The New Holographic Will in California: Has It Outlived Its Usefulness

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COMMENTS

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INTRODUCTION

Traditionally, a holographic will was defined as an unattested will completely in the handwriting of the testator. Presently, a minority of states permit their use. In these jurisdictions, the holograph has consistently spawned litigation.

In California, early courts looked upon the holograph with disfavor. These courts strictly interpreted the holographic will statute. Any printed material in the holograph, including letterheads, invalidated the instrument. The result led to a denial of a decedent’s intentions due to minor flaws in the instrument.

Gradually, courts seeking to avoid these harsh results, began interpreting the holographic will statute more liberally. This trend reached its apex with the recent California Supreme Court decision in Estate of Black. In Black, the supreme court upheld the validity of a holograph written on a printed will form. In order to reach their result, the Black court liberally interpreted the

1. Unattested refers to the fact that the will does not require any subscribing witnesses. A subscribing witness is one who witnesses the signature of a party to an instrument, and in testimony thereof, signs his own name to the document.

2. CAL. CIV. CODE § 1277 (1872) provided:
   An olographic 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. (Older cases and statutes used the spelling “olograph” rather than the present day spelling “holograph”).


5. See infra notes 37-44 and accompanying text.

6. Id.

7. Id.

8. See infra notes 45-68 and accompanying text.


10. Id.
California holographic will statute.\textsuperscript{11} The dissent argued this was not a liberal interpretation but rather an emasculation of clear legislative intent.\textsuperscript{12}

In response to the supreme court’s decision, the California legislature recently repealed the statutory requirements regarding holographs and enacted new legislation defining the standards of holographic wills.\textsuperscript{13} The new legislation requires only the signature and material portions of the holograph be handwritten.\textsuperscript{14} This represents a dramatic liberalization of the holographic will requirements. The result will allow instruments previously denied probate validity as holographs. However, the question remains: whether the liberalization of the holographic will requirements will create more burdens and problems than it was designed to remedy.

This Comment will first trace the history and development of the holographic will in California, with particular emphasis on \textit{Estate of Black}.\textsuperscript{15} Next, this Comment will discuss the advantages and disadvantages of the new legislation and, in light of this analysis, will conclude that the attempt by the California legislature does not solve the problems it was designed to remedy. Finally, alternative methods of handling the problems encountered with holographic wills will be proposed.

I. HISTORY AND DEVELOPMENT OF THE HOLOGRAPHIC WILL IN CALIFORNIA

As mentioned previously, a holographic will is an unattested

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 882, 641 P.2d at 756, 181 Cal. Rptr. at 224. The court noted the “greater liberality in accepting a writing as an holographic will . . .” \textit{Id.} (citation omitted).
\item \textsuperscript{12} \textit{Id.} at 889, 641 P.2d at 763, 181 Cal. Rptr. at 231 (Mosk, J., dissenting).
\item \textsuperscript{13} CAL. PROB. CODE § 53 (West Supp. 1984) provides:
\begin{enumerate}
\item A will which does not comply with Section 50 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.
\item If a holographic will does not contain a statement as to the date of its execution and:
\begin{enumerate}
\item If such failure results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of such inconsistency unless the time of its execution is established to be after the date of execution of the other will.
\item 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.
\end{enumerate}
\item As used in this section, “will” includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.
\end{enumerate}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982).
\end{itemize}
will which must be in the handwriting of the testator. Thus the major distinction between a holographic will and a formally executed will is that the holograph does not require subscribing witnesses. Of course, the testator must have the requisite testamentary intent and capacity at the time of execution of the holograph. The holograph can perform the same functions as a formally attested will. It may dispose of property, appoint an executor or guardian, or revoke or revive a prior will.

The requirement that a will be witnessed serves ritual, evidentiary and protective functions. As a holograph need not be witnessed, there is an increased danger of fraud or forgery. For this reason, holographs are permitted in a minority of states but only to the extent authorized by statute. In the states authorizing holographs, the requirement that the holograph be in the handwriting of the testator is deemed to serve the same functions as attestation. The danger of fraud of forgery is lessened since a successful counterfeit of another's handwriting is exceedingly difficult.

Historically, California statutes have required holographs to be entirely written by the hand of the testator. However, the fact that there is also printed matter in the holograph does not necessarily invalidate it. In deciding whether printed matter will invalidate a holograph, courts have used either one of two theories: the "surplusage" theory or the "intent" theory. The surplusage theory, adopted by the new legislation, disregards the printed matter.

