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Holographic and Nonconforming Wills: Dispensing With Formalities—Part I

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This column is sponsored by the CBA Trust and Estate Law Section. The column focuses on trusts and estate law topics, including estate and trust planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

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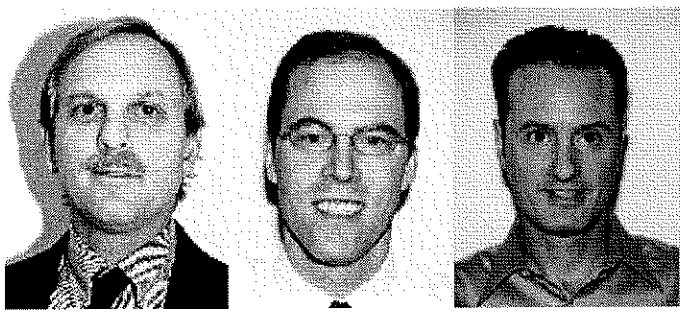

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This two-part article contains a primer on holographic and nonconforming wills, an update on applicable Colorado law, and a discussion of future issues and considerations regarding holographic and nonconforming wills.

> *In short, a will may be a man's monument or his folly. Prudence, therefore, demands that the testator plan wisely, and frame his testamentary provisions with great care. That is, he should, if possible, use such words that his plan shall not be misunderstood and shall be carried into effect without dispute or litigation, for unlike instruments between living persons, it is only after the testator is dead and cannot explain his meaning that his will can take effect, or be open to dispute.*
>
> *—A Well-Known Author on Wills*1

Since the beginning of recorded history, and probably long before, people have created plans for the testamentary disposition of their property. The drafting and execution of wills were codified and formalized in the Statute of Wills of 1540, the Statute of Frauds (1677), and the Wills Act of 1837. The formalities demanded by those laws still are observed in the current law of wills. Nonetheless, cognizant of the fact that some wills are made in haste in the testator's own hand, the law of wills historically has included provisions for the validation of handwritten (holographic) wills.

This two-part article covers issues specific to holographic wills and wills that do not conform to statutory formalities. The first part reviews the laws of Colorado and other jurisdictions as they relate to litigation of holographic wills. It covers the requirements of most jurisdictions, including Colorado, regarding requirements for valid holographic wills.

Part II, to be printed in the January 2003 issue of this publication, provides an overview of the varieties of holographic and nonconforming wills. It discusses the effects that technology has had on wills, as well as possible changes in the way wills may be made and executed in the future.

Uniform Probate Code And Holographic Wills

Sixteen states have adopted the Uniform Probate Code ("UPC"), which addresses holographic wills, among other probate matters. Colorado adopted the UPC in 1973, and adopted the revised UPC ("UPC II") pertaining to holographic wills in 1995.2 The UPC II contains important changes that impact holographic wills, in particular:

> The original UPC requires the "material provisions" of a holographic will to be in the handwriting of the testator. UPC II requires the "material portions" of the document to be in the handwriting of the testator. The purpose of changing from "material provisions" to "material portions" was to leave no doubt about the validity of a will in which immaterial parts of a dispositive provision—such as "I give, devise, and bequeath"—are not in the testator's handwriting. *The material portion* of a dispositive provision—which must be in the testator's handwriting under the revised UPC—are *the words identifying the property and the devisee.* (*Emphasis added.*)3

The UPC II is codified in Colorado statutes at CRS §§ 15-10-101 *et seq.*

Colorado Law Regarding Holographic Wills

According to CRS § 15-11-502(2), which Colorado adopted from the UPC

II, a "will that does not comply with [CRS § 15-11-502(1)] is valid as a holographic will, whether or not witnessed, *if the signature and material portions* of the document are in the testator's handwriting." (*Emphasis added.*) CRS § 15-11-502(2) does not specifically define "material portions." Moreover, none of the reported decisions of Colorado appellate courts provides a definition of the term "material portions" for purposes of holographic wills.

