been subjected to similar criticism, see Comment, supra note 5, at 269 (stating that "[w]hat is material to one court may very well be surplusage to another."), thus providing further evidence that the "material provisions" requirement is a codification of the surplusage theory.

117. See In re Estate of Jones, 44 Tenn. App. 323, 335, 314 S.W.2d 39, 44 (1957) (citing In re Yowell's Estate, 75 Utah 312, 285 P. 285 (1930), an intent theory case, in holding that certain typewritten words from a prior will, which dealt with the nomination of an executrix, were not material to the provisions of the holograph); cf. Estate of Robinson, 20 Wis. 2d 626, 630, 123 N.W.2d 515, 517 (1963) (applying South Dakota law) (holding that certain printed words could be rejected as surplusage and formed no part of the will because the testator did not intend to incorporate the printed matter).

118. See Estate of Black, 30 Cal. 3d 880, 908, 641 P.2d 754, 775, 181 Cal. Rptr. 222, 243 (1982) (Mosk, J., dissenting). Under this approach, if a court found that the testator intended to incorporate nonhandwritten matter, it would make no objective inquiry into the relevance, necessity, or effect of such words upon the portion written in the testator's handwriting. Id.

119. The commentary accompanying the Uniform Probate Code also accompanies the statutes of five jurisdictions. See supra notes 35-36 and accompanying text (setting forth the commentary to § 2-503 and listing the five jurisdictions with similar commentary).


122. Id. at 233 (stating in dicta that "[w]here it is asserted that a holographic will is decedent's last will and testament rather than an earlier will, the date is material.").
was a reference to the "material provisions" requirement or to the "importance" or "significance" of the date under such circumstances is unclear. If in fact the court's statement referred to the "material provisions" requirement, omission of the date would result in failure to satisfy the "material provisions" requirement and would invalidate the will. If, on the other hand, the court's statement referred to the "significance" of the date, omission of the date would not necessarily preclude probate of the instrument. Although the court most likely intended the latter interpretation, Grobman exemplifies the type of ambiguity which may result under the "material provisions" requirement.

3. Trends in Interpretation.—The tendency of both courts and legislatures toward greater liberality in accepting a writing as a valid holographic will is evidenced by the increased popularity of the surplusage theory (vis-a-vis the intent theory) in recent decades. Implicit in this trend is a strong desire to give effect to testators' "home-made" documents whenever possible, given that the legislature has authorized the informal drafting of wills. Judicial retention and application of the intent theory, however, seems to reflect an implicit desire to draw a limit on the form of instrument which may be probated as a holographic will and, perhaps, an underlying reluctance to depart from traditional conceptions of holographic wills. Consequently, a more rigid construction is given to the statutory "writing" requirement in such cases.

As stated in In re Estate of Mulkins, courts should not adopt a strained construction of holographic will statutes that defeat the

123. See supra notes 115-16 and accompanying text.
124. See supra notes 115-16 and accompanying text.
125. Since the date was not a required element of the statute in Grobman, the court most likely did not intend it to be essential for the testator to write the date under such circumstances. See Grobman, 635 P.2d at 233.
127. See supra notes 8-9, 66-110 and accompanying text.
128. Such a limit might reflect judicial desire to provide greater stability and predictability (i.e. more definite results) in the probate of holographic wills. Alternatively, courts might prefer the intent theory because it involves a simpler task for the court. See Comment, supra note 5, at 273. Greater stability, however, comes in the form of harsher treatment of holographic wills. See supra notes 69-104 and accompanying text.
129. Printed will forms, for example, are virtually precluded under the intent theory. See supra note 80 and accompanying text.
testator’s clear intention to make a will. Yet, the “purely technical” construction which results in the intent theory makes it more difficult for lay persons to execute a valid holographic will since courts engage in a more cursory and less objective analysis of holographic instruments and testators’ intentions. It appears that the intent theory, while it may seem to do more justice to the “entirely handwritten” requirement, does less justice to testators’ intentions.

Each theory provides the same protection against forgery, since in either case only the testator’s handwritten matter may be admitted to probate. However, the surplusage theory clearly reflects a greater concern for testators’ intentions and is better supported by policy considerations. Moreover, the surplusage theory is not only less criticized, but the criticism that does exist is more easily refuted. Even the assertion that courts emasculate statutory requirements and usurp legislative authority in applying the surplusage theory, perhaps the most forceful argument in support of the intent theory, is inapposite where legislatures have adopted the surplusage theory. Accordingly, state legislatures should codify the surplusage theory and lay the intent theory to rest. Since the power to make a will is derived from legislatures it is only proper that legislatures take the lead in this regard.

There are certain problems, however, in codifying the surplusage theory through use of the “material provisions” requirement. Most importantly, the use of such terminology leaves open a possible construction, at least where no commentary accompanies the statute to shed light on legislative intent, that handwritten matter is “material” because the testator intended to incorporate it and make it a part of his will. In other words, courts might still be able to em-

131. Id. at 181, 496 P.2d at 607.
132. Id.
133. See id.
134. See supra notes 73-80, 105-10 and accompanying text.
135. See supra note 105 and accompanying text.
136. One scholar, in analyzing California’s holographic will provision, similarly suggested that the legislature should either codify the surplusage theory if holographic wills were to be authorized by the statute or abolish the holographic wills provision entirely. See Bird, supra note 3, at 633.
137. In fact, even in jurisdictions which have applied the surplusage theory by judicial decision, courts do not adhere solely to the surplusage theory. See Note, supra note 8, at 616.
138. See Miller’s Ex’r v. Shannon, 299 S.W.2d 103, 105 (Ky. 1957) (stating that the power to dispose of one’s property is purely statutory).
139. See supra notes 117-18 and accompanying text (discussing the tendency of courts to confuse the independence of the surplusage theory and the intent theory by intermingling them into a single “hybrid” approach).
ploy the intent theory. Second, the word "material" is a common word, often used by courts in other contexts to mean "essential," "important," or "significant." Thus, confusion may arise as to whether the word is intended to have legal significance in a given context. Third, the "material provisions" requirement provides a rather vague form of guidance to testators. Lay persons are in no position to know what is meant by such terminology; that is for the courts to decide. The surplusage theory is no panacea, especially when printed will forms are utilized, and whenever nonhandwritten matter appears on the instrument there is a risk that the instrument will be denied probate. Even if the testamentary portion is held valid, the danger often remains that provisions dealing with the administration of the estate will not be given effect. To minimize this danger, testators should be encouraged to handwrite holographic wills in their entirety.

