

Reducing Litigation Costs for Holographic Wills

EMILY ROBEY-PHILLIPS

Holographic wills, which must be handwritten at least in part and do not require attestation, remain controversial despite their long history. Their opponents argue that holographs produce excessive litigation, while their proponents deny that charge and argue that holographs' benefits to increasing access to testacy far outweigh any costs.

Assuming arguendo that holographs do produce too much litigation, this Essay explores why. Analyzing the caselaw, this Essay identifies several points on which courts struggle to probate holographs. It recommends adopting a series of presumptions and safe harbors to reduce litigation costs surrounding holographic wills. In this manner, this Essay seeks to move the needle on the holographic-wills debate in favor of allowing them.

Introduction

Holographic wills, which must be handwritten at least in part and do not require attestation, are now recognized in over half of states and several foreign jurisdictions.¹ Still, they remain a topic of debate. On one side, opponents argue that holographs produce excessive litigation and that testators would be better served by professional estate planning.² On the other side, proponents dispute the excessive-litigation charge and argue that any costs are far outweighed by the benefit of increased testacy.³

Holographs provide several benefits that attested wills do not. Perhaps most importantly, holographs are more accessible to all. Not only are they cheaper than attested wills,⁴ but the lack of a complex attestation requirement—difficult if not impossible without legal help⁵—makes

homedrawn holographs possible. The low cost of holographs to testators is especially important given the disproportionate impact of intestacy on those who cannot afford to hire an attorney.⁶ The format offers other benefits, too: it takes less time to execute a holograph, as only the testator's participation is necessary.⁷ This means holographs may be the only option for testators on their deathbed.⁸ Because no witnesses are required, isolated people can access testacy.⁹ In short, the homedrawn will is more affordable, achievable, and democratic than the attested will. Holographs make testamentary freedom—the “organizing principle” of the probate system¹⁰—accessible to all.

Yet the objection that holographs produce too much litigation may have some weight. Such litigation can burden litigants, the courts, or both.¹¹ The cost of a mistaken decision is the testator's freedom of disposition: both refusing to probate what was a valid will and probating what was not intended as a will violate that freedom.¹² Moreover, the testator's family and friends incur the costs of litigation—time and money—at an emotionally trying time. Finally, excess litigation harms the judicial system, taking up sparse judicial resources. Uncertain doctrine encourages litigation,¹³ meaning the system must process more matters. It also means that each decision point requires more time, producing longer, costlier litigation.

Litigation over holographs falls into several categories: (1) disputes over the document's authenticity, (2) disputes over the document's terms, and (3) disputes over whether the decedent intended the document to be a will or some other, casual document.¹⁴ In fact, one study found that the most commonly litigated issue among all potential wills—not just holographs—was whether the document was intended to be a will or some other document.¹⁵

This Essay explores the question of how to tell whether a decedent intended a document as a will and not a casual letter, draft, memorandum, or other document. Authors have analyzed

the other two litigation points in depth,¹⁶ but little scholarship has focused on how courts might more systematically discern whether a document was a will or some other document. The question is not unique to holographs, but more pronounced: attestation means the testator almost certainly had the requisite testamentary intent. Holographs have no formality that serves the channeling function of attestation;¹⁷ signature and writing are not unique to wills and therefore do not signal unequivocal intent to make a will.¹⁸ Social letters, which can be identical in form to valid holographs, may be “casual” and “offhand.”¹⁹ Professors Lindgren,²⁰ Miller,²¹ Guzman,²² Gordon,²³ and Glover²⁴ have each analyzed how courts have approached the issue. This Essay approaches the question from a different angle and adds doctrinal recommendations. A simplification of holographic litigation can reduce social costs by reducing litigation. A well-calibrated simplification should also protect testamentary freedom by reaching the correct outcome more frequently. In this manner, this Essay seeks to reduce litigation over holographs and thus reduce objections to holographs. A further contribution is that this Essay’s recommendations can be applied to harmless error litigation, where courts must also inquire into testamentary intent.

Part I of this Essay explores various aspects of testamentary intent, drawing on frameworks established by prior scholarship before analyzing indicators of testamentary intent in decades of caselaw. Part II makes policy recommendations, most in the form of presumptions that courts should establish for structuring, and thereby simplifying, holograph litigation.

This Essay recommends establishing several safe harbors, in which documents are presumed valid holographs. Unlike attested wills, potential holographs should not be presumed valid merely for complying with the formalities. Instead, this Essay draws on indicators such as the document’s label or title, the placement and formality of the signature, the physical location

of the document, and whether the document attempts a partial or complete disposition of the decedent's property in determining categories of documents to presume valid. Systematizing the doctrine in this way would reduce the complexity and frequency of litigation and help courts protect testamentary freedom in the process.

I. Variables: Types of Intent and Signals

Testamentary intent is the reason wills exist. When a court decides whether a document should be probated, the question it is really asking is whether doing so would carry out the decedent's testamentary intent. Yet because the witness whose testimony would be dispositive is dead, the law of wills needs a system of determining testamentary intent that does not require questioning the decedent.²⁵

Traditional law's answer to this worst-evidence problem was to invent the formalities: writing, signature, and attestation. If a will complied exactly with all three formalities, the court presumed that the decedent had possessed testamentary intent.²⁶ After all, it would be difficult for someone to create a document, gather witnesses, and complete an often-elaborate attestation ceremony without intending the document to be a will. The formalities therefore took the place of testamentary intent, to the extent that if the document did not exactly comply, there arose a conclusive presumption of a *lack* of testamentary intent.²⁷ In other words, courts never really looked for the *presence* of testamentary intent, but only its absence. Testamentary intent was often referenced but rarely explored.

Holographic wills have always been different. Handwritten, unattested wills are at least as old as Roman law²⁸ and have been legal in some states for centuries.²⁹ Unlike attested wills, holographs force courts to inquire into testamentary intent fairly frequently. Attestation, the

formality they lack, provides an unequivocal signal of testamentary intent. Courts must therefore often ask whether a handwritten, signed document is really a will, or something else.³⁰

Surprisingly, centuries of courts confronting this very question have not produced a settled method of analysis for it.