Colorado and other states in which the UPC II has been adopted have defined the term "material" in the context of determining the validity of holographic wills. Specifically, in *In re Estate of Krueger*,4 the North Dakota Supreme Court, in a case involving the validity of a holographic will, defined "material" as "relevant," "consequential," or "having a certain or probable bearing . . . on the effect of an instrument."5

A proponent of a holographic will has the burden of establishing *prima facie* proof of due execution of the instrument.6 The Colorado Probate Code provides that, in construing a will, it is the court's duty to ascertain and give effect to the testator's intent.7 CRS § 15-11-502(3) allows extrinsic evidence to be considered by the court in determining testamentary intent. Nevertheless, Colorado courts have interpreted this section to require close scrutiny so as not to validate holographic writings when: (1) the decedent's intent is
uncertain; (2) the writing is incomplete, ambiguous, or contemplates a future action; or (3) the attempted will or draft will is not signed, or is not effectively witnessed.8

In *In re Estate of Fegley*,9 the Colorado Court of Appeals addressed the validity of a holographic will where the decedent's name appeared only in the exordium (introductory) clause. The will had a residuary clause, appointed a personal representative, and included a revocation clause as well as an attestation clause for witnesses. After a review of intrinsic evidence, the *Fegley* court held that the testator's name in the exordium clause of the will was not sufficient without additional evidence that the testator intended the signing of her name to constitute her signature.

The *Fegley* court held that a holographic will must be signed, but recognized that the Colorado will-execution statute, CRS § 15-11-502, did not specifically require a testator's signature to be at the end of the document.10 The court focused on the lack of extrinsic evidence of the testator's intent and held that the writing in question was not complete because there was room on the page for the testator to sign after the words, "Witness my hand this 16th day of September, 1976." The court concluded that the testator intended to sign the document at some future time and did not intend that her name in the exordium clause constitute her signature. As a result, the document was never signed within the meaning of CRS § 15-11-502.

In *In re Estate of Harrington*,11 the Colorado Court of Appeals addressed the validity of a holographic codicil. The court held that for a holographic codicil to be valid, the writing must establish, together with any admissible extrinsic evidence, that the decedent intended the writing to make a testamentary disposition of his or her property. In *Harrington*, the court held that evidence failed to establish that a list of property found in an envelope in the decedent's safety deposit box was a valid holographic codicil. Even though it was in the decedent's handwriting, it had no discernable testamentary significance.12

*In re Estate of Olschansky*13 is a case where a handwritten letter was

offered as a will. The Colorado Court of Appeals affirmed the Denver Probate Court's finding that, although the letter was written by the testator and discussed testamentary subjects, it was intended only as a letter. When read as a whole, the letter did not reflect the testator's immediate testamentary intent.

Dating of Holographic Wills

Only a minority of jurisdictions require a valid holographic will to be dated.14 The Colorado Court of Appeals in *In re the Estate of Grobman*15 held that there is no statutory requirement that a holographic will be dated. The *Grobman* trial court denied the probate of a holographic will because the date on the will was illegible and one of the pages contained the signature of a person other than the testator. Further, the trial court held that the proponent could not establish when the holographic document was prepared and whether it was superseded by a later, formally executed will. However, the Court of Appeals reversed, holding that the construction of a will is a matter of law and that the date on the will at issue was sufficiently legible to determine when the document was prepared.16

Requirements Concerning Proof of Holographic Wills

In some jurisdictions, both testamentary and signatory intent must appear from intrinsic evidence on the face of the holographic will, while more liberal states permit extrinsic evidence.17 UPC jurisdictions, such as Colorado, generally permit both intrinsic evidence and extrinsic evidence as to the testator's signatory intent and testamentary intent.

A starting point for examining intrinsic evidence should be an evaluation of the completeness of the holographic document —for example, whether it included: (1) a residuary clause; (2) a clause appointing a personal representative; (3) a place at the end for the testator's signature; (4) a place for witnesses' signatures; and (5) space for notarization. The words that precede as well as follow the testator's name also can constitute intrinsic evidence.

An examination of extrinsic evidence would include prior wills of the decedent. Such issues might include an examination of whether: (1) the testator had a history of writing holographic wills or whether all prior wills were typed and prepared by attorneys; (2) prior drafts of handwritten wills were mailed to family members; (3) the testator made statements to witnesses regarding the holographic document before and at the time the document was prepared; (4) witnesses made statements as to their belief that the document the testator prepared was intended to be his or her last will; (5) any statements were made by the testator to the custodian of the will during the delivery of the document; and (6) the acts of the testator were consistent with the notion that the holographic document was his or her last will.

Signature Requirement, Completeness, and Intent

All states that recognize holographic wills require that the testator's signature be handwritten.18 Although the trend of most courts and legislatures throughout the United States is toward greater flexibility in accepting a variety of documents as holographic wills, the testator's signature remains an essential requirement. The signature represents

demonstrative evidence that the testator signed the holographic will with intent to authenticate the document.