Therefore, legislatures should not follow the Uniform Probate Code model requiring the "material provisions" of the will to be handwritten. Rather, an approach similar to that taken by North Carolina is preferable. North Carolina requires holographic wills to

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140. In jurisdictions such as Arizona where the surplusage theory has a long history of judicial application, it is unlikely that the intent theory would be revived. Similarly, in jurisdictions such as California, Idaho, Maine, North Dakota, and Utah which follow the Uniform Probate Code approach and include editorial commentary to explain the meaning of the statute, see supra note 32, legislative intent may be clear enough so as to effectively preclude application of the intent theory. But for those jurisdictions in which the holographic will statute does not contain accompanying commentary, or in which clear precedent for the surplusage theory is lacking, the problem may be more significant.

141. See supra notes 119-25 and accompanying text (discussing the difficulty inherent in the application of a materiality standard).

142. See supra notes 81-94 and accompanying text. Despite the liberality of the surplusage theory, the danger of invalidation remains, especially with printed will forms. For example, in In re Estate of Johnson, 129 Ariz. 307, 630 P.2d 1039 (Ct. App. 1981), when all the printed portions on a form will were excised, testamentary intent was not clearly expressed by the handwritten words, and the will was invalidated. Id. at 309, 630 P.2d at 1041. The only words which seemed to manifest testamentary intent were found in the printed portion. Id. Under similar circumstances in Estate of Phifer, 152 Cal. App. 3d 813, 200 Cal. Rptr. 319 (1984), the court held that the handwritten portion, standing alone, was insufficient to constitute a valid holographic will: there was simply not enough in the testator's handwriting to give it meaning without the printed matter. Id. at 817-18, 200 Cal. Rptr. at 322.

143. See supra notes 23-36 and accompanying text.

144. While many lay persons do not seek legal advice or possess legal knowledge, see supra note 11 and accompanying text, those who do follow statutory guidelines should receive clearer guidance. Even for testators who find out informally that they may execute a valid holographic will, such as through word of mouth, the word "entirely" should be stressed.

145. See supra note 35 (setting forth the commentary to § 2-503 of the Uniform Probate Code).
be entirely handwritten, but creates an exception in cases where non-
handwritten matter appears on the instrument, but does not affect
the meaning of the handwritten portions of the will. This excep-
tion provides for the surplusage theory by using the same general
language used by courts. Such an approach more clearly delini-
ates legislative intent to codify the surplusage theory, creates less
potential for confusion, and provides better guidance to testators.
If a “material provisions” requirement is enacted, legislatures
should at least include some form of editorial commentary, such as
that which accompanies the Uniform Probate Code, to evidence
legislative intent. It is interesting that even where commentary ex-
ists, there is no language stating that the testator’s intent to incorpo-
rate matter not in his own handwriting is irrelevant. Since such
language would effectively preclude a resurrection of the intent the-
ory, it seems advisable, whichever model is chosen to codify the sur-
plusage theory, to include this language in the statute, or at least in
the accompanying commentary.

B. Dating Requirements

Two frequently litigated issues often arise with respect to the
fulfillment of statutory dating requirements. First, in order to exe-
cute a valid holographic will, when is it necessary to write the date?
Second, is the date sufficient in terms of form and completeness?
Where the date is an essential element of a statute, it is
mandatory that the testator write the date on the face of the instru-
ment; otherwise the will is invalid. Extrinsic evidence is not admis-

147. See supra notes 29, 81-94 and accompanying text.
148. See supra note 35 (setting forth the commentary to § 2-503 of the Uniform Pro-
bate Code).
149. See supra note 35 (setting forth the commentary to § 2-503 of the Uniform Pro-
bate Code).
150. See supra notes 37-43 and accompanying text (surveying the dating requirement
for a valid holographic will).
151. See, e.g., In re Estate of Collins, 714 P.2d 1006 (Nev. 1986) (holding a holographic
will void on its face because the date was not written by the testator as required by statute); In
re Abram's Will, 182 Okla. 215, 77 P.2d 101 (1938) (holding that even though a document is
testamentary in character, is entirely handwritten, and is signed by the testator, it may not be
probated if undated). Where one or more of the essential requirements of execution is lacking,
the instrument will be denied probate. See In re Paull's Estate, 208 Okla. 195, 254 P.2d 357
(1950). Even a liberal construction of the statute cannot be stretched to excuse at least a
substantial compliance with statutory formalities for the execution of wills. See In re Carpen-
ter's Estate, 172 Cal. 268, 269, 156 P. 464, 465 (1916); Montague v. Street, 59 N.D. 618, 638,
sible to supply a missing date.\textsuperscript{152} Thus, strict compliance is required with respect to the requirement that at least some form of date be included in the instrument.\textsuperscript{158}

Even when a date is included in some form, the sufficiency of the included date is frequently litigated.\textsuperscript{154} In some demanding jurisdictions the date must be complete, specifying the year, month, and day;\textsuperscript{155} omission of one or more of these components has been held to invalidate a holographic will.\textsuperscript{156} Some courts require objective or reasonable certainty in evaluating the components of the included date.\textsuperscript{157} This requirement has led some courts to hold that "numerical" dating is insufficient as to form.\textsuperscript{158} Extrinsic evidence may be admissible to help establish the certainty of an ambiguous date.\textsuperscript{159} Furthermore, the date of execution is recognized as the relevant date.

231 N.W. 728, 739 (1930). The requirement that the date be in the testator's handwriting adds to the authenticity of the instrument, it is argued, because if the holographic will is forged, the date may furnish the means of detection. See Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281 (1896).

152. See Succession of Boyd, 306 So. 2d 687 (La. 1975) (stating that an absent date cannot be supplied by extrinsic evidence because it must be furnished in the handwriting of the testator, but an ambiguous date may be clarified). Not every jurisdiction contains such a strict requirement. Some courts hold that while extrinsic evidence may not supply an omitted date, it is nevertheless sufficient if the date is determinable from the face of the instrument. See, e.g., In re Abram's Will, 182 Okla. at 216, 77 P.2d at 103 (stating that "[t]he only evidence is the will itself." (quoting Heffner v. Heffner, 48 La. Ann. 1088, 1090, 20 So. 281, 282 (1896))).

153. See Note, supra note 13, at 149 (stating that "courts have been strict in requiring compliance with the statutory formalities such as dating").

154. See Note, Olographic Wills: Extrinsic Evidence Admissible to Prove Uncertain Date, 21 Loy. L. Rev. 973, 974 (1975) (authored by Larry S. Bankston).