The failure to develop a framework for testamentary intent is becoming a more urgent problem. The Uniform Probate Code (“UPC”) has endorsed holographic wills, kicking off a new wave of holograph authorization.³¹ Moreover, the reform movement initiated by Professor Langbein calls for courts to look past minor defects in the formalities and probate a document in the event the court finds sufficient evidence of testamentary intent.³² While the reform has by no means captured every jurisdiction, it has won over the UPC³³ and the Restatement (Third) of Property,³⁴ suggesting that testamentary intent may soon be crucial in an entire category of probate cases.³⁵

Even without the recent reforms, determining testamentary intent in holographs is a critical issue. It is necessary to safeguarding the testamentary freedom of those decedents who could not access testacy via attested wills. Beyond protecting decedents who could not afford attorneys, holographic wills make the law accessible to everyone. They are not just a tool, but a valuable one that merits refining. To that end, this Part creates a framework with which to discuss and examine testamentary intent. This lays the groundwork for the next Part, which analyzes the caselaw to propose more systematic ways to approach the question.

A. What “Testamentary Intent” Entails

The question of whether the decedent had testamentary intent is deceptively simple. Canvassing the caselaw and scholarship on holographic wills, three distinct facets of

testamentary intent arise. First, the absence of witnesses throws the document's authenticity into question: the court must ask whether the decedent actually created the document.³⁶ Second, the absence of an unequivocal attestation ceremony means the decedent may not have intended the document to be a will.³⁷ Finally, even when the court is satisfied that the document was created by the decedent with intent that it be a will, the court must still interpret the document.³⁸ The value of holographs—that laypeople can create them—means they often lack the benefit of an attorney's drafting skills.

The question of what sort of document the decedent intended provokes the most litigation.³⁹ And while courts have developed tools to analyze authenticity and construction, a fully fledged doctrine for determining whether testamentary intent exists in a holograph has yet to emerge. The concept of testamentary intent is broad and amorphous, and courts do not have a language for specifying its aspects and subcategories. In order to recommend a better organization for the doctrine, it is necessary to provide a better framework for analyzing testamentary intent.

The ultimate question courts ask when faced with an alleged will is “Did the decedent intend this document to have legal effect at death?” The analysis of whether *this decedent* is the author is a separate inquiry into authenticity. This question also lays aside the inquiry into how the decedent intended the document to be construed. Professor Guzman's analysis of testamentary intent calls these separate matters “primary” and “secondary intent.”⁴⁰ Within primary intent are three variables: *this document*, *legal effect*, and *at death*. Each of these has separate facets, all of which allow courts to determine whether testamentary intent existed.

Regarding the question of *this document*, the decedent must have intended the document to be final. This question arises most frequently for holographic wills, but is not unknown for

attested wills. Signature and attestation are both directed at ensuring the decedent intended a final document. Since holographs lack attestation, they rely only on signature. As later Parts will show, some courts have therefore developed requirements specific to holographs, such as subscription. Professor Lindgren has labeled aspects of this inquiry “nontentative” and “executory intent,” the latter focusing on intent to execute the document, as opposed to finish it.⁴¹ In addition to finality, the decedent must have intended this actual paper to be the will, as opposed to some other document. Professor Lindgren terms this “evidentiary intent,” phrasing it as intent that the document in question be used as evidence of the estate plan.⁴² It separates wills from letters referring to wills, or instructing attorneys on what to draft.

Whether the decedent intended the document to have *legal effect* is a more complex inquiry. It would be too strict to ask whether the decedent intended the document meet the legal definition of a will. Such a high bar would rule out too many testators and obviate the main point of holographs: accessibility. Professor Lindgren labels this legalistic version of intent “channeling intent” and does not suggest it be necessary for probate.⁴³ Instead of requiring decedents to have an understanding of probate law, courts should—and usually do—instead ask whether the decedent intended people to be able to use the document to effect legal change, usually in property transfers. Professor Glover labels this “operative intent.”⁴⁴ Professor Lindgren’s evidentiary intent is again important: if there is evidence that the decedent treated the document as valuable, it is likely that evidentiary intent existed.

Finally, intent that the document take effect *at death* is critical. Professor Lindgren divides this inquiry into that of “ambulatory” and “delayed dispositive intent.”⁴⁵ The former focuses on when the document should take effect; the latter, on when property should be transferred.⁴⁶ Professor Glover captures both aspects in what he calls “donative intent”: “whether

the purported will express[es] an intent to make gifts that become effective upon the decedent's death."⁴⁷ Whether the decedent intended the document to be revocable is irrelevant: after all, it is revocable whether or not it was intended to be.⁴⁸ The key, as some courts have recognized, is distinguishing wills from inter vivos gifts. As later Parts discuss, this has led courts to inquire into whether any property was actually transferred in lifetime, or whether the property to be transferred could possibly have been intended for an inter vivos gift.

Addressing the different aspects of the question "Did the decedent intend this document to have legal effect at death?" permits a better-organized analysis. Having identified the importance of *this document*, *legal effect*, and *at death*, this Essay proceeds to apply the theoretical framework to individual cases from across the country.

B. Variables and Signals

Holographic wills can contain or be accompanied by a variety of signals of testamentary intent. The most important are, or are related to, the formalities: writing and signature. However, several are instead in extrinsic evidence. It is therefore relevant to note that not all states allow consideration of extrinsic evidence when deciding whether to probate wills.⁴⁹ Some states allow the court to use its discretion in determining whether, and how much, extrinsic evidence to consider.⁵⁰ Others allow extrinsic evidence only to resolve ambiguity.⁵¹ Some courts hold more specifically that if testamentary intent is completely absent in the document's face, no extrinsic evidence can establish it.⁵² Such courts therefore look to extrinsic evidence only if the document's language establishes doubt. Finally, some courts refuse to consider extrinsic evidence in the question of testamentary intent.⁵³ These views on extrinsic evidence necessarily limit a court's ability to consider what could be important signals of intent.

i. Writing

Holographs' first formality is writing: not only must holographs be written, but they must be handwritten. Jurisdictions differ on how much of the document must be handwritten: some require the entire document;⁵⁴ others require material portions;⁵⁵ and still others, material provisions.⁵⁶ The key here is whether the printed matter can be considered as extrinsic evidence, which a later section of this Part addresses. But taking for now only the handwritten portions that constitute the 'writing' itself, several signals can appear: labeling, testamentary language, language expressing that the document is valuable, and document type.