Some states require that the testator's signature appear at the end of the will.19 However, the vast majority of states, including Colorado, do not require the testator to sign at any particular location on the writing.20 Thus, a name written in the exordium clause or in the body of a will, regardless of its location, sometimes may be held to be sufficient.

The Utah Supreme Court, in *In re Estate of Erickson*,21 held that the written name in an exordium clause was a signature only if it was made with the intent to authenticate the will. By contrast, signatory intent may be inferred where a signature is at the end of the instrument. For a signature appearing elsewhere, including in the exordium clause, evidence of completeness of the document is essential. If the document is not a complete testamentary instrument, no inference of validity attaches to a handwritten name located other than at the end. The *Erickson* court specifically noted that the Utah Probate Code had liberalized the UPC. The Court cited the Utah editorial board comments, which stated that the basic intent of these sections is to validate the will whenever possible.

In *Erickson*, the document in question consisted of three index cards. The cards could be interchanged, and they contained nothing to indicate that the decedent had finished his writing. Thus, there was no way to tell if the instrument actually ended at the bottom of the third card. There was neither an attestation clause nor a final note, which often are present in documents validated as holographic wills. The proponent's only evidence regarding the decedent's intent were the index cards and extrinsic evidence that the handwritten name matched the decedent's signature on checks and other business documents.

The *Erickson* court applied a two-step analysis to determine if the decedent had the signatory intent necessary to execute a will. The Court first looked to the extrinsic evidence, including documentary evidence and the testimony of witnesses regarding the purpose behind the signing. Second, it looked to evidence intrinsic to the instrument that would support an inference of signatory intent. The Court concluded that the instrument as a whole did not contain sufficient indicia of completeness to support an inference that the testator intended his name in the exordium clause to be his signature.

Erickson also is a noteworthy holographic will opinion because the Court stated that completeness of a document purporting to be a will is not determined by whether the instrument disposes of all of the decedent's property.22 Other states have held that completeness *does* depend on whether a purported will provides for distribution of all of a testator's assets.23

Acknowledgement of Unsigned Wills By Witnesses

A number of cases in other states have addressed the validity of holographic wills where, although the testator's name appears only in the exordium clause, the will is witnessed or the testator's signatory intent is supported by credible extrinsic evidence. The Virginia Supreme Court, in *Forrest v. Turner*,24 upheld a holographic will where the decedent's signature appeared only in the exordium clause. The decedent had delivered the will with instructions to Forrest, the proponent, to "take care of it." The testator acknowledged the document as his will to Forrest and

another person. Forrest also was present when the testator created the document.

Similarly, the Iowa Supreme Court, in *In re Johnson's Estate*,25 upheld an unsigned holographic instrument that included an attestation clause signed by two witnesses. The testator acknowledged to the witnesses that the instrument was his will and placed it in an envelope on which he wrote "Will of D. D. Johnson" in front of the witnesses.

In *Slate v. Titmus*,26 the Virginia Supreme Court held that the words "given my hand" located in the exordium clause followed by the testator's name indicated authentication of the testator's name as his signature.27 The West Virginia Supreme Court in *Clark v. Studenwalt*28 upheld an instrument that was not signed by the testator that included the words "Witnesses [*sic*] By names below," after which the testator had drawn two signature lines. Significantly, both witnesses affirmed in sworn affidavits that they knew they were signing a will as witnesses.

The Illinois Supreme Court, in *Bamberger v. Barbour*,29 refused to uphold the probate of a holographic will where the decedent's name appeared in the exordium clause even though the will was witnessed. The decedent, while hospitalized, requested that two friends witness his holographic will. The Court looked at a number of cases from other states, which provided that where the name is at the beginning of the instrument, it must be proved that the signing was made with the intent of validating the instrument. None of the witnesses could verify that the name in the will's exordium clause was intended to be an execution of a completed will. The Court held the will invalid, even in light of the testimony of a witness to the will that the testator stated to her, "This is my will; take it and sign it."30

In *In re Estate of Cunningham*,31 the document at issue was a pre-printed will form in which the first and last clauses, plus the attestation clause, were printed and the balance was totally handwritten.32 The decedent obtained a signature of a notary (who was a realtor) on the line provided for his own signature. In addition to the notary's signature and a second witness's signature, a notary seal was embossed over the word "seal" at the end of the line where the testator was to sign. In upholding the validity of the document as a will, the New Jersey Supreme Court stated:

> It can reasonably be inferred that the testator identified the writing as his will to the realtor. . . . Although it is apparent that the decedent was not completely familiar with the formal requirements for the execution of a will, he obviously was of the impression that it required two signatures and possibly believed that an acknowledgment by a Notary Public was also necessary.33

The varied outcomes of cases addressing the proof of holographic wills are classic examples of equity jurisprudence. These cases illustrate how the consideration of circumstances of each case ultimately determines the validity of holographic wills.