156. See Succession of Raiford, 404 So. 2d 251, 253 (La. 1981).

157. See id. (requiring that the date on a holographic will must include the day, month, and year, and must be reasonably certain). The Raiford court held that the date "Monday 8 1968" was not sufficiently certain, reasoning that the figure "8" could have reflected either the day or the month, and the date could not be established with certainty through extrinsic evidence. Id. The holographic will was therefore invalidated. Id.

158. See, e.g., Succession of Montero, 365 So. 2d 929, 930 (La. Ct. App. 1978); In re Estate of Nelson, 250 N.W.2d 286 (S.D. 1977). Holographic wills which include dates separated by either dashes or slashes have generated much litigation. See Note, supra note 154, at 974. In Nelson, for example, the disputed date read "4-23-59". 250 N.W.2d at 287. In Montero, the disputed date read "5/29/74". 365 So. 2d at 930.

159. Succession of Montero, 365 So. 2d at 930 (holding extrinsic evidence sufficient to establish the day, month, and year of a numerical date with certainty); Succession of Boyd, 306 So. 2d 687 (La. 1975) (holding extrinsic evidence admissible to establish that February 8, 1972 was meant by the date "2-8-72"); Succession of Lefort, 139 La. 51, 71 So. 215 (1916) (stating there is "a physical difference between a document without a date and one with a date" and approving the use of extraneous evidence to remove the uncertainty or ambiguity in the written date).
in some jurisdictions.\textsuperscript{160}

Other jurisdictions, however, are more liberal in their construction of statutory dating requirements, holding that the date need not be the actual date of execution\textsuperscript{161} or need not even be correct.\textsuperscript{162} Under this more relaxed approach, the omission of a component of the date or the inclusion of more than one date is not necessarily fatal on all occasions.\textsuperscript{163} Furthermore, in some jurisdictions numerical dating has been held sufficient without resort to extrinsic evidence.\textsuperscript{164} Yet, despite policies of substantial compliance, many holographic wills are invalidated due to an insufficient date.\textsuperscript{165}

Problems often arise with respect to the sufficiency of an included date when such date is not written entirely in the testator's handwriting.\textsuperscript{166} This occurs most often when the testator uses a printed will form or a rubber stamp.\textsuperscript{167} In such instances, courts must wrestle with either the surplusage theory or the intent theory, but only the portions of the date in the testator's handwriting may be considered to determine whether the date is sufficient.\textsuperscript{168}

It is desirable that the date appear on the face of a holographic will because the date provides a reference point that aids in the adjudication of various attacks on the will.\textsuperscript{169} Thus, where more than one


\textsuperscript{161} See, e.g., Kanable v. Birch, 86 Nev. 558, 561, 471 P.2d 237, 239 (1970) (stating that "a bare factual showing that the date on a holographic will was admittedly different from the date it was executed is not sufficient as a matter of law to preclude its petition for probate.").

\textsuperscript{162} See, e.g., In re Estate of Vance, 174 Cal. 122, 162 P. 103 (1916).

\textsuperscript{163} In re Estate of Hail, 106 Okla. 124, 129, 235 P. 916, 921 (1925) (holding that omission of the day of the month from the date did not violate the statutory dating requirement where "there [was] no question of lack of mental capacity, undue influence, or duress involved"); Randall v. Salvation Army, 100 Nev. 466, 469, 686 P.2d 241, 243 (1984) (stating that "the fact that the instrument bears more than one date does not necessarily make its date uncertain or otherwise prevent it from being probated as a holographic will.").

\textsuperscript{164} See, e.g., In re Estate of Cheavaller, 159 Cal. 161, 113 P. 130 (1911) (holding date of "4-14-07" sufficient); In re Estate of Nelson, 250 N.W.2d 286 (S.D. 1977) (holding date of "4-23-59" sufficient).

\textsuperscript{165} See, e.g., In re Carpenter's Estate, 172 Cal. 268, 156 P. 464 (1916) (finding the date of "10-1912" invalid). See generally Bird, supra note 3, at 612-14 (discussing the development of the requirement that a holographic will be entirely dated by the hand of the testator).

\textsuperscript{166} See supra note 87 (discussing the requirements for admitting the handwritten portion of a holographic will to probate while simultaneously disregarding the nonhandwritten portion as surplusage).

\textsuperscript{167} See supra notes 84-86 and accompanying text.

\textsuperscript{168} See supra note 90 and accompanying text.

\textsuperscript{169} Succession of Raiford, 404 So. 2d 251, 254 (La. 1981) (Lemmon, J., dissenting);
will is offered for probate, or where testamentary capacity, undue influence, or duress is at issue, the court’s task is simplified; without resort to extrinsic evidence the court need only examine the instrument to determine the relevant date. The dangers of fraud are therefore minimized.

The dating requirement can lead to harsh results. Since the date is not always at issue (except to the extent that it is required by statute), holographic wills are defeated due to an omitted or defective date in cases where the date is not even material. Even where the date is material, some jurisdictions require a complete and certain date—even though it is not always necessary to establish the date with certainty to resolve a dispute. The result is the frustration of the testator’s intentions.

Furthermore, since various attacks on a will focus on the date of execution, it seems inconsistent to hold, as some courts have done, that the date on the will need not be correct and need not be the date of execution. Perhaps such a holding reflects an underlying desire to avoid a strict construction of the dating requirement and to avoid harsh results.

Holographic wills are, however, justified on the grounds that the testator’s handwriting and signature provide adequate guarantees of authenticity, notwithstanding that proof of these matters does not provide a ready source of evidence as to the facts and circumstances of execution. Since the lack of attesting witnesses is an inherent problem with holographic wills, it is natural that testamentary capacity, duress, and undue influence are not protected against in the same manner as if there were attesting witnesses. Requiring the date as an essential formality does not remedy this defect. Such a requirement merely imposes an additional burden on the testator, thereby facilitating attacks and making it more difficult to execute a

See also supra notes 154-68 and accompanying text (discussing the significant amount of litigation that occurs with respect to the sufficiency of the included date).