First and most important is whether the document is labeled or otherwise refers to itself as a 'Last Will and Testament' or some variation thereof. Self-labeling provides a clear answer to all aspects of whether the decedent intended this document to have legal effect at death. Relying on such labels is not a complicated concept on its face, except that most preprinted forms have the label in the printed matter.⁵⁷ Additionally, the label might be handwritten, but might not be on the purported will itself.⁵⁸ Either situation relegates a large volume of documents to the extrinsic-evidence category, but there remain some entirely handwritten documents with such a label. A standard example is a will that says "By this will I leave" and "This is my last will and testament."⁵⁹ Such labels strongly suggest Professor Lindgren's channeling intent, that is, the most specific and legalistic intent that the document fall into the legal category of a 'will.' Since this is more specific than courts should require, it should more than suffice for probate.

Second, and relatedly, is the use of testamentary language. This can take the form of use of testamentary or legal vocabulary: words such as "estate" or "bequeath" that are not part of daily language. A will is not required to use terms of art,⁶⁰ but their presence is persuasive because it signals that the decedent intended *legal effect* and, in some cases, effect *at death*.⁶¹ For

example, *Estate of Logan* found testamentary intent in part because the document used the words “estate” and “beneficiary.”⁶² Closer calls have occurred with language that could be related to testation, but are not legal terms. One court found that the terms “give” and “beloved” were insufficient, as they had no relation to death.⁶³ Language relating to death can also be persuasive: courts often ask whether the writer contemplated death or serious illness.⁶⁴ The court in *Bogges* noted that “apprehension or anticipation of early death” is a key indicator of testamentary intent.⁶⁵ *Spencer’s Estate* discussed the matter of imminent death at length, finding no evidence of contemplation thereof in the purported will.⁶⁶ Such inquiries focus entirely on effect *at death*, leaving aside the question of whether the decedent intended *legal effect*.

A related body of caselaw handles purported wills that discuss plans to make a will or codicil. Such letters by definition contain testamentary language, usually with words such as “I’ll leave a will,”⁶⁷ but this language refers not to the purported will, but to some other document. In *Beebee’s Estate*, the court refused to probate a letter asking the recipient to make changes to the writer’s will.⁶⁸ The court reasoned that it was impossible for the writer to have intended the letter to be a will when the letter discussed changes to a different document—the actual will.⁶⁹ Yet language discussing plans to make or amend a will is not always fatal to probate. A famous example is *Estate of Kuralt*, in which the purported holograph said “I’ll have the lawyer visit the hospital to be sure you *inherit* the rest of the place.”⁷⁰ The court allowed extrinsic evidence—always permitted in that jurisdiction⁷¹—and remanded the case to the trial court to determine testamentary intent.⁷² Apparently, the language only “suggest[ed]” that the decedent intended a different document.⁷³ These cases show that the mere presence of testamentary language may not be sufficient to show testamentary intent: it also matters whether that language refers to a

different document, or the one in question. In other words, the decedent might have intended *legal effect* and *at death*—but not *this document*.

The third factor relevant to writing is whether the document refers to itself as important or valuable, a strong signal of *this document* having *legal effect*. This often takes the form of commands to the recipient, the most famous being “Kepp this letter lock it up it may help you out.”⁷⁴ The court in *Kimmel’s Estate* considered the command a factor in determining that the testator had intended the letter “to be effective in and of itself.”⁷⁵ Other courts have confronted similar situations, usually agreeing that a document that refers to itself as somehow valuable and important was probably intended to have legal effect. In *White v. Deering*, *Blake’s Estate v. Benza*, and *Estate of Morrison*, the purported wills called on their recipients to save the documents.⁷⁶ At least one court has also considered the opposite: one letter recommended that the recipient burn it, which the court concluded meant the decedent did not intend the letter to be a will.⁷⁷ Courts that analyze these cases are inquiring into whether the decedent’s testamentary intent pertained to *this document*.

Finally, the writing may show what type of document the purported will was intended to be in addition to—or instead of—a will. Again, the decedent may have had intent for *legal effect at death*, but not related to *this document*. The most common are letters, drafts, or notes. Letters⁷⁸ fall into a further four categories: (1) To Whom It May Concern letters, (2) addressed, but unsent letters, (3) letters to an estate planner, and (4) any other letter, for example to a friend. Some of these categories are more significant than others. To Whom It May Concern letters appear more testamentary than the other types, because they cannot also be a social letter to a friend or relative.⁷⁹ Letters addressed to a specific person, but unsent, are particularly difficult cases: Did the testator forget to send it, or decide not to? Letters to estate planners often discuss plans to

make or amend a will or codicil, and therefore are unlikely to have testamentary intent.⁸⁰ Letters to a friend or relative make up the broadest, and most difficult, category.

Holographic wills could have a combination of the above factors, or none at all. Other relevant variables are related to the holograph's signature.

ii. Signature

While a signature has evidentiary power to protect against fraud, this is not its only function in holographic wills. After all, the bulk of the document is handwritten, providing plenty of evidence for authentication.⁸¹ More important for this analysis is that a signature suggests finality and gravity⁸²—intent that *this document* have *legal effect*. A testator is more likely to sign a final copy than a draft or page of notes.⁸³ Further, signature's legal status gives it a ritual and cautionary effect.⁸⁴ These points are all relevant to attested wills, which also require signature, but the problems they bear on are more acute in holographs, because attestation brings stronger ritual and cautionary functions.⁸⁵ Relatedly, it is important to note that for most people, a handwritten name and a signature are not identical and are unlikely to be confused.

Nonetheless, signature does not serve the intent-verifying function as well as attestation.⁸⁶ Two aspects of a signature, however, factor into the analysis of intent: location and type of name. In some jurisdictions, the signature must be at the foot of the will.⁸⁷ No state, however, explicitly requires a full, legal name to appear in the signature.