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16. 2 J. BOWE & O. PARKER, PAGE ON WILLS § 20.1 (1960) [hereinafter cited as PAGE ON WILLS].
17. Id. at § 20.10.
18. Estate of French, 225 Cal. App. 2d 9, 36 Cal. Rptr. 908 (Ct. App. 1964). Courts have been very liberal in admitting extrinsic evidence to show intent. Id. at 16, 36 Cal. Rptr. at 912 (citations omitted).
19. PAGE ON WILLS supra note 16, at § 20.3.
21. Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 5-9 (1941) [hereinafter cited as Gratuitous Transfers].
22. Bird, Sleight of Handwriting, supra note 4, at 608-10.
23. PAGE ON WILLS, supra note 16, at § 20.4.
24. See supra note 3.
26. Estate of Dreyfus, 175 Cal. 417, 419, 165 P. 941, 942 (1917). The instrument was denied probate as the court felt the danger of prejudice was great. The instrument had been entirely typewritten with the exception of the handwritten date and signature. "Written" is strictly interpreted to mean handwritten, precluding the use of typewriters or "any sort of printing by the use of type, whether on a printing-press or placed at the end of a rod manipulated by keys." Id. at 419, 165 P. at 942. Bird, Sleight of Handwriting, supra note 4, at 610.
27. See infra notes 52, 53 and accompanying text.
28. See infra notes 52, 53 and accompanying text.
29. ATKINSON ON WILLS, supra note 25, at § 75.
provided enough handwritten words remain to be given effect.\textsuperscript{30} Therefore, as long as the printed matter is not material to the will, it will be disregarded as surplusage and the validity of the holograph will be upheld.\textsuperscript{31}

California, however, had long been a proponent of the intent theory.\textsuperscript{32} The intent theory provides that if the testator intended to incorporate the printed matter into the holograph, the entire instrument is invalid.\textsuperscript{33} This is true regardless of whether the printed matter is necessary for an understanding of the will.\textsuperscript{34}

In California, holographic wills were first authorized by statute in 1872.\textsuperscript{35} The initial statute required the will to be entirely written, dated, and signed by the testator.\textsuperscript{36} Early cases strictly applied the intent theory.\textsuperscript{37} In the case of \textit{In re Bernard's Estate},\textsuperscript{38} the decedent's holograph was written on hotel stationery which contained the printed words “Long Beach, California.”\textsuperscript{39} On the same line as the letterhead, decedent had written the date.\textsuperscript{40} The California Supreme Court concluded that as the handwritten date and the printed letterhead were on the same line, the decedent had intended to incorporate the printed heading.\textsuperscript{41} The holograph was therefore not entirely in the handwriting of the decedent and was invalid.\textsuperscript{42} In these early cases, any printed matter in the holograph was usually held to have been incorporated.\textsuperscript{43} The result was that many holographs were declared invalid.\textsuperscript{44}

Seeking to avoid these harsh results, the California Supreme Court in \textit{In re DeCaccia Estate}\textsuperscript{45} applied a more lenient interpretation of the intent theory. In \textit{DeCaccia}, as in \textit{Bernard}, the entire
will was handwritten except for the printed words "Oakland, California." Next to this heading the decedent had written the date. The court held, if the printed words formed no part of the written instrument, and no reference was made to them, their mere presence would not invalidate the will. Therefore, printed words would not invalidate a holograph unless the testator intended they be incorporated into the will. The mere fact the printed and handwritten words were on the same line was no longer sufficient evidence of the decedent's intent to incorporate. Thus the instrument in DeCaccia was upheld as a valid holographic will.

Subsequently, in 1931, the DeCaccia holding was codified in the California Probate Code. It read:

A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will.

The statute required the court to determine the decedent's intent. If the decedent did not intend to incorporate the printed matter, it was disregarded and the validity of the will was upheld. Courts have looked to several factors in determining a decedent's intent. The intent to incorporate may be shown, if the handwritten provisions refer to the printed matter or can be inferred from the location of the printed matter. While in most cases location alone is not determinative, it is a factor to be considered by the court. In those cases where the decedent filled in the blanks on a printed form, location has been held as prima facie evidence of incorporation. The intent theory gave courts

46. Id. at 721, 273 P. at 553.
47. Id.
48. Id. at 726, 273 P. at 555.
49. See Id.
50. See Id.
51. Id.
52. CAL. PROB. CODE § 53 (West 1956) (repealed 1982).
53. Id.
54. In re Whitney's Estate, 103 Cal. App. 577, 284 P. 1067 (Ct. App. 1930). Letterhead on office stationery was held not to have been incorporated.
flexibility while also providing them with an easily discernible test. It has been applied with little difficulty in numerous cases.58 However, in 1966, the California Supreme Court in Estate of Baker59 began moving away from the intent theory and towards the surplusage theory. The decedent in Baker wrote his will on hotel stationery on which the hotel’s name and location were printed.60 The letterhead read:

AAA
Approved

Hotel Covell
Modesto, California61

The decedent crossed out everything but the words “Modesto, California.”62 While Baker could have been decided under the existing intent theory63 focusing on the testator’s intent to incorporate the printed words, the court instead created and applied a hybrid of the intent and surplusage theories. The court stated that printed words would not invalidate a holograph unless such words were (a) incorporated, and (b) relevant to the holograph’s substance or essential to its validity as a will.64 The Baker court thus added a requirement that the printed words be relevant or essential, although the statute contained no such language.65 The Baker test has been termed the objective intent theory.66 It is not the true surplusage theory as the court must still determine whether the decedent intended to incorporate the printed matter.67 Under a strict surplusage theory, the court’s analysis would end after determining relevance.68

The appellate courts of California have expressed reluctance and dissatisfaction in applying the Baker test.69 In In re Helmar’s