170. Comment, supra note 5, at 271.
171. Id.
172. See supra notes 150-71 and accompanying text.
173. See supra notes 151-68 and accompanying text.
174. See supra notes 155-57 and accompanying text.
175. See supra notes 161-64 and accompanying text.
176. See supra notes 7, 60-65 and accompanying text.
177. See supra note 1.
178. Even if the date is written entirely by the testator in a complete and unambiguous manner, the date in itself does not shed light on the facts and circumstances of execution. The lack of attesting witnesses is still a problem.
valid holographic will.179

Therefore, eliminating the date as an essential statutory formality seems the most preferable alternative. The date should be required only when it is material. Significantly, a number of jurisdictions which formerly required a complete dating of holographic wills have now abandoned that requirement,180 perhaps finding from experience that a complete dating requirement caused more problems than it was worth.

If a legislature is reluctant to abandon the dating requirement entirely, there are a number of available options, any of which seem preferable to a mandatory dating requirement. A legislature might consider adopting the following two provisions:

(1) If a holographic will and one or more other wills are offered for probate, and there is doubt as to which will shall control, the holographic will is invalid to the extent of any inconsistency if it cannot be established by any evidence which will was later executed.181


180. California, Idaho, Mississippi, North Dakota, and Utah all formerly required the date as an essential statutory formality, which was construed to mean that the testator had to write the date completely, specifying the day, month, and year. See Estate of Hazelwood, 249 Cal. App. 2d 263, 57 Cal. Rptr. 332 (1967); In re Estate of Hengy, 53 Idaho 515, 26 P.2d 178 (1933); Sullivan v. Jones, 130 Miss. 101, 93 So. 353 (1922); Montague v. Street, 59 N.D. 618, 231 N.W. 728 (1930); In re Love's Estate, 75 Utah 342, 285 P. 299 (1930). The current statutes in these jurisdictions have abandoned the date as an essential statutory requirement. See supra notes 37-43 and accompanying text (surveying the date requirement for a valid holographic will).

181. This provision is similar to a provision in California's holographic will statute. See Cal. Prob. Code § 6111(b)(1) (West 1985), set forth supra text accompanying note 43. The California provision has two main purposes. First, it is "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." Cal. Prob. Code § 6111 comment (West 1985). In such situations, the date must either appear on the holographic will or be shown by other evidence to have been executed later than the date of execution of the other will. If it cannot be established that the holographic will was executed later, the holographic will is invalid to the extent of any inconsistency. See id. Thus, portions of the holographic will which are not governed by another will and are not inconsistent are still to be given effect. See id. Second, § 6111 applies to both wills in "the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter." Id. If it cannot be established which was later executed, both wills are invalid to the extent of any inconsistency, but consistent provisions are valid. See id.

Utah has a similar provision, though apparently narrower—by its language the provision purports to cover only inconsistent holographic wills, much like the "second" purpose of the California statute. See Utah Code Ann. § 75-2-503 (1978), set forth supra text accompanying note 42; see also In re Estate of Fitzgerald, 738 P.2d 236 (Utah Ct. App. 1987) (holding the consistent provisions of two holographic wills valid, in accordance with the statutory re-
(2) If it is established that the testator lacked testamentary capacity, or was under duress or subject to undue influence, at any time during which the holographic will might have been executed, the will is invalid unless it is established that the holographic will was executed at a time when the testator had testamentary capacity, was not under duress, or was not subject to undue influence.  

Consonant with judicial treatment of the dating issue in most jurisdictions that contain a dating requirement, these provisions reflect a liberal approach. The testator need not write the date, as extrinsic evidence is admissible. The date, moreover, need not be established with certainty, but only to the extent necessary to resolve the particular dispute. By limiting the instances in which the date is a factor and allowing this type of flexibility, the harshness of a mandatory dating requirement is ameliorated. Provision (1) set forth above only invalidates holographic wills to the extent of any inconsistency with other wills where it is impossible to ascertain which will was last executed. Such an approach seems desirable because it allows probate of words entirely handwritten by the testator which are not contradicted by other wills and avoids the alternative disposition of the estate pursuant to the laws of intestacy.

Even if legislatures are reluctant to accord such liberal treatment, where it was uncertain whether one of two holographic wills was executed before or on the same date as the other will. If indeed this provision applies only to inconsistent holographic wills, it seems unduly narrow—if holographic wills are to be a viable alternative to attested wills, formal wills should not be accorded preferential treatment.

Nebraska's provision is similar in some respects, but different in others. There, the "date of signing" is required by statute, but an undated instrument may still be valid "if such instrument is the only such instrument [offered for probate] or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence." Neb. Rev. Stat. § 30-2328 (Supp. 1984), discussed supra text accompanying notes 38-41. This provision is more restrictive than the California statute in two respects. First, if there is an inconsistency with any "like instrument," no provision is made for the probate of consistent provisions; apparently the entire instrument is invalidated. Second, the "date of signing" is required. Therefore, it would probably be insufficient to establish merely that the holographic will was later executed.

This provision is also similar to a provision in California's holographic will statute, except the California provision only applies to testamentary capacity. See Cal. Prob. Code § 6111(b)(2) (West 1985), set forth supra text accompanying note 43. The proposed rule also applies to duress and undue influence. Thus, it is broader in scope so as to cover other situations in which the date has been held to be material.

182. This provision is also similar to a provision in California's holographic will statute, except the California provision only applies to testamentary capacity. See Cal. Prob. Code § 6111(b)(2) (West 1985), set forth supra text accompanying note 43. The proposed rule also applies to duress and undue influence. Thus, it is broader in scope so as to cover other situations in which the date has been held to be material.

183. Cf. supra note 37 (listing the seven jurisdictions that require the date as an essential element for a valid holographic will).


185. Cf. id.

186. See supra note 181 and accompanying text (setting forth provision (1)).

187. See supra note 181 and accompanying text (setting forth provision (1)).
ment to the dating issue, possibly because they are hesitant to depart from precedent or are fearful of the asserted dangers of resorting to extrinsic evidence, the above provisions could be modified accordingly. Thus, while keeping the same “introductory” language in each provision, a legislature might further provide that the holographic will is invalid if the date is not written in the handwriting of the testator. Such an approach would allow a strict construction of the dating requirement, but would at least restrict the date as an essential statutory requirement to those occasions in which the date is material. Although problems of sufficiency and completeness would still remain, the results would be less harsh than those achieved by imposing a mandatory dating requirement on all holographic wills.

C. Signature Requirements

The testator’s signature is an essential formality in all jurisdictions which authorize holographic wills. All jurisdictions, moreover, require animus signandi—a signing with the intent to authenticate the document. In some jurisdictions, such intent must appear from the face of the instrument, while in others extrinsic evidence is admissible. The purposes of such a signing are to connect the testator with the instrument and to provide evidence of the finality of testamentary intent, and to protect against fraud and forgery.