Most important is the location of the signature. Subscription—signature at the end of the document—speaks to finality. It may also prevent people other than the testator from adding provisions in the space below. Some jurisdictions therefore require subscription. California, having abandoned the subscription requirement, demands an explanation of why a signature does not appear at the end before probating a will with a signature elsewhere.⁸⁸ The court in *Button's*

Estate was satisfied that the testator had signed in the margin of the final page because she had run out of space at the bottom of that page.⁸⁹ In the absence of such an explanation, a testator's signature somewhere other than at the foot of the will can raise doubts.⁹⁰ It is for a similar reason that courts are warier of applying the harmless error rule to signature defects than attestation defects.⁹¹

The name that appears in the signature can also be important in the analysis of testamentary intent. A full, legal name suggests more ritual and gravity than a nickname or family name. Both are valid:⁹² *Kimmel's Estate* allowed a signature of "Father" because that was how the testator signed all his letters;⁹³ *Button's Estate* permitted a signature of the nickname "Muddy."⁹⁴ In *Blake's Estate*, the writer had signed a casual letter with "Uncle Harry," then added a postscript—the text of which was the purported will—and signed again with his full, legal name.⁹⁵ The court found this fact pattern especially persuasive and sustained the will's admission to probate.⁹⁶ In other words, while a nickname may suffice, a legal name is highly persuasive of intent to have *legal effect*. Subscription, as opposed to a signature placed elsewhere, is similarly suggestive of the effect pertaining to *this document*.

iii. Extrinsic Evidence

Extrinsic evidence surrounding a purported will can also be persuasive of testamentary intent. It bears repeating, however, that not all courts will consider extrinsic evidence, and that some limit its application when it comes to testamentary intent.⁹⁷ The categories most valuable in signaling testamentary intent (or lack thereof) are the use of a preprinted will form, the location of the purported will, and the existence of similar documents.

Use of a preprinted will form is strong evidence of testamentary intent. It strongly suggests all three aspects of *this document*, *legal effect*, and *at death*. If the jurisdiction allows

courts to consider the printed matter as extrinsic evidence,⁹⁸ the only question courts could have when confronting a preprinted will form is whether it is a draft or a final copy. In *Estate of Gonzalez*, the court was confronted with two preprinted forms: one, the decedent had filled out with an estate plan and signed; the other, he had left blank, but had had witnesses sign.⁹⁹ Witnesses testified that the decedent had intended to copy out the estate plan neatly onto the signed copy, but had died before he could do so.¹⁰⁰ The court affirmed probate of the unattested copy as a holograph, ruling that the printed material was “implicitly adopted and incorporated.”¹⁰¹ Of course, most courts will not have the benefit of such clear-cut facts regarding a rough as opposed to final copy. But the Maine Supreme Court understood the persuasive nature of the use of a preprinted will form.

The location of the purported will has the power to be so persuasive regarding *this document* and *legal effect* that North Carolina has codified it. In addition to handwriting and signature, a North Carolina holograph must be found among the testator’s valuable papers, or the testator must have delivered it somewhere, or to someone, for safekeeping.¹⁰² Jurisdictions that do not have this requirement nevertheless inquire into the document’s location, because it can shed light on how the decedent viewed the document. A document treated as valuable suggests its author had intended it to have *legal effect*. *Brown’s Estate* noted as relevant that the decedent had left the purported will with her “private papers,” weighing it in favor of the presence of testamentary intent.¹⁰³ The *Morris* court likewise held that the document’s location in the decedent’s bedroom with her “tax and other important papers” was a factor in determining that she had testamentary intent.¹⁰⁴ Both of these wills would probably have met North Carolina’s valuable-papers requirement. Even the *Kimmel’s Estate* letter could have fulfilled it, as the testator had instructed his son to “Kepp this letter lock it up,” which could qualify as leaving the

letter with that son for safekeeping.¹⁰⁵ These cases are inquiring into whether *this document* was intended to have *legal effect*; North Carolina's requirement is particularly insistent about it.

The final factor this Part analyzes is the existence of similar documents. Similar documents can cast doubt on whether *this document* was the intended will. The standard revocation-by-implication rules apply to holographs. However, some jurisdictions have developed doctrines regarding when a holograph can revoke a prior, attested will. In California, a holograph can only revoke or amend an attested will if the holograph is unambiguous.¹⁰⁶ The reasoning here seems to be that a testator with a formal will is aware of attestation requirements. Both *Spencer's Estate* and *White* noted that the decedents were aware of how to execute a formal will: *Spencer's Estate* discussed the testator's education and professional life¹⁰⁷ and *White* noted that the testator had already executed an attested will and two attested codicils.¹⁰⁸ The *White* court sustained the refusal of probate on the grounds that probating the will would "require an overstraining of the imagination or much linguistic juggling."¹⁰⁹ *Estate of Gonzalez* also confronted a series of documents, one of which was acknowledged to be a draft.¹¹⁰ The presence of more than one draft can at least allow a court to tell which document is more finalized, providing evidence of nontentative intent.

In sum, both of holographic wills' formalities can contain evidence that signals testamentary intent. Extrinsic evidence can provide even more relevant indicia. The caselaw has developed several patterns in which courts have grappled with the various signals. The following Part marshals these patterns and makes recommendations for further development of the doctrine.

II. Proposal

Beyond the few specific doctrines noted in Part I,¹¹¹ litigation over whether a document is a holograph or a casual document proceeds case by case¹¹²—a necessarily expensive method. In order to systematize and simplify holograph litigation, this Part recommends establishing several safe harbors, in which documents are presumed valid wills. This is familiar geography for probate law: it is how the formalities function in the presence of substantial compliance or harmless error.¹¹³ Probate law has also learned from experience and created presumptions of validity or invalidity in other doctrines, such as undue influence.¹¹⁴ Outside of the harbors, proponents of a will would still have to litigate. Yet the very existence of the presumptions would reduce litigation.

A. The Background: Testamentary Freedom

In shaping the safe harbors, testamentary freedom should be the guiding principle. It is, after all, the “organizing principle” of the probate system.¹¹⁵ Courts should therefore err on the side of testacy.¹¹⁶ While this is a common presumption in attested-wills law,¹¹⁷ some courts refuse to apply it when testamentary intent is the factor under question.¹¹⁸ A presumption in favor of testacy better protects freedom of disposition, especially in holographic-wills law: holographs are designed to be accessible to non-attorneys, and are therefore less likely to comply perfectly with courts’ image of the ideal will.¹¹⁹ Moreover, within the safe harbors, a document would be presumed a valid will and the burden of proof would be on the opponent.