60. Id. at 682, 381 P.2d at 914, 31 Cal. Rptr. at 34.
61. Id.
62. Id.
63. Id. at 683-84, 381 P.2d at 915, 31 Cal. Rptr. at 35. The court stated: “decedent did not refer to or adopt them [referring to the words ‘Modesto, California’] as a part of the ‘provisions which are in the handwriting of the decedent.’” Id. (citation omitted).
64. Id. at 685, 381 P.2d at 915, 31 Cal. Rptr. at 35. See supra notes 52, 53 and accompanying text.
65. Bird, Sleight of Handwriting, supra note 4, at 623.
67. See supra notes 59-68 and accompanying text.
Estate the court denied probate to a holograph written entirely by the decedent with the exception of a typewritten exordium clause. Applying Baker, the instrument should have been upheld as a valid holograph; the exordium clause was not relevant to the holograph’s substance or essential to its validity. The court however, refused to apply the Baker test. They held the printed exordium clause had been incorporated and therefore this was fatal to the validity of the holograph. As for its reasons for not applying the relevance test of Baker, the court stated it: “would require us to further erode the requirements of section 53 under the guise of liberal judicial interpretation of an unambiguous expression of legislative intent.”

In Estate of Christian, the decedent used a printed will form to dispose of his property. The decedent filled in the blanks in the exordium clause, disposed of his property in a handwritten clause and then filled in the blanks in the executor clause. In applying the two-part Baker test the court concluded the printed words in the executor clause had been incorporated and relevant to the substance of the will. The court reasoned that as the handwritten words only made sense when read in conjunction with the printed words, the printed words must have been incorporated. The second part of the test was to determine whether this clause was relevant to the substance of the will. The court held the term “substance” must be broadly construed to include all provisions material to the administration and distribution of the estate. To hold otherwise, the court argued, would be to “emasculate the statutory requirement that the will be entirely written in the testator’s handwriting.” As the executor clause had been incorporated and was relevant to the substance of the will, the holograph was denied probate.

One can see the Helmar and Christian appellate courts’ refusal to apply the Baker test does not stem from their dissatisfaction

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[71] Id. at 112, 109 Cal. Rptr. at 7.
[72] Id. at 114, 109 Cal. Rptr. at 9.
[73] Id.
[75] Id. at 977, 131 Cal. Rptr. at 842.
[76] See supra notes 59-68 and accompanying text.
[77] Christian, 60 Cal. App. 3d at 981-82, 131 Cal. Rptr. at 844-45.
[78] Id. at 981, 131 Cal. Rptr. at 844.
[79] Id. at 981-82, 131 Cal. Rptr. at 844-45.
[80] Id. at 982, 131 Cal. Rptr. at 845.
[81] Id.
[82] Id.
with the test itself, but rather with what they viewed as emasculation of clear legislative intent.\textsuperscript{83} Thus, the implications of \textit{Baker},\textsuperscript{84} and the lean towards the surplusage theory, had been greatly restricted. However, in \textit{Estate of Black},\textsuperscript{85} the supreme court clearly restated their preference for the surplusage theory.

In \textit{Black}, the decedent used three copies of a printed will form as her testamentary instrument.\textsuperscript{86} In the blanks provided in the exordium clause of each page, the decedent inserted her signature and her place of domicile.\textsuperscript{87} This was followed by decedent’s handwritten disposition of her property.\textsuperscript{88} At the end of the third page decedent inserted in the appropriate blanks the name and gender of her executor.\textsuperscript{89}

The supreme court, in a four to three decision, reversed the trial and appellate courts’ denial of probate and concluded the instrument was a valid holograph.\textsuperscript{90} The court stated, in determining whether printed matter had been incorporated, that the court’s focus should not be on the decedent’s intent to include the printed matter into the instrument.\textsuperscript{91} Rather, the test is “whether, because of its [printed matter] importance or materiality to the testamentary message, he intended to include it.”\textsuperscript{92} The court concluded as the exordium and executor clauses were not necessary or material to decedent’s disposition of property, they had not been incorporated and could therefore be disregarded.\textsuperscript{93}

Thus \textit{Black} had taken the \textit{Baker} test\textsuperscript{94} one step further. The court will no longer look to the decedent’s intent, which was still an element of the \textit{Baker} test, but rather the test is whether the court views the printed matter as material to the disposition of the estate.\textsuperscript{95} The move to the surplusage theory was complete.