Other Factors Used to Determine Holographic Will Validity

Courts, including Colorado, generally look to extrinsic evidence when determining whether a holographic document is a valid will. Such evidence sometimes includes the location where the purported will was found or whether the decedent delivered the purported will to another individual

after writing it.

Location of Will

Several North Carolina cases upheld holographic wills where the wills were found with the decedent's valuable papers. In the case of *Alexander v. Johnston*,34 the North Carolina Supreme Court upheld the decedent's will, which was found with her valuable papers. Prior to her death, the decedent had stated to others that she had made a will and told them where it could be found.

In another North Carolina Supreme Court case, *In re Lowrance's Will*,35 the Court upheld a holographic will in an envelope, stating, "the paper must be found after death among the valuable papers of the deceased or deposited with some person for safekeeping."36 The Court held that the location of a will furnishes evidence that the deceased attached importance to the paper as a testamentary disposition and lessens the opportunity for fraud or imposition.

Delivery

Some courts have placed much emphasis on the delivery of the will after its preparation. In most of these cases, the will was delivered to third parties and accompanied by some form of declaration from the testator to the third party, such as, "This is my will; keep it in a safe place."

The Texas Court of Civil Appeals, in *In re Estate of Brown*,37 upheld a holographic will where the testatrix, before signing the envelope, advised witnesses at a bank, "If anything happens to me, this is yours."38 The envelope was then delivered to the testatrix's attorney prior to the decedent's hospitalization.

In *Smith v. MacDonald*,39 the Arkansas Supreme Court upheld an unsigned holographic will that contained the decedent's name in the exordium clause where the decedent prepared the document, then delivered it to her attorney, declaring the document to be her will. In *Forrest*,40 the Virginia Supreme Court upheld a will where two witnesses observed the testator prepare the holographic will and the testator then handed it to another witness and told her "to take care of it."41

Conclusion

The first part of this article is intended to give practitioners an overview of the criteria considered by courts in determining the validity of holographic wills. However, it should be noted that validity must be determined on a case-by-case basis. The second part of this article, which will appear in this column next month, will illustrate, through the use of several examples, the many varieties of holographic and other non-witnessed wills. It also will examine the criteria used by courts in determining whether particular documents should be admitted to probate.

NOTES

1. Quotation attributed to "a well-known author on wills," Harris, *Ancient, Curious and Famous Wills* (Boston, MA: Little Brown, 1911) at 9.

2. Many other states have incorporated portions of the UPC into their probate statutes.

3. *See Restatement of the Law (Third) of Property (Wills and other Donative Transfers)* § 3.2, Comment a, which discusses the holographic will section from UPC II. That section was enacted in Colorado in 1995 as CRS § 15-11-502(2).

4. *Estate of Krueger*, 529 N.W.2d 151, 153 (N.D. 1995).

5. *Id., citing Webster's 3rd New International Dictionary.*

6. CRS § 15-12-407.

7. CRS § 15-10-102.

8. *In re Estate of Sky Dancer*, 13 P.3d 1231 (Colo.App. 2000).

9. *Estate of Fegley*, 589 P.2d 80 (Colo.App. 1978).

10. Id. *at 81.*

11. *Estate of Harrington*, 850 P.2d 158 (Colo. App. 1993).

12. *Id.* at 160.

13. *Estate of Olschansky*, 735 P.2d 927, 929 (Colo.App. 1987).

14. *See* La. Civ. Code Ann. Art. 1588; Mich. Comp. Laws Ann. § 700.123; Neb. Rev.Stat. § 30-2328; Nev. Rev.Stat.Ann. § 133.090; Okla. Stat.Ann. Tit. 84, § 54; P.R. Laws Ann. Tit. 31, § 2161; S.D. Codified Laws Ann. § 29-2-8.

15. *Estate of Grobman*, 635 P.2d 231 (Colo. App. 1981).