Of the three standards of proof, this Essay recommends clear and convincing, in line with the UPC¹²⁰ and Professor Langbein’s recommendation.¹²¹ Beyond a reasonable doubt is inappropriate, as that standard is designed for situations in which false positives are much more harmful than false negatives.¹²² Unlike the preponderance of the evidence standard, the clear and

convincing standard would disincentivize litigation of marginal cases, so it is the appropriate balance between error costs and social costs.¹²³

The intent courts should look for is intent that the document have legal effect. Requiring the decedent to have intended the holograph fit the legal definition of a will would have too many harsh results: most people have not had the benefit of legal training. The other extreme would be to allow discussion of which property could go to which people alone to qualify. However, this would allow probate of casual letters describing estate plans, drafts, and even notes, burdening courts with significantly more litigation than they now experience.¹²⁴ Testamentary freedom and social costs must find some balance. The best option is operative testamentary intent, which is already the majority position.¹²⁵

For holographic wills to continue to be accessible to the broadest swath of society, states must abrogate the entirely-handwritten rule. While many states have done so, some jurisdictions continue to require it.¹²⁶ This requirement eliminates any use of preprinted will forms, which provide extremely strong evidence of testamentary intent. Moreover, the prevalence of preprinted will forms may lead testators to believe they can be legitimate. The rule may reduce litigation costs, but at too great a cost to testamentary freedom. This Essay therefore recommends adopting the UPC's material provisions rule.¹²⁷ Jurisdictions that lack statutory authorization to make this change might rely on substantial compliance in the meantime to avoid invalidating holographs with some printed matter.¹²⁸

Finally, for most of the safe harbors to be effective, courts must allow extrinsic evidence. Most of the patterns in the caselaw rely on extrinsic evidence,¹²⁹ such as preprinted matter. Courts could allow extrinsic evidence only in the case of holographs, or they could set no limits on the doctrine. The UPC, for example, allows extrinsic evidence to “establish[] [i]ntent that the

document constitute the testator's will.”¹³⁰ Allowing extrinsic evidence necessarily complicates litigation, introducing decision costs that do not exist without extrinsic evidence. However, it also reduces the risk of mistaken holdings and eliminates some of the harshest and most nonsensical outcomes. A potentially more serious danger is that it may also lead to cases like *Estate of Kuralt*, in which the court allowed extrinsic evidence to overcome the language of the document itself.¹³¹ This Essay recommends admitting any extrinsic evidence, but not allowing it to take precedence over the document's language. If the text makes it clear the document was not intended as a will, no amount of extrinsic evidence should allow probate.

B. The Safe Harbors: Presumptions of Validity

This Essay does not recommend a presumption of validity based solely on compliance with handwriting and signature. Attested wills' three formalities “enable a court easily and reliably to ascertain” that the document was an authentic testamentary action.¹³² An attested will, after all, does not take the same form as other documents. Holographs, however, can be indistinguishable in form from handwritten letters, so more indicators are necessary. To this end, this Part recommends the following safe harbors.

If a document is handwritten in its material provisions, signed, and labeled a will or testament, a presumption of validity should arise. The label could be in preprinted matter; it could be written at the top of the document, or somewhere within it (e.g. “By this will I leave...”). If the label is instead on a document attached to the will, such as an envelope or cover page, the presumption should still arise once the proponent shows the testator—as opposed to someone else—provided the label, by a preponderance of the evidence. The preponderance standard is appropriate here because the question is of pure fact and does not touch upon intent.

If the document is a preprinted will form, with material provisions handwritten and a signature, a presumption of validity should arise. This situation will probably fall under the one listed above, but bears stating specifically. A signature is sufficient evidence of finality for doubts of a draft to be satisfied. Otherwise, “printed-form wills are completely unambiguous in character.”¹³³

If the document is discovered among the decedent’s important papers—for example, in a safe-deposit box or given to a trusted friend for safekeeping—and meets both the handwriting and signature formalities, a presumption of validity should arise. However, the location could not be simply among the decedent’s papers, because that would not distinguish a potential draft from a completed will. The document would have to be somewhere that indicates its importance: in the bank, with an attorney, or with valuable papers such as a passport, social security card, deed, or birth certificate. This Essay does not advocate adopting the North Carolina requirement, however: one can imagine a variety of circumstances in which a valid holograph might fail to make its way to safekeeping or the testator’s valuable papers.¹³⁴ Given holographs’ utility in emergencies, a valuable-papers *requirement* seems misguided. Location among valuable papers, however, is a strong indicator of intent that *this document* have *legal effect*.

If a document complies with the formalities and makes a complete disposition of the decedent’s property, a presumption of validity should arise. People are unlikely to give away the entirety of their property during life. In the rare event that a lifetime transfer of the decedent’s complete estate was intended, the opponent of the will should be able to show it: for example, the decedent could have joined a religious organization. *Laurin’s Estate* and *Estate of Logan* both noted the minute possibility of a living person giving away all his property.¹³⁵

Finally, any letter that describes intended consequences on death, is signed, and exhibits awareness of its own value merits a safe harbor. Most social letters do not instruct their recipients to “SAVE THIS”¹³⁶ or “lock [this] up,”¹³⁷ so such a command strongly suggests intent that *this document* have legal effect.

The safe harbors listed above are designed to reduce litigation in several common instances where testamentary intent is sufficiently clear. Not all caselaw patterns lend themselves to a safe-harbor form, however, so further recommendations continue below.

C. Further Recommendations

One pattern in the caselaw requires establishing a presumption of invalidity. If the purported will is a letter requesting that an estate planner make changes to the estate plan, the proponent should have the burden of showing testamentary intent. The same should be true for a letter discussing plans to make a will, such as the *Estate of Kuralt* letter.¹³⁸ Such language shows the decedent intended a will, but not that it be *this document*: in other words, there is testamentary intent for some *other* document. This presumption of invalidity should arise even if the document otherwise falls into a safe harbor.