\section{II. \textsc{California Probate Code Section 53 and the Surplusage Theory}}

Shortly after \textit{Black}, the California legislature repealed the old statute and enacted the new legislation. The new legislation fol-

\begin{itemize}
\item \textsuperscript{83} See supra notes 73, 81 and accompanying text.
\item \textsuperscript{84} See supra notes 59-68 and accompanying text.
\item \textsuperscript{85} 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982).
\item \textsuperscript{86} \textit{Id.} at 909-11, 641 P.2d at 760-62, 181 Cal. Rptr. at 228-30.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.} at 911, 641 P.2d at 762, 181 Cal. Rptr. at 230.
\item \textsuperscript{90} \textit{Id.} at 888, 641 P.2d at 759, 181 Cal. Rptr. at 227.
\item \textsuperscript{91} \textit{Id.} at 885-86, 641 P.2d at 757, 181 Cal. Rptr. at 225.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} See supra notes 59-68 and accompanying text.
\item \textsuperscript{95} See supra note 92 and accompanying text.
\end{itemize}
follows Black and represents a codification of the surplusage theory in its most liberal form. Following the model set forth in the Uniform Probate Code, the new legislation reads: "A will which does not comply with Section 50 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

Under the old legislation, holographic wills had to be entirely written, dated and signed by the testator." If printed matter was incorporated the will was invalid (intent theory). Now, only the signature and material provisions of the holograph need be written by the testator. Printed matter will be disregarded if it is not material to the validity of the will (surplusage theory).

As a result of this liberal interpretation of holographs, instruments previously not entitled to probate will now be upheld as valid holographic wills. The advantages, as well as the disadvantages, that may result from relaxing the requirements of a holograph should therefore be examined.

A. Advantages

The new legislation has primarily two advantages. First, it will lessen the harsh results caused by the intent theory. Second, courts need no longer make a conjectural determination of the decedent's intent.

The prior legislation required the holograph to be entirely written by the testator. This often resulted in the invalidation of a holograph because a nonessential part of the will was printed. Thus, a holograph was denied probate where the day, month and last two digits of the year were handwritten but the first two digits of the year were printed. The result was the testator's intent was frustrated as his estate passed through intestacy.

California now requires only the signature and material provi-

96. Bird, Sleight of Handwriting, supra note 4, at 629.
100. See supra note 53 and accompanying text.
101. See supra notes 32-34 and accompanying text.
102. See supra note 99 and accompanying text.
103. See supra notes 29-31 and accompanying text.
104. See supra note 53 and accompanying text.
105. See supra notes 32-44 and accompanying text.
106. In re Francis' Estate, 191 Cal. 600, 217 P. 746 (1923). The date read 10,22,1919 with the italicized figure representing the printing.
107. Intestate statutes provide and prescribe the disposition of estates of persons who die without disposing of their estates by will.
sions be in the handwriting of the testator. Now, although printed matter is incorporated, if it is not material to the validity of the holograph it will be disregarded as surplusage. The instrument will be upheld as a valid holographic will and the remaining handwritten words will be given effect. Therefore, rather than the estate passing through the laws of intestacy, the decedent’s testamentary plan will be given effect.

In addition, under the old legislation and the intent theory, courts had to determine whether the decedent intended to incorporate the printed matter. Since there were no witnesses, courts had little to base their determination on other than the instrument itself. The common sense rules of interpretation aided courts in this determination but still required courts to interject their judgment of the decedent’s intent. Under the new legislation, the validity of a holograph does not turn on the decedent’s intent. This relieves courts of the “hazards and guess work of a conjectural determination of the deceased’s intent.”

B. Disadvantages

The new legislation and the surplusage theory will be applied in primarily two situations. It may be invoked to disregard printed words in a clause, giving effect to the remaining written words, or it may disregard the entire clause. In either situation, problems can be expected to arise.

In the former, printed matter will be disregarded and effect given to the handwritten words provided that sense can be made of the remaining handwritten words taken alone. In Black, to get the required signature, the court disregarded the printed words in the exordium clause and gave effect to the remaining handwritten words. The exordium clause read:

I, Frances B. Black of Long Beach in the County of Los Angeles and State of Calif. being of sound mind, memory and understanding, do make, publish and declare this to be my last Will and Testament, hereby revoking any and all former wills made

108. See supra notes 99-103 and accompanying text.
109. See supra notes 29-31, 99-103 and accompanying text.
110. Id.
111. See supra notes 32-34, 49-58 and accompanying text.
112. See supra notes 55-58 and accompanying text.
113. See supra notes 55-57.
114. Under the new legislation, the validity of the holograph turns on the materiality of the written and printed words.
115. PAGE ON WILLS, supra note 16, at § 20.5 at 288.
116. See supra notes 24-26 and accompanying text.
by me. Future courts might reach a contrary result as the signature might be held to lack the requisite testamentary intent. Regardless, the result of this approach is that courts are forced to make a case by case determination as to whether the written words, standing alone, are sufficient to be given effect. If the written words are intelligible after the court's editing, they will be given effect.

For the testator who relies on a printed will form, the result is even more nebulous. In Black, the court disregarded the entire executory clause. The clause read: "And Lastly, I do hereby constitute and appoint Dr. Gene Ray Bouch as my executor of my last Will and Testament, to so serve without Bond being required." If the decedent had written out the entire word "executor" there is a strong chance the clause would have been given effect. The handwritten words, standing alone, would then have read "Dr. Gene Ray Bouch as my executor." Therefore, the omission of six letters ("execut") resulted in the whole clause being disregarded and decedent's intentions not given effect.