188. The “introductory” language in the first provision extends to the second comma, see supra text accompanying note 181, and extends in the second provision to the third comma, see supra text accompanying note 182.

189. Two other alternatives should also be considered. First, instead of requiring the date to be written on the face of the instrument, the holographic will might be deemed valid if the date is determinable from the face of the instrument. Since the paper itself is the only evidence, there should be little or no objection to this approach. Second, and in more liberal fashion, holographic wills might be validated if the date can be established by resort to any evidence. This is the approach apparently taken by Nebraska. See Neb. Rev. Stat. § 30-2328 (Supp. 1984), set forth supra text accompanying note 41.

190. See statutes cited supra note 15.

191. Note, supra note 8, at 618; see statutes cited supra note 15.

192. See, e.g., Wilson v. Polite, 218 So. 2d 843 (Miss. 1969) (holding extrinsic evidence inadmissible to show that the testator intended his written name as a signature since such intention must clearly appear from the face of the instrument).

193. See, e.g., In re Estate of Tyrell, 17 Ariz. 418, 153 P. 767 (1915); Peevy v. Richeyson, 261 Ark. 841, 552 S.W.2d 218 (1977). In Peevy, the court examined the purported holographic will and extrinsic evidence (a subsequent letter written by the decedent which was signed and dated at the end) before invalidating the instrument. Id. at 844, 552 S.W.2d at 221. The court held that the testator’s name in the body of the document was not written with the intention of authenticating or executing the instrument as a will. Id.

194. Fenton v. Davis, 187 Va. 463, 469, 47 S.E.2d 372, 375 (1948). While indicative of testamentary intent, the signature is not necessary to a finding of such intent. See Hamlet v.
HOLOGRAPHIC WILLS

As with the absence of other essential statutory requirements, the absence of a signature on the will results in invalidation, regardless of how clearly testamentary intent is expressed.\textsuperscript{196} Courts are more liberal, however, with respect to the form of signature.\textsuperscript{197} The use of abbreviations, initials, partial names, nicknames, or other forms or markings have been held sufficient, provided the testator writes in his own handwriting and intends such indications to be his signature.\textsuperscript{198} Substantial compliance as to the form of signature is, therefore, the general rule.

The primary problem pertaining to the signature concerns its required location on the document.\textsuperscript{199} Thus, in some jurisdictions, either by express provision or judicial construction of the signature requirement, the testator must sign at the end of the will.\textsuperscript{200} In construing this requirement, it has been held that \textit{animus signandi} must clearly appear from “the four corners of the will itself” with no extrinsic evidence admissible.\textsuperscript{201} If the testator’s proper signature is not found to appear at the end of the will, probate is denied.\textsuperscript{202}

In determining whether the testator signed at the end of the

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\textsuperscript{195} Weems v. Smith, 218 Ark. 554, 557, 237 S.W.2d 880, 882 (1951).

\textsuperscript{196} See Estate of Twohig, 178 Cal. App. 3d 555, 559, 223 Cal. Rptr. 352, 354-55 (1986) (stating that despite the trend toward liberality in construing holographic will statutes, courts have not condoned the absence of a signature; strict compliance is required as to essential statutory requirements and the testator’s intentions are irrelevant in such instances); Miller’s Ex’r v. Shannon, 299 S.W.2d 103, 106-07 (Ky. 1957) (holding signature on a sealed envelope containing holographic will insufficient; the will itself was not signed).

\textsuperscript{197} See Estate of Twohig, 178 Cal. App. 3d at 560, 223 Cal. Rptr. at 355.

\textsuperscript{198} See, e.g., Pilcher v. Pilcher, 117 Va. 356, 366, 84 S.E. 667, 670 (1915) (holding use of initials sufficient if manifestly intended as a signature and stating that sufficiency is to be determined on a case-by-case basis); \textit{In re} Estate of Briggs, 148 W. Va. 294, 134 S.E.2d 737 (1964) (holding that a will cannot be declared invalid merely by the fact that the decedent’s signature consisted only of his first name). The testator’s name appearing in a holographic will is not considered a signature unless it appears that the testator intended it to be a signature, “and then is only a signature as to so much of the paper as it was designed to authenticate.” Fenton v. Davis, 187 Va. 463, 470, 47 S.E.2d 372, 376 (1948).

\textsuperscript{199} Note, supra note 8, at 617-18. This problem is generally unique to holographic wills because “attestation formalities, usually under professional supervision, would anticipate a signing at the end.” Id. at 618.

\textsuperscript{200} See supra notes 45-46 and accompanying text (noting those jurisdictions that require the testator’s signature at the end of the will).

\textsuperscript{201} See, e.g., Wilson v. Polite, 218 So. 2d 843, 850 (Miss. 1969).

\textsuperscript{202} Id. at 853; \textit{In re} Estate of King, 203 So. 2d 581 (Miss. 1967) (invalidating a holographic will where the purported signature appeared in the body of the will in the middle of a sentence).
will, courts have generally required substantial compliance, at least in the absence of any issue of fraud, undue influence, or capacity.\textsuperscript{208} Although nothing appearing after or below the signature may be given effect,\textsuperscript{204} the validity of what precedes the signature has been held not to be affected by any useless or superfluous matter which follows the signature.\textsuperscript{205} Provided all the dispositive provisions appear in the portion before the signature, that portion may be found valid, even though other matter, such as the date or an executor clause, follows the signature.\textsuperscript{206} Occasionally, rather than invalidating the entire instrument, courts have held dispositive matter which follows the signature invalid as an unsigned holographic codicil.\textsuperscript{207} However, courts are not always disposed to follow policies of substantial compliance and sometimes insist upon stricter compliance with the signature location requirement.\textsuperscript{208}

Where the signature is not required to appear at the end of the will courts are far more liberal. In these jurisdictions the precise location of the signature is not critical—courts uniformly hold that the signature need not appear at the end of the document.\textsuperscript{209} The signa-

203. See, e.g., Weems v. Smith, 218 Ark. 554, 559, 237 S.W.2d 880, 883 (1951); In re Estate of Giles, 228 So. 2d 594, 596 (Miss. 1969). In Giles, the signature was held valid even though it had been cut from a prior will and sewn on the bottom of the will with thread. \textit{Id.} at 595, 597.