Regarding the signature-subscription divide, this Essay recommends adopting the California rule for failure to subscribe.¹³⁹ In order to reach the safe harbor, the proponent of an unsubscribed document must explain why there was no subscription. For example, the testator might have run out of space for a subscription.¹⁴⁰ The additional social costs of the slightly more complicated litigation are balanced by the lower risk of error.

Two of the thorniest problems are whether something is a draft, as opposed to a final copy, and whether a letter that describes an estate plan is intended to be a will. Generally, a

signature separates drafts from final copies. On the same spectrum are notes. However, it should be simpler to tell drafts from notes: unlike with notes, a decedent has begun to put a draft in the form of a will. Drafts, then, signal that the decedent was closer to the relevant testamentary intent: while both drafts and notes likely have intent to transfer property at death, drafts have begun to move towards intent that *this document* have that *legal effect*. Further, there is likely less change between successive drafts than between notes and a draft. For these reasons, this Essay argues that there is less danger in accidentally probating a draft than in probating notes. In no event should a court probate notes: decedents are unlikely to think their notes would have legal effect. However, in the event something that may be a draft falls into one of the safe harbors described above, this Essay recommends against imposing an additional burden on the proponent to show that the decedent had intent to finalize the document. The risk of error is not worth the litigation burden.

The recommendations already laid out dispose of several varieties of letters, notably letters that discuss plans to make or amend a will, letters that describe themselves as a will or are aware of their evidentiary value, and To Whom It May Concern letters stored with the decedent's valuable papers. What remains are letters that may describe an estate plan contained in a different document, or that may be wills. These are most likely to be letters to a friend or relative or To Whom It May Concern letters. Analysis of the signature can help clarify the intent behind the document. Use of a full, legal signature, especially in social letters when the decedent usually signs less formally, suggests intent to have *legal effect*. Courts should review extrinsic evidence to compare the signature to the decedent's other signatures.

Finally, this Essay recommends that courts use the process of elimination if necessary. Several courts have concluded that the alleged will was valid because there was no other

explanation for the document. A major alternative is an inter vivos gift; these courts ask, then, whether there was delivery, or whether the decedent could have completed delivery. For example, the *Laurin's Estate* court noted that, because the decedent lived with the will's primary beneficiary, the decedent could have made delivery at any time.¹⁴¹ It was therefore unlikely to have been intended as an inter vivos gift.

The above recommendations are designed to systematize litigation, based on decades of experience with holographic wills in the United States. Moreover, all of the recommendations are applicable to harmless-error litigation: when deciding whether to excuse a harmless error, courts must inquire into whether the decedent intended the document to be a will.¹⁴² That is precisely the question the proposed safe harbors address. These recommendations, then, would reduce costs in both holographic-will and harmless-error litigation.

Conclusion

Holographic wills support testamentary freedom in ways that attested wills cannot. Holographs make testacy accessible to those who cannot afford legal help, to those who are not aware they need legal help, and to those who are isolated or too close to death to execute an attested will. However, holographic wills have been criticized for producing more litigation than attested wills. Jurisdictions that have not yet authorized holographic wills may be reluctant to open the gates to increased litigation.

This Essay therefore analyzes holographic-wills caselaw to determine how to reduce litigation over a key issue: whether the decedent intended a purported holograph to be a will or some other, non-testamentary document. Decades of judicial experience with holographs has produced important patterns, but no fully fledged doctrine. This Essay therefore proposes a series

of safe harbors, in which a document is presumed to be a valid holograph. Further, this Essay highlights other indicia of testamentary intent and makes recommendations for courts' analysis of purported holographs that do not fall into the proposed safe harbors.

By suggesting ways to systematize holographic-wills litigation, this Essay seeks both to reduce costs in jurisdictions that authorize holographs and to reduce barriers to authorization of holographs in other jurisdictions. Because holographs need not be too great a burden on the judicial system, states that have yet to authorize holographs should enact UPC § 2-502(b).¹⁴³ Recognizing holographs would open the exercise of testamentary freedom to a number of people currently trapped in intestacy.

¹ Jim D. Sardis, *From Tractor Fenders to iPhones: Holographic Wills*, 86-DEC N.Y. ST. B. J. 10, 13 (2014).

² See, e.g., Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 100 (2006); Jacque W. Best, *Holographic Wills in Montana: Problems in Probate*, 24 MONT. L. REV. 148, 159 (1963).

³ See, e.g., Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L. J. 27, 60-62 (2008).

⁴ Holographs are generally executed without legal assistance and therefore cost only as much as the pen and paper (or whichever media) with which they are written.

⁵ Lindgren argues that attestation is “mainly a trap for the unwary.” James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 572 (1990) [hereinafter Lindgren, *Abolishing the Attestation Requirement*]; see also *id.* at 543 (noting that many wills have been denied probate because of a requirements such as line-of-sight presence). In addition, not everyone is aware of the attestation requirement, or even that one might need an attorney’s assistance with a will. As more states authorize holographs, this last problem may become especially acute. A testator might be correct that her previous domicile allowed holographs, but may not realize that probate law varies from state to state.

⁶ See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L. J. 36, 54 (2009) (noting that those who die intestate are disproportionately of low income, less educated, female, and/ or non-white).

⁷ Attested wills require at least the additional time to procure witnesses and complete the ceremony. Attorney-drafted wills take significantly longer. See Clowney, *supra* note 3, at 55.

⁸ See *id.* at 37-38.

⁹ Moreover, the ability to execute a will alone could protect testators from duress: a holograph could revoke a previous, involuntary will. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism: Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 287 (1991) [hereinafter Miller, *Part One*]. Cf. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1, 12 (1941).

¹⁰ Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1 cmt. a (2003).

¹¹ See, e.g., Brown, *The Holograph Problem*, *supra* note 2, at 123. The limited data is inconclusive, with studies finding both that holographs produce more litigation than attested wills, and that they do not. Compare Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1134 (2015) (finding that holographs were litigated more frequently than attested wills) with Clowney, *supra* note 3, at 61 (“[N]othing in the data supports the claim that holographs subject testators and their families to unacceptable risks of litigation.”).

¹² Robert H. Sitkoff, *Teaching Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L. J. 643, 647 (2014). See also Mark Glover, *Minimizing Probate-Error Risk*, 49 UNIV. MICH. J. L. REFORM (forthcoming 2016) [hereinafter Glover, *Minimizing Probate-Error Risk*].