The slim distinctions and judgments courts are forced to make under this approach can best be seen by a comparison of two Louisiana cases, Succession of Burke and Succession of Shows. In Shows, the decedent's holograph contained the written words

118. Id. at 909, 641 P.2d at 760, 181 Cal. Rptr. at 228.
119. Id. at 888, 641 P.2d at 758, 181 Cal. Rptr. at 226.
120. A signature must be accompanied by testamentary intent. It must affirmatively appear from the face of the instrument itself. Estate of Morgan, 200 Cal. 400, 401, 253 P. 702, 703 (1940); In re Kinney's Estate, 16 Cal. 2d 50, 52, 104 P.2d 782, 783 (1940). It must appear that the testator wrote his name there with the intention of authenticating or executing the instrument as his will. In re Glass' Estate, 165 Cal. App. 2d 380, 384, 331 P.2d 1045, 1048 (Ct. App. 1958). It appears that the Black court was very liberal in their interpretation of the signature. Given the language of the exordium clause, and the fact that each of the three pages were signed, it seems more likely the signature was meant solely to identify the decedent as the maker of the instrument. Future courts might not give such a liberal interpretation.
121. In Fairweather v. Nord, 388 S.W.2d 122 (Ky. Ct. App. 1965), after omitting the printed words, the holograph contained no dispositive words such as "give, devise or bequeath." The court deemed the written words sufficient without them. Id. at 124. Once again, every court might not be so liberal.
122. See Atkinson on Wills, supra note 25, § 75 at 358.
124. Id. at 911, 641 P.2d at 762, 181 Cal. Rptr. at 230 (emphasis added).
125. Id.
126. The court appointed an administrator with the will annexed rather than appointing Dr. Bouch as the will directed. Id. at 885, 641 P.2d at 757, 181 Cal. Rptr. at 225. The court appoints an administrator with the will annexed when a valid will fails to appoint a representative to carry out the terms of the will.
128. 246 La. 651, 166 So. 2d 261 (1964).
"All to My Sister" followed by decedent's signature. In Burke, the court disregarded the printed words on the will form, the handwritten words read "to my sister, Delia, my interest in property..." This holograph was probated as it was held to evidence the requisite testamentary intent. The Burke court distinguished Shows on the ground that the clause in Shows, "All to My Sister," could have been a reply to a question, such as; "To whom shall we send the bills?" The distinction and the court's reasoning appears unsupported by the evidence, as the holograph in Shows was attached to a bundle of papers, including various deeds to property and a savings account book.

In addition to the foregoing problems, the application of this "editing" approach is logically inconsistent. In Black, the court deemed the signature in the exordium clause as sufficient. Yet these are the same clauses the court considers immaterial and therefore disregards as surplusage. This contradiction caused Justice Mosk in the dissent to note: "Manifestly they [the majority] cannot have it both ways, and their attempt to do so merely emphasizes the insurmountable defects of the document here offered for probate."

Similar problems will arise when a court omits an entire clause. The new legislation permits a court to omit immaterial printed matter. However, the legislation gives no definition of "material." Therefore, courts must necessarily determine materiality on a case by case basis. What is material to one court may very well be surplusage to another. For example, in Christian, the holograph was denied probate as the printed executor clause was held to be material. However, in Black, the court reached a contrary result as to the materiality of the executor clause. The Christian test for "material" was construed to include those clauses affecting the administration and distribution of the es-

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129. Id. at 654, 166 So. 2d at 262.
130. Id. at 656-57, 166 So. 2d at 263.
131. Burke, 365 So. 2d at 860.
132. Id.
133. Id.
134. Shows, 246 La. at 655, 166 So. 2d at 262 (1964).
135. Black, 30 Cal. 3d at 888, 641 P.2d at 758, 181 Cal. Rptr. at 226.
136. Id. at 885, 641 P.2d at 757, 181 Cal. Rptr. at 225.
137. Id. at 906, 641 P.2d at 773, 181 Cal. Rptr. at 241 (Mosk, J., dissenting).
138. See supra notes 29-31, 107-10, 116 and accompanying text.
139. See supra note 13.
140. Bird, Sleight of Handwriting, supra note 4, at 629.
141. See supra notes 76-82 and accompanying text.
142. See supra notes 85-95 and accompanying text.
Black's test was more narrowly construed to include only those clauses affecting the distribution of the estate. It appears as though the Christian test finds more support in the case law and the new legislation. A will need not dispose of any property to be valid; it may merely appoint an executor or revise or revoke a prior will. The will is entitled to probate for purposes of administration of the estate. While an executor clause standing alone is entitled to probate, this same clause as part of another instrument, under Black, may be deemed immaterial and disregarded. This inconsistency leads to the conclusion that the Christian test for materiality will most likely be followed by courts in the future. Regardless, if courts cannot agree on the test to be used in determining materiality, it is doubtful whether their decisions will have any semblance of uniformity. As a result, the validity of a holograph will often depend on the court in which the instrument is offered for probate.