204. See \textit{In re George's Estate}, 208 Miss. 734, 749, 45 So. 2d 571, 572 (1950).

205. See \textit{Weems v. Smith}, 218 Ark. at 559, 237 S.W.2d at 883.

206. See, e.g., \textit{id.} at 557, 237 S.W.2d at 882 (holding the signature at the end of the will valid where all of the dispositive provisions appeared before the signature and no issue of fraud, undue influence, or capacity was raised); Fairweather v. Nord, 388 S.W.2d 122 (Ky. 1965) (finding that the signature at the end of the will but prior to the date satisfied statutory requirements). The dissent in \textit{Weems} argued that substantial compliance was inappropriate and that it was immaterial that no fraud was at issue because the words "everything in it" followed the signature and were arguably part of the testamentary provisions. See \textit{Weems}, 218 Ark. at 560, 237 S.W.2d at 883 (Smith, J., dissenting).

207. See, e.g., Parrott v. Parrott's Adm'x, 270 Ky. 544, 110 S.W.2d 272 (1937) (holding that the dispositive provision on the reverse side of the document was an improperly executed codicil because it was not signed at the end, but upholding the validity of the holographic will which preceded the signature).

208. See, e.g., Wilson v. Polite, 218 So. 2d 843, 854 (Miss. 1969) (invalidating a holographic will and holding that the testator's name appearing in the fifth line from the bottom of the writing was not a signature). The dissent in \textit{Wilson} argued that substantial compliance should have been followed by the majority because no dispositive provisions appeared after the signature. See \textit{id.} at 856 (Ethridge, C.J., dissenting).

ture may appear anywhere, provided it is written by the testator with the intent to authenticate or execute the document as his will (i.e. written with animus signandi). Thus, a name written in the commencement, the exordium clause, or in the body of the will, regardless of the location of the dispositive provisions, may sometimes be held sufficient. Courts in these jurisdictions only differ as to whether extrinsic evidence is admissible to establish animus signandi—some admit such evidence while others hold that the necessary intent to authenticate must appear from the face of the will.

A requirement that the signature appear at the end of the will marks a refusal to accept a signature in any other part of the document, at least where all or part of the dispositive provisions follow the purported signature. As a result, based solely upon the physical location of an alleged signature, and without regard to the intention of the testator, an entire will may be denied probate.

The requirement that holographic wills be signed at the end has been justified primarily on the ground that it establishes in the document internal evidence of the finality of testamentary intent.

210. See cases cited supra note 209.

211. See, e.g., Estate of Black, 30 Cal. 3d at 888, 641 P.2d at 759, 181 Cal. Rptr. at 227 (holding that the testator's name written in three exordium clauses of a printed will form was a sufficient signature); In re Estate of Cunningham, 198 N.J. Super. at 489, 487 A.2d at 780 (holding that the testator's name in the beginning of the writing was a sufficient signature); Nicley v. Nicley, 38 Tenn. App. at 475, 276 S.W.2d at 499 (holding that the testator's name in the body of the document was a valid signature); Burton v. Bell, 380 S.W.2d 561, 568 (Tex. 1964) (holding that the name written in the first part of the writing was sufficient); Hall v. Brigstocke, 190 Va. at 464, 58 S.E.2d at 533 (holding that the name at the top of the document was sufficient where the will itself showed that the testator manifestly intended it to be a signature). But see Peevy v. Ritcheson, 261 Ark. 841, 846, 552 S.W.2d 218, 220 (1977) (holding that the testator's name appearing in the body of the instrument was not written with the intention of authenticating or executing the instrument as a will); In re Estate of Fegley, 42 Colo. App. at 48, 589 P.2d at 82 (stating that "[t]he placement of the phrase 'witness my hand . . . , ' followed by a signature space and an attestation clause, indicate[d] that [the testatrix] intended to sign the document at some future time, and that she did not intend that her name in the exordium clause be a signature."); Hamlet v. Hamlet, 183 Va. 453, 460, 32 S.E.2d 729, 733 (1945) (holding that the testator's name, placed in the body of a will, was not a signature, even though there was insufficient space for a signature elsewhere in the document).

212. See supra notes 201-08 and accompanying text.

213. See supra notes 199-208 and accompanying text.

214. See, e.g., Wilson v. Polite, 218 So. 2d 843, 853 (Miss. 1969); In re Estate of King, 203 So. 2d 581, 583 (Miss. 1967).

215. In re George's Estate, 208 Miss. 734, 749, 45 So. 2d 571, 572 (1950). In other words, the requirement reflects a concern that it appear from the face of the instrument that the testamentary purpose is complete and that the document is not merely "notes" for a will to
sumably, the testator's name following the dispositive provisions creates a strong inference, based on custom, that it was intended as an authenticating signature. Resort to extrinsic evidence and its potential dangers is thereby averted.  

This justification is somewhat tenuous because regardless of the location of an alleged signature, the instrument itself offers internal evidence of animus signandi from the mere juxtaposition of words, including the dispositive provisions.  

Thus, alleged signatures located in other parts of the will have been either invalidated or upheld in many cases based solely upon an examination of the four corners of the will itself.  

Moreover, allowing a holographic will to be signed anywhere is not inconsistent with a holding that the required intent to authenticate must "manifestly appear . . . from the face of the instrument . . . ." Such an approach provides protection against the potential dangers of extrinsic evidence and also gives effect to testators' clearly expressed intentions, without limiting the place where a testator may sign.  

Furthermore, whatever inferences may be drawn from a testator's name appearing at the end of a document, it seems odd to preclude a signing in another part of the will without making an objective inquiry into whether the name was written with animus signandi. The court's task may be simplified through such a mechanical approach, but little justice is done to the testator who fails to sign at the end.

be prepared at a subsequent time. Id.  

216. See supra notes 200-02 and accompanying text.  

217. See In re Estate of Fegley, 42 Colo. App. 47, 48, 589 P.2d 80, 82 (1978) (stating that "[t]he placement of the phrase 'witness my hand . . . .' followed by a signature space and an attestation clause, indicate[d] that [the testatrix] intended to sign the document at some future time and that she did not intend that her name in the exordium clause be a signature."); Hamlet v. Hamlet, 183 Va. 453, 461, 32 S.E.2d 729, 733 (1945) (holding that the placement of the testator's name in the second paragraph of a holographic will, which declared the will to be his last and revoked other wills made by him, after the paragraph merely explaining his reason for rewriting previous wills, did not indicate that the name was intended as a signature to the will).  