¹³ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1 (1984); Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN’S L. REV. 597, 641 (2014) [hereinafter Glover, *Decoupling the Law of Will-Execution*].

¹⁴ Clowney, *supra* note 3, at 35-36.

¹⁵ Horton, *supra* note 11, at 1102. *But see* Clowney, *supra* note 3, at 60 (finding no litigation over whether the document had been intended as a will). Interestingly, Horton found very little

litigation over attestation, and none at all over the presence requirement. Horton, *supra* note 12, at 1131. Compare with John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 15-16 (1987) [hereinafter Langbein, *Harmless Error*].

¹⁶ For example, several articles argue that holographs provide better evidence for determining authenticity than attested wills. See, e.g., Gulliver & Tilson, *supra* note 9, at 13.

¹⁷ See, e.g., Best, *supra* note 2, at 155.

¹⁸ Cf. Miller, *Part One*, *supra* note 9, at 262 (“[O]nly attestation unequivocally signifies that the will is complete and intended to be enforced.”).

¹⁹ Gulliver & Tilson, *supra* note 9, at 14.

²⁰ James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992) [hereinafter Lindgren, *The Fall of Formalism*].

²¹ Miller, *Part One*, *supra* note 9, at 283-86 (1991).

²² See generally Katherine R. Guzman, *Intents and Purposes*, 60 KAN. L. REV. 305 (2014) (analyzing how courts approach testamentary intent generally, not just in holographs, defining testamentary intent, and making recommendations on both substantive and procedural reforms).

²³ Deborah S. Gordon, *Letters Non-Testamentary*, 62 KAN. L. REV. 585, 596-600 (2014).

²⁴ Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEORGE MASON L. REV. (forthcoming 2016) [hereinafter Glover, *A Taxonomy of Testamentary Intent*].

²⁵ JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 147 (9th ed. 2013) (discussing probate law’s “worst evidence” problem). A small minority of states allow antemortem probate. See Miller, *Part One*, *supra* note 9, at 295-96.

²⁶ See Glover, *Minimizing Probate-Error Risk*, *supra* note 12.

²⁷ See *id.*

²⁸ R. H. Helmholz, *The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills*, 20 SYRACUSE J. INT’L L. & COM. 147, 153 (1994).

²⁹ DUKEMINIER & SITKOFF, *supra* note 25, at 198.

³⁰ See, e.g., *In re Kimmel’s Estate*, 123 A. 405, 407 (Penn. 1924) (determining that the document was a will and not just a casual letter); *In re Estate of Gonzalez*, 855 A.2d 1146, 1149 (Me. 2004) (holding that the document was a will and not a draft).

³¹ UNIF. PROB. CODE § 2-502(b) (1990).

³² The first wave of reform called for substantial compliance. See generally John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter Langbein, *Substantial Compliance*]. Professor Langbein then advocated for the harmless error rule. See generally Langbein, *Harmless Error*, *supra* note 15.

³³ The UPC has adopted the harmless error rule, as opposed to substantial compliance doctrine. UNIF. PROB. CODE § 2-503 (1990).

³⁴ RESTATEMENT (THIRD) OF PROB.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

³⁵ See Guzman, *Intents and Purposes*, *supra* note 22, at 317-18.

³⁶ This concern is much more prevalent in the scholarship than the caselaw. See, e.g., Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 160 n. 12 (1988). Several scholars have argued on the other side that forged holographs are no great danger. See, e.g., Clowney, *supra* note 3, at 59 (finding “no evidence of counterfeit documents”).

³⁷ Horton, *supra* note 11, at 1102.

- ³⁸ Non-attorneys often do not use the standard probate language, which means courts cannot rely on familiar terms. Brown, *supra* note 2, at 122.
- ³⁹ Horton, *supra* note 11, at 1102. *But see* Clowney, *supra* note 3, at 60 (finding no litigation over whether the document had been intended as a will).
- ⁴⁰ *See generally* Guzman, *Intents and Purposes*, *supra* note 22.
- ⁴¹ Lindgren, *The Fall of Formalism*, *supra* note 20, at 1018, 1017.
- ⁴² *Id.*
- ⁴³ *Id.* at 1017.
- ⁴⁴ *See* Glover, *A Taxonomy of Testamentary Intent*, *supra* note 24.
- ⁴⁵ Lindgren, *The Fall of Formalism*, *supra* note 20, at 1017.
- ⁴⁶ *See id.* at 1017-18.
- ⁴⁷ Glover, *A Taxonomy of Testamentary Intent*, *supra* note 24.
- ⁴⁸ *Id.*
- ⁴⁹ *See* Guzman, *Intents and Purposes*, *supra* note 22, at 330-31.
- ⁵⁰ *See, e.g.*, In re Estate of Kuralt, 981 P.2d 771, 775 (Mont. 1999); UNIF. PROB. CODE § 2-502(c) (1990).
- ⁵¹ *See, e.g.*, In re Hogan's Estate, 146 N.W. 2d 257, 258 (Iowa 1966); In re Laurin's Estate, 424 A.2d 1290, 1293 (Penn. 1981).
- ⁵² *See, e.g.*, In re Brown's Estate, 507 S.W.2d 804-05 (Tex. Ct. Civ. App. 1974); In re Estate of Allen, 301 S.W.3d 923, 929 (Tex. Ct. App. 2009).
- ⁵³ *See e.g.*, Edmunson v. Estate of Fountain, 189 S.W.3d 427, 430 (Ark. 2004).
- ⁵⁴ This is the traditional view, but it produced harsh and often absurd results. *See, e.g.*, In re Estate of Thorn, 192 P. 19, 20 (Cal. 1920).
- ⁵⁵ *See, e.g.*, In re Estate of Harless, 310 P.3d 550, 552 (Mont. 2013).
- ⁵⁶ *See, e.g.*, In re Estate of Gonzalez, 855 A.2d 1146, 1149 (Me. 2004); UNIF. PROB. CODE § 2-503 (1990).
- ⁵⁷ *See, e.g.*, Estate of Gonzalez, 855 A.2d at 1147; Matter of Johnson's Estate, 630 P.2d 1039, 1041 (Ariz. Ct. App. 1997).
- ⁵⁸ *See, e.g.*, Edmunson v. Estate of Fountain, 189 S.W. 3d 427, 429 (Ark. 2004).
- ⁵⁹ Foote v. Carter, 357 P.2d 1000, 1002-03 (Okla. 1960). *See also* Guaranty Nat. Bank v. Morris, S.E. 2d 194, 195 (W.Va. 1986).
- ⁶⁰ *See, e.g.*, Foote, 357 P.2d at 1003; Estate of Logan, 413 A.2d 681, 683 (Penn. 1980).
- ⁶¹ *See, e.g.*, Boggess v. McGaughey, 207 S.W. 2d 766, 768 (Ky. 1948).
- ⁶² Estate of Logan, 413 A.2d at 683.
- ⁶³ Poindexter v. Jones, 106 S.E. 2d 144, 148 (Va. 1958).
- ⁶⁴ *See, e.g.*, In re Laurin's Estate, 424 A.2d 1290, 1293 (Penn. 1981).
- ⁶⁵ Boggess, 207 S.W. 2d at 768.
- ⁶⁶ In re Spencer's Estate, 197 P.2d 351, 353-54 (Cal. Ct. App. 1948).
- ⁶⁷ In re Moore's Estate, 228 P.2d 666, 673 (Cal. Ct. App. 1951). *See also* Miller, *Part One*, *supra* note 9, at 285.
- ⁶⁸ In re Beebee's Estate, 258 P.2d 1101, 1101 (Cal. Ct. App. 1953).
- ⁶⁹ *See id.*
- ⁷⁰ In re Estate of Kuralt, 981 P.2d 771, 774 (Mont. 1999). For a discussion, see Guzman, *Intents and Purposes*, *supra* note 22, at 338-42.
- ⁷¹ Estate of Kuralt, 981 P.2d at 775.
- ⁷² *Id.* at 776.