A court must now, as a matter of law, determine which clauses are material. Therefore, it is often forced to substitute its judgment and biases for that of the decedent. The result is the decedent's intent may be frustrated. In Black, the decedent clearly expressed her intention to have Dr. Bouch appointed executor. However, as the court deemed this clause immaterial, the court appointed an administrator with the will annexed. The importance of clauses in a will may vary in importance to the validity of the will. However, seemingly insignificant clauses may be of utmost importance to the decedent. For example, the appointment of a guardian for a couple with children is often the most important function of a will. Yet under the Black test for materiality, this clause would be excluded. Every clause in a will must be considered sufficiently important to the decedent or they would not have been included. Given the varied circumstances of individual decedents, courts should not substitute their judgment of decedent's intent for the decedent's.

143. See supra notes 76-82 and accompanying text.
144. See supra notes 85-95 and accompanying text.
146. 94 C.J.S. Wills § 131 (1956); see supra note 13.
147. McMahon v. State Bar, 39 Cal. 2d 367, 371, 246 P.2d 931, 933 (1952). Dispositive provisions of the will were invalid, yet the will was operative as it had appointed an executor.
148. See supra notes 74-82 and accompanying text.
149. See supra notes 138-48 and accompanying text.
150. Black, 30 Cal. 3d at 911, 641 P.2d at 762, 181 Cal. Rptr. at 230.
151. Id. at 885, 641 P.2d at 757, 181 Cal. Rptr. at 225; see supra note 126.
152. C.E.B., California Will Drafting § 7.9 at 302 (1982).
The problems resulting from this approach are best exemplified in another Louisiana case, *Girven v. Miller*.\(^{153}\) In *Girven* the court upheld the validity of a holograph by omitting a printed clause.\(^{154}\) As the handwritten provisions of the will were complete, the court gave decedent’s property outright to the person named in the will (Father Miller).\(^{155}\) However, the omitted printed clause contained instructions on how to dispose of the decedent’s property.\(^{156}\) These instructions clearly showed Father Miller was intended to be solely a trustee of the property and was never intended to be absolute owner.\(^{157}\) By disregarding the printed clause, the court had disposed of decedent’s property contrary to his intentions. Similar problems of this type can be expected to arise in California under the new legislation.

The new legislation has eliminated the requirement that a holograph be dated.\(^{158}\) Without the date requirement, two types of problems will arise: (a) when there are two instruments offered for probate, and the court must determine which was executed last and is thereby controlling; and (b) when the testamentary capacity of the decedent is in question.

By requiring a holograph to be dated, these questions were easily settled. Courts simply had to examine the holograph. Now, if the holograph is not dated, courts seemingly must resort to extrinsic evidence in order to reach their determination.\(^{159}\) The result will be an additional burden on our already overbooked courts.\(^{160}\) In addition, it also increases the potential for fraud as both beneficiaries and potential beneficiaries parade to the witness stand with their version of the facts.\(^{161}\)

In short, the new legislation and the surplusage theory provide a more liberal interpretation of holographs. This will result in more holographs being entitled to probate, accompanied by the
problems of proof inherent in an unattested will.162 In addition, courts are required to make a case by case determination as to materiality.163 For this reason, the new legislation and the surplusage theory are not likely to eliminate litigation in the jurisdictions adopting it.164

III. ALTERNATIVES

The new legislation and the surplusage theory do not solve the problems inherent in the holographic will. However, California does have alternatives which are preferable to the present legislation and the surplusage theory. They are:

a. abolishing the holograph as a testamentary instrument,

b. return to the old legislation and the intent theory.

While others have called for the abolition of the holograph,165 the timing in California has never been so right. The major benefit of holographic wills is that they provide a convenient and inexpensive way by which a layman may dispose of his property. However, holographic wills are a convenience to testators, not a necessity, as evidenced by the fact that only a minority of jurisdictions permit their use.166 By abolishing the holograph, testators need not resort to the more conventional (and expensive) means of executing a will by consulting an attorney. On January 1, 1983, California became the first state to authorize the use of statutory form wills.167 The simplicity and convenience which this form will offers should quickly make holographs impractical. The statutory form will sets out various clauses and provisions which the testator may or may not adopt.168 Included in this are clauses disposing of property as well as executory and guardianship provisions.169 The will also contains directions and instructions which should be easily discernible by laymen.170 In the event a testator does not understand the directions, the form suggests that he consult an attorney.171

The testator’s duties consist of reading the instructions, filling in the appropriate blanks, and having the will attested to by two wit-
nesses. Requiring the will to be attested is not a great burden in light of the simplicity which the form will offers. Although at the present time the statutory form will is limited in scope, it could be easily amended to cover most types of testamentary dispositions.

If the holographic will is to be kept in existence, perhaps California should return to the old legislation and the intent theory. While perhaps harsh in individual cases, the intent theory gives more definiteness and stability to an area that desperately requires it. Under the intent theory, a court must simply determine whether the testator intended to incorporate the printed matter. This determination and the rules of interpretation present a simpler task than determining whether the printed matter is material under the present statute.

The new legislation and the surplusage theory permit testators to utilize printed form wills yet offers them no definite result. This has been likened to a type of consumer fraud. The intent theory precludes the use of form wills as holographic instruments. However, this does not present a tremendous burden to a testator as he may now utilize the new statutory form will. Testators are therefore not greatly inconvenienced and courts receive the definiteness that attestation of a will provides.