220. See In re Estate of King, 203 So. 2d 581, 584 (Miss. 1967).
The only other justification for requiring the signature to conclude the document is to prevent the fraudulent making of interpolations on the writing after the testator’s signature is affixed; thus, nothing following the signature should be given effect.\textsuperscript{221} Implicit in the recognition of holographic wills, however, is the notion that proof of the testator’s handwriting protects against fraud of this variety and that successful forgeries are not only exceedingly difficult, but are also detectable under close scrutiny.\textsuperscript{222} It is therefore unlikely that requiring the signature to conclude the will offers much, if any, additional protection in this regard.

If the testator intends his written name to constitute a signature, thereby authenticating the document as his holographic will, then the location on the instrument should be irrelevant. After all, it is the signature itself, not its physical location, which indicates that testamentary purpose is completed.\textsuperscript{223}

A legislative decision to specify the location of the signature will increase the number of holographic wills which will be denied probate due to a technicality. Through a policy of substantial compliance, courts often try to uphold the validity of the testators’ “home-drawn” documents whenever possible,\textsuperscript{224} but there is only so much they can do. Nothing which follows the signature may be given effect unless resigned at the end.\textsuperscript{225} In jurisdictions with no restrictions on the signature’s location, courts look to the intent of the testator.\textsuperscript{226}

Thus, in light of the foregoing considerations, the better approach is to allow a signature anywhere on the instrument, provided that \textit{animus signandi} is clearly shown. This is not to suggest that the signature’s location on the will is unimportant. Even in the absence of a signature location requirement, a testator who fails to sign at the end of the document runs a substantial risk that the instrument will be denied probate.\textsuperscript{227} But this simply underscores the greater flexibility and fairness of such an approach. Rather than automati-

\textsuperscript{221} See \textit{In re} George’s Estate, 208 Miss. 734, 749, 45 So. 2d 571, 572 (1950).
\textsuperscript{222} See \textit{supra} note 7 and accompanying text (discussing the ritualistic, evidentiary, and protective functions of the attestation formality).
\textsuperscript{223} See \textit{supra} note 190-95 and accompanying text.
\textsuperscript{224} See \textit{Lebleu} v. \textit{Manning}, 225 La. 1087, 1091, 74 So. 2d 384, 385 (1954) (stating that “[t]he policy of our law is to maintain the validity of a will if possible.”); \textit{supra} notes 203-08 and accompanying text (discussing the substantial compliance requirement).
\textsuperscript{225} See \textit{supra} notes 204-07 and accompanying text.
\textsuperscript{226} See \textit{supra} notes 209-12 and accompanying text.
cally invalidating a holographic will solely because the purported signature does not appear at the end, courts examine the face of the instrument (or possibly extrinsic evidence in more liberal jurisdictions) to determine whether the testator's name was intended as a signature. Sometimes the signature will be held sufficient, other times it will not, but at least the testator is given the benefit of an objective inquiry.

Therefore, legislatures should allow judicial discretion to find animus signandi on a case-by-case basis and no restrictions should be placed on the location of the signature in a holographic will.

D. Requirements Concerning Proof of Holographic Wills

Five jurisdictions require, as an essential statutory formality, that the testator's handwriting and signature be proven by witnesses. The type and number of required witnesses varies, however, from jurisdiction to jurisdiction. For example, the types of witnesses required by the statutes include "witnesses," "credible witnesses," "disinterested witnesses," and "credible disinterested witnesses." Although "credibility" is not expressly mentioned in each of the statutes, it is nevertheless a factor in judicial construction of each statute.

228. See supra notes 209-11 and accompanying text.


231. See supra notes 51-56 and accompanying text (discussing the statutory requirements concerning proof of holographic wills).

232. See, e.g., Gunn v. Phillips, 410 S.W.2d 202 (Tex. Civ. App. 1966). In Gunn, the court reversed an order admitting to probate a purported holographic will since the evidence did not support a finding that the will was wholly handwritten. Id. at 205. The court held, in light of testimony presented by the only two witnesses, that they could not identify a printed name in the will because they were not familiar with nor had they ever seen the decedent's printing. Id. at 205-06. Implicit in such a holding is the notion that witnesses must be credible, possessing familiarity with the decedent's handwriting and the ability to testify that
To be a “credible” witness, one needs to be familiar with the testator’s handwriting and signature, and must be able to testify that “each and every part” of the handwriting, including the signature, is genuine. The requisite familiarity may be demonstrated in any manner. One may be familiar due to past experiences or may acquire familiarity solely for the purpose of the litigation, such as with a witness with no previous familiarity but who compares the holographic instrument with other authenticated writings of the testator. If a witness is not found to be credible by the court, that witness cannot be used to satisfy the statutory requirement.

A “disinterested” witness is one who has no interest either for or against the probate of the will and who is without bias or prejudice either way by reason of any potential advantage. A witness possessing such an interest, prejudice, or bias is not precluded from testifying; he or she is simply disqualified from satisfying the statutory requirement.

In establishing the authenticity of a holographic will the burden of proof is on the proponent to prove by a preponderance of the evidence that the will is entirely in the handwriting of the testator. Both lay persons as well as handwriting experts may offer opinion testimony as to the authenticity or falsity of the handwriting and signature, but whether the testimony will qualify under statutory requirements is a case-by-case matter. In determining whether the
proponent has made out a prima facie case of authenticity, the court may make its own comparisons with other authenticated writings of the testator. If there is a dispute as to the genuineness of the handwriting or signature, the trier of fact is to make a determination based on all the evidence.

In jurisdictions where proof by witnesses is not an essential requirement of the holographic will statute, the testator’s handwriting and signature must still be proven. The proof required must be demonstrated in substantially the same manner as in jurisdictions where the statutory requirements do exist. Thus, the proponent has the same burden of proof and must produce at least enough evidence to make out a prima facie case of genuineness. Similarly, the opinions of lay witnesses and expert witnesses are generally of little or no probative value unless familiarity with the testator’s handwriting and the basis for an opinion are demonstrated.

A requirement that disinterested witnesses testify seems unnecessary and perhaps overly restrictive for several reasons. First, those most likely to be familiar with the testator’s handwriting (i.e. his relatives and friends) are also those most likely to have an interest in

Farr, 460 S.W.2d at 434. One testified that she only saw the decedent sign the will and that she notarized the signature. Id. The testimony of the other two witnesses was merely opinion evidence, adequate only to raise an issue of fact as to whether the will was entirely handwritten by the decedent. Id. The court stated that “the trial court had the right to disbelieve the testimony and to hold, as it did, that the evidence was insufficient . . . .” Id. In Thomason, lay witnesses who did not see the decedent write the will compared writing samples of documents they had seen the decedent write with the purported holographic will and testified that the handwriting was authentic. Thomason, 184 S.W.2d at 544. The court stated that in the absence of contradictory proof, either by oral or physical evidence, the testimony of the witnesses would be sufficient as a matter of law. Id. at 545. But the court, after examining the instrument and comparing it with other authenticated writings of the decedent, held that the instrument itself showed sufficient evidence to contradict the opinion testimony. Id. The issue, therefore, should have been submitted to the jury. Id. at 548.