16. *Id.* Absent from the Court of Appeals' decision is the fact that the holographic document consisted of several sheets of paper, one of which was signed by the decedent, the other by a third party. The trial court held that the proponent had failed to meet an additional burden of establishing that the document was not a two-party contract.

17. Langbein, "Substantial Compliance with the Wills Act," 88 *Harv. L.Rev.* 489, 491 (1975).

18. Alaska Stat. § 13.11.160; Ariz. Rev.Stat. Ann. § 14-2503; Ark. Stat.Ann. § 60-404; Cal. Prob. Code § 6111; CRS § 15-11-502; Idaho Code § 15-2-503; Ky. Rev.Stat.Ann. § 394.040; La. Civ. Code Ann. Art. 1588; Me. Rev.Stat.Ann. Tit.18-A, § 2-503; Mich. Comp. Laws Ann. § 700.123; Miss. Code Ann. § 91-5-1; Mont. Code Ann. § 72-2-303; Neb. Rev.Stat. § 30-2328; Nev. Rev. Stat.Ann. § 133.090; N.J. Stat.Ann. § 3b:3-3; N.C. Gen.Stat. § 31-3.4; N.D. Cent. Code § 30.1-08-03; Okla. Stat.Ann. Tit. 84, § 54; P.R. Laws Ann. Tit. 31, §§ 2143, 2161; S.D. Codified Laws Ann. § 29-2-8; Tenn. Code Ann. § 32-1-105; Tex. Prob. Code Ann. § 60; Utah Code Ann. § 75-2-503; Va. Code Ann. § 64.1-49; W. Va. Code § 41-1-3; Wyo. Stat. § 2-6-113.

19. Ky. Rev.Stat.Ann § 446.060; Mich. Comp. Laws Ann. § 700.123.

20. *See* Alaska Stat. § 13.11.160; Ariz. Rev. Stat.Ann. § 14-2503; Ark. Stat.Ann. § 60-404; Cal. Prob. Code § 6111; CRS § 15-11-502; Idaho Code § 15-2-503; La. Civ. Code Ann. Art. 1588; Me. Rev.Stat.Ann. Tit. 18-A, § 2-503; Mont. Code Ann. § 72-2-303; Neb. Rev.Stat. § 30-2328; Nev. Rev.Stat.Ann. § 133.090; N.J. Stat.Ann. § 3b:3-3; N.C. Gen.Stat. § 31-3.4; N.D. Cent. Code § 30.1-08-03; Okla. Stat.Ann. Tit. 84, § 54; S.D. Codified Laws Ann. § 29-2-8; Tenn. Code Ann. § 32-1-105; Tex. Prob. Code Ann. § 60; Utah Code Ann. § 75-2-503; Va. Code Ann. § 64.1-49; W. Va. Code § 41-1-3; Wyo. Stat. § 2-6-113.

21. *Estate of Erickson*, 806 P.2d 1186 (Utah 1991).

22. *Id. Cf. Payne v. Rice*, 171 S.E.2d 826 (Va. 1970), *citing* as authority *McElroy v. Roltson*, 34 S.E.2d 241 (Va. 1945); and *Hamlet v. Hamlet*, 32 S.E.2d 729 (Va. 1945).

23. *See, e.g., Payne v. Rice, supra*, note 22.

24. *Forrest*, 133 S.E. 69 (Va. 1926).

25. *Johnson's Estate*, 229 N.W. 261 (Iowa 1930).

26. *Slate*, 385 S.E.2d 590 (Va. 1989).

27. *Id.*

28. *Clark*, 419 S.E.2d 308 (W. Va. 1992).

29. *Bamberger*, 167 N.E. 122 (Ill. 1929).

30. *Id.*

31. *Estate of Cunningham*, 487 A.2d 777 (N.J. 1984)

32. *Id.*

33. *Id.* at 778.

34. *Alexander*, 88 S.E. 785 (N.C. 1916).

35. *Lowrance's Will*, 155 S.E. 876 (N.C. 1930). *See also In re Gatling's Will*, 68 S.E.2d 301 (N.C. 1951) (upholding will in envelope found in lock box of decedent).

36. *Lowrance's Will, supra*, note 35 at 878.

37. *Estate of Brown*, 507 S.W.2d 801 (Tex.App. 1974).

38. *Id.* at 802.

39. *Smith*, 481 S.W.2d 741 (Ark. 1972).

40. *Forrest, supra*, note 24.

41. *Id.*

Back