**Conclusion**

This Comment suggests the holograph has outlived its usefulness. Holographic wills have historically been a troublesome area for probate courts. As has been established throughout this Comment, the new legislation, in conjunction with the surplusage theory, creates more problems than it was designed to remedy. Courts are forced to make case by case determinations as to the materiality of words and clauses. In addition, the new legislation requires only the signature and material portions of the ho-

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173. A testator may dispose of his property to his spouse, his children or to those relatives who would inherit under intestacy.
174. See supra notes 32-34, 53-58 and accompanying text.
175. ATKINSON ON WILLS, supra note 25, at § 75, at 358.
176. See supra notes 55-57 and accompanying text.
177. See supra notes 116-57 and accompanying text.
178. See supra notes 138-48 and accompanying text.
179. Bird, Sleight of Handwriting, supra note 4, at 632.
180. See supra notes 167-71 and accompanying text.
182. Bird, Sleight of Handwriting, supra note 4, at 632.
183. See supra notes 138-48 and accompanying text.
This will result in the probate of more holographs, accompanied by the problems of proof inherent in probating an unattested will. This problem is further compounded under the new legislation by the elimination of the date requirement.

Given these problems, California should seek to abolish or limit the use of holographic wills. A return to the old legislation and the intent theory will have the desired limiting effect. In addition, the intent theory provides courts with a more easily discernible standard than the surplusage theory.

If it is determined the holograph creates more problems than it solves, it should be abolished. Holographs are a convenience to testators not a necessity. The new statutory form will offers testators this same convenience while eliminating many of the problems inherent in the holograph.

The holographic will no longer meets today's needs. It has been replaced by a more efficient instrument—the statutory form will. California should abolish the holographic will or alternatively limit its use.

Robert P. Kirk, Jr.

184. See supra note 13.
185. See supra note 162.
186. See supra note 13.
187. See supra notes 167-73 and accompanying text.
APPENDIX A

CALIFORNIA STATUTORY WILL

NOTICE to the person who signs this will:

1. It may be in your best interest to consult with a California lawyer because this Statutory Will has serious legal effects on your family and property.

2. This will does not dispose of property which passes on your death to any person by operation of law or by any contract. For example, the will does not dispose of joint tenancy assets or your spouse's share of community property, and it will not normally apply to proceeds of life insurance on your life or your retirement plan benefits.

3. This will is not designed to reduce death taxes or any other taxes. You should discuss the tax results of your decisions with a competent tax advisor.

4. You cannot change, delete, or add words to the face of this California Statutory Will. You may revoke this California Statutory Will and you may amend it by codicil.

5. If there is anything in this will that you do not understand, you should ask a lawyer to explain it to you.

6. The full text of this California Statutory Will, the definitions and rules of construction, the property disposition clauses, and the mandatory clauses follow the end of this will and are contained in the Probate Code of California.

7. The Witnesses to this will should not be people who will receive property under this will. You should carefully read and follow the procedure described at the end of this will. All of the witnesses must witness you sign this will.

8. You should keep this will in your safe deposit box or other safe place.

9. This will treats most adopted children as if they are natural children.

10. If you marry or divorce after you sign this will, you should make and sign a new will.

11. If you have children under 21 years of age, you may wish to use the California Statutory Will with Trust or another type of will.

INSTRUCTIONS contained in California Probate Code Sections 56.1, 56.2, 56.4, and 56.6:

1. Any person of sound mind and over the age of 18 may execute a California Statutory Will under the provisions of this chapter.

2. The only method of executing a California Statutory Will is for the following to occur:
   (a) The testator shall do the following:
       (1) Complete the appropriate blanks.
       (2) Sign the will.
   (b) The witnesses shall do the following:
       (1) Observe the testator's signing.
       (2) Sign their names in the presence of the testator.

   The execution of the attestation clause provided in the California Statutory Will by two or more witnesses shall satisfy Section 329.

3. If more than one property disposition clause appearing in paragraph 2.3 of a California Statutory Will Form is selected, or if none is selected, the property of a testator who signs a California Statutory Will shall be distributed to the testator's heirs as if the testator did not make a will.

4. (a) A California Statutory Will may be revoked and may be amended by codicil in the same manner as other wills.
   (b) Any additions to or deletions from the California Statutory Will on the face of the California Statutory Will Form, other than in accordance with the instructions, shall be ineffective and shall be disregarded.
CALIFORNIA STATUTORY WILL OF

(Inset Your Name)

ARTICLE I. DECLARATION
This is my will and I revoke any prior wills and codicils.

ARTICLE 2. Disposition of My Property

2.1 PERSONAL AND HOUSEHOLD ITEMS.
I give all my furniture, furnishings, household items, personal automobiles and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2 CASH GIFT TO A PERSON OR CHARITY.
I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made.

No death tax shall be paid from this gift.

2.3 ALL OTHER ASSETS, (MY "RESIDUARY ESTATE").
I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will go under Property Disposition Clause (c) and I realize that means the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)
(a) TO MY SPOUSE, IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD
(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING
(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL

ARTICLE 3. NOMINATIONS OF EXECUTOR AND GUARDIAN

3.1 EXECUTOR (Name at least one.)
I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR
SECOND EXECUTOR
THIRD EXECUTOR
3.2 GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual names in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then the others shall serve in the order I list them in the other boxes.