243. See Thomason, 184 S.W.2d at 546.
244. Id.
245. See Herd v. Herd, 293 Ky. 258, 168 S.W.2d 762 (1943); In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).
247. Herd, 293 Ky. at 265, 168 S.W.2d at 766 (stating that the opinion of a lay person “possesses no probative value, not even a scintilla, in the absence of a statement of fact within the witness’ personal knowledge upon which his opinion is based, sufficient in some degree to support the expressed opinion.”); In re Will of Gatling, 234 N.C. at 567, 68 S.E.2d at 306 (stating that “the conclusion of a handwriting expert as to the authenticity or nonauthenticity of a signature, standing alone, might be of little or no probative force, but if his conclusion be supported by cogent reasons, it would be strengthened and its value as evidence correspondingly enhanced.” (quoting State v. Young, 210 N.C. 452, 453, 187 S.E. 561, 562 (1936))).
the litigation. The individuals most competent to fulfill the statutory requirement are thus precluded from doing so. Second, credibility of the witnesses is a paramount issue in determining whether the handwriting and signature are authentic, and clearly, a witness need not be disinterested in order to be credible. Third, whether or not a witness is disinterested could readily be taken into account by courts in determining whether or not that witness is credible. Consequently, whether or not a witness is disinterested should be irrelevant, provided such witness is credible.

E. The “Valuable Papers or Effects” Requirement

The “valuable papers or effects” requirement currently exists only in North Carolina. Under this broadly-worded requirement, a holographic will must be found after the testator’s death among his valuable papers or effects, in a safe-deposit box or other safe place, or in the possession of some other entity where it was placed for safekeeping. Moreover, it is essential for the validity of the holographic will that the will be placed in such location or deposited with another for safekeeping with the testator’s knowledge or consent. The North Carolina courts have liberally construed this requirement. The proponent of the holographic will must show that the papers among which the holographic will was found were regarded as valuable by the testator and that they are, in fact, valuable.

The purpose of this requirement is to provide further evidence of testamentary intent. The requirement is particularly useful where a holographic instrument is ambiguous on its face as to the

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248. See supra note 239 and accompanying text.
249. See supra notes 233-36 and accompanying text.
251. N.C. GEN. STAT. § 31-3.4(a)(3) (1984). “Valuable papers” are those regarded by the testator as “worthy of preservation, and ... of some value.” Winstead v. Bowman, 68 N.C. 122, 127 (1873). Yet, the will need not be found among the testator’s most valuable papers. Id. at 126.
253. See, e.g., In re Williams’ Will, 215 N.C. 259, 266-67, 1 S.E.2d 857, 862 (1939); In re Groce’s Will, 196 N.C. 373, 376, 145 S.E. 689, 690 (1928).
254. In re Will of Gilkey, 256 N.C. at 420, 124 S.E.2d at 158 (stating that “[t]he place where the papers and effects of deceased, including the paper-writing offered for probate, are found, after his death, is material, only upon the question as to whether or not such papers and effects are, and were considered by the deceased as valuable.” (quoting In re Groce’s Will, 196 N.C. at 374, 145 S.E. at 690)).
255. Id. at 420, 124 S.E.2d at 159.
issue of testamentary intent. In such instances, evidence that the will was found among the testator's valuable papers or effects provides a sufficient amount of proof for the issue of testamentary intent to be submitted to a jury, and extrinsic evidence relevant to that issue is admissible. If, however, there is insufficient evidence that the instrument was found among the testator's valuable papers or placed by him in the possession of another for safekeeping, the instrument may not, as a matter of law, be admitted to probate.

While the "valuable papers or effects" requirement is designed to provide evidence of testamentary intent, it imposes an additional technical requirement upon testators who wish to execute a valid holographic will. Failure to satisfy this requirement, as with other statutory formalities, results in invalidation of the will.

Although the merits of the testamentary intent requirement are apparent, holographic wills may be denied probate merely because a testator was ignorant of the requirements of the law, or because he neglected or forgot to place the will among his valuable papers or effects or in the possession of another entity for safekeeping. Moreover, given the courts' policy of liberally construing testamentary intent in holographic wills, the "valuable papers or effects" requirement seems unnecessary and potentially troublesome.

In general, if the "valuable papers or effects" requirement were abolished, the place of deposit would still be relevant—rather than being an essential statutory formality, the place of deposit would constitute circumstantial evidence bearing on the question of testamentary intent.

IV. CONCLUSION

Holographic wills, often written by lay persons without legal knowledge or advice, tend to be informally drawn documents. Never-
theless, they are authorized in a number of jurisdictions because of their convenience to testators and because the forging of another's handwriting and signature are considered extremely difficult. But if testators are to be encouraged through holographic will statutes to write their own wills, then such wills should constitute, to the extent possible, a viable alternative to formally attested wills. As demonstrated in this Note, however, the formalities for the execution of holographic wills are sometimes rigorous, causing testators' intentions to be frequently defeated. The suggestions made herein are designed to combat this harshness whenever possible; a balance is sought between giving effect to testators' intentions and providing adequate protection against fraudulent will-making. The main concern is in reducing the number of occasions in which holographic wills are invalidated on a technical basis, not in simplifying a court's task or eliminating litigation. If these latter concerns are paramount to a legislature, then holographic wills should not be authorized at all. Indeed, it is the premise of this Note that there should be either liberal provision for holographic wills or no provision at all.

Kevin R. Natale

263. See supra note 9 and accompanying text. In general, holographic wills are probably authorized due to a certain "atavistic desire to give effect to the last wishes of a decedent, however informally expressed." Bird, supra note 3, at 610.

264. See supra note 7 and accompanying text. The science of investigating the genuineness of documents has advanced greatly over the years and the methods for testing handwriting, ink, paper, watermarks, and other similar items has reached a degree of precision which makes the detection and demonstration of forgery practically infallible. Gunn v. Phillips, 410 S.W.2d 202, 206 (Tex. Civ. App. 1966).