FIRST GUARDIAN OF THE PERSON

FIRST GUARDIAN OF THE PROPERTY

SECOND GUARDIAN OF THE PERSON

SECOND GUARDIAN OF THE PROPERTY

THIRD GUARDIAN OF THE PERSON

THIRD GUARDIAN OF THE PROPERTY

3.3 BOND

My signature in this box means that a bond is not required for any individual executor or guardian named in this will. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code.

I sign my name to this California Statutory Will on __________________________ at __________________________

City State

Signature of Testator

STATEMENT OF WITNESSES

(You must use two adult witnesses and three would be preferable.)

Each of us declares under penalty of perjury under the laws of California that the testator signed this California Statutory Will in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature __________________________ Residence Address __________________________

Print Name Here:

Signature __________________________ Residence Address __________________________

Print Name Here:

Signature __________________________ Residence Address __________________________

Print Name Here:

Notice to Testator: The Witnesses shall do the following: (1) Observe the testator's signing. (2) Sign their names in the presence of the testator.
Definitions and Rules of Construction

The following definitions and rules of construction shall apply to this California Statutory Will unless the context clearly requires otherwise:
(a) "Testator" means any person choosing to adopt a California statutory will.
(b) "Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.
(c) "Executor" means both the person so designated in a California statutory will and any other person acting at any time as the executor or administrator under a California statutory will.
(d) "Trustee" means both the person so designated in a California statutory will and any other person acting at any time as the trustee under a California statutory will.
(e) "Descendants" means children, grandchildren, and their lineal descendants of all degrees.
(f) A class designation of "descendants" or "children" includes (1) persons legally adopted into the testator's family during minority and (2) persons naturally born into the class (in or out of wedlock). The reference to "descendants" in the plural includes a single descendant where the context so requires.
(g) Masculine pronouns include feminine, and plural and singular words include each other, where appropriate.
(h) If a California statutory will states that a person shall perform an act, the person is required to perform that act. If a California statutory will states that a person may do an act, the person's decision to do or not to do the act shall be made in the exercise of the person's credit terms; (B) lease estate assets without restriction as required to perform granted under the Independent Administration of Estate Assets Act of any state.
(i) Whenever a distribution under a California statutory will is to be made to a person's descendants, the property is to be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner.
(j) "Person" includes individuals and institutions.

Property Disposition Clauses

1. The following is the full text of paragraph 2.1 of this California Statutory Will:
   If my spouse survives me, I give my spouse all my books, jewelry, clothing, personal automobiles, household furnishings, effects, and other tangible articles of a household or personal use. If my spouse does not survive me, the executor shall distribute those items among my children who survive me, and shall distribute those items in as nearly equal shares as feasible in the executor's discretion. If none of my children survive me, the items described in this paragraph shall become part of the residuary estate.
2. The following are the full texts of the Property Disposition Clauses referred to in paragraph 2.3 of this California Statutory Will:
   (a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.
      If my spouse survives me, then I give all my residuary estate to my spouse. If my spouse does not survive me, then I give all my residuary estate to my descendants who survive me.
      (b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD, I LEAVE NOTHING TO MY SPOUSE, IF LIVING.
      I give all my residuary estate to my descendants who survive me. I leave nothing to my spouse, even if my spouse survives me.
      (c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL.
      The executor shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of California in effect on the date of my death and relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse.
   (d) POWERS OF EXECUTOR.
      (1) In addition to any powers now or hereafter conferred upon executors by law, including all powers granted under the Independent Administration of Estate Assets Act, the executor shall have the power to: (A) sell estate assets at public or private sale, for cash or on credit terms; (B) lease estate assets without restriction as to duration, and (C) invest any surplus moneys of the estate in real or personal property, as the executor deems advisable.
      (2) The executor may distribute estate assets otherwise distributable to a minor beneficiary to (A) the guardian of the minor's person or estate, (B) any adult person with whom the minor resides and who has the care, custody or control of the minor, or (C) a custodian, serving on behalf of the minor under the Uniform Gifts to Minors Act of any state.
      The executor is free of liability and is discharged from any further accountability for distributing assets in compliance with the provisions of this paragraph.
      (3) On any distribution of assets from the estate, the executor shall have the discretion to partition, allot, and distribute the assets(1) in kind, including undivided interests in an asset or in any part of it, or (2) partly in cash and partly in kind, or (3) entirely in cash. If a distribution is being made to more than one beneficiary, the executor shall have the discretion to distribute assets among them on a pro rata or non-pro rata ratio, basis, with the assets valued as of the date of distribution.
      (e) POWERS OF GUARDIAN. A guardian of the person nominated in the California statutory will shall have the same authority with respect to the person of the ward as a parent having legal custody of a child would have. A guardian of the estate nominated in a California statutory will shall have all of the powers conferred by law. All powers granted to guardians in this paragraph may be exercised without court authorization.