⁷³ *Id.*

⁷⁴ *In re Kimmel's Estate*, 123 A. 405, 405 (Penn. 1924).

⁷⁵ *Id.*

⁷⁶ *See White v. Deering*, 177 P. 516, 517 (Cal. Ct. App. 1918) (“Save this letter.”); *Blake's Estate v. Benza*, 587 P.2d 271, 272 (Ariz. Ct. App. 1978) (“SAVE THIS”); *In re Estate of Morrison*, 65 A.2d 384, 385 (Penn. 1949) (“keep this it may be of use to you some day”).

⁷⁷ *See McBride v. McBride*, 67 Va. 476, 477 (1875).

⁷⁸ For a discussion, *see Miller, Part One, supra* note 9, at 285-288.

⁷⁹ *But see In re Gasparovich's Estate*, 487 P.2d 1148, 1149-50 (sustaining a denial of probate for a “To Whom It May Concern” letter). Professor Lindgren notes that in *Gasparovich's Estate*, “The intent to leave a will... is manifest.” Lindgren, *The Fall of Formalism, supra* note 20, at 1020.

⁸⁰ *See, e.g., In re Beebee's Estate*, 258 P.2d 1101, 1101 (Cal. Ct. App. 1953).

⁸¹ Because the document will degrade less quickly than witnesses' memories, holographs may actually fulfill the evidentiary function better than attested wills. *See Gulliver & Tilson, supra* note 9, at 13. *See also id.* at 7.

⁸² *See Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 3.1 cmt. j (2003).

⁸³ *See id.*; Langbein, *Substantial Compliance, supra* note 35, at 518.

⁸⁴ *See id. But see Miller, Part One, supra* note 9, at 278.

⁸⁵ *See Lindgren, Abolishing the Attestation Requirement, supra* note 5, at 558.

⁸⁶ *Cf. Miller, Part One, supra* note 9, at 262.

⁸⁷ *See, e.g., KY. REV. STAT. § 446.060(a)* (2015).

⁸⁸ *In re Button's Estate*, 287 P. 964, 966 (Cal. 1930) (en banc).

⁸⁹ *Id.* at 965

⁹⁰ Langbein, *Harmless Error, supra* note 15, at 52.

⁹¹ *Id.*

⁹² *Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 3.1 cmt. j (2003).

⁹³ *In re Kimmel's Estate*, 123 A. 405, 407 (Penn. 1924).

⁹⁴ *In re Button's Estate*, 287 P. 964, 966 (Cal. 1930) (en banc).

⁹⁵ *Blake's Estate v. Benza*, 587 P.2d 271, 273 (Ariz. Ct. App. 1978).

⁹⁶ *Id.* at 274.

⁹⁷ *See supra* notes 49-53 and accompanying text.

⁹⁸ *See, e.g., In re Estate of Gonzalez*, 855 A.2d 1146, 1149 (Me. 2004).

⁹⁹ *Id.* at 1147-48. The court also observed that there were notes written in the margin of the unattested copy. *Id.* at 1148.

¹⁰⁰ *Id.* at 1148.

¹⁰¹ *Id.* at 1149.

¹⁰² N.C. GEN. STAT. § 31-3.4(a) (2012).

¹⁰³ *In re Brown's Estate*, 707 S.W. 2d 801, 805 (Tex. Civ. Ct. App. 1974).

¹⁰⁴ *Guar. Nat. Bank v. Morris*, 342 S.E. 2d 194, 196-97 (W.Va. 1986).

¹⁰⁵ *In re Kimmel's Estate*, 123 A. 405, 405 (Penn. 1924).

¹⁰⁶ *See, e.g., In re Spencer's Estate*, 197 P.2d 351, 355 (Cal. Ct. App. 1948); *White v. Deering*, 177 P. 516, 517 (Cal. Ct. App. 1918).

¹⁰⁷ *Spencer's Estate*, 197 P.2d at 355.

¹⁰⁸ *White*, 177 P. at 517.

¹⁰⁹ *Id.*

- ¹¹⁰ *In re Estate of Gonzalez*, 855 A.2d 1146, 1147 (Me. 2004).
- ¹¹¹ *See supra* note 88; *supra* note 107.
- ¹¹² *Miller, Part One*, *supra* note 9, at 281; *Matter of Nelson's Estate*, 250 N.W. 2d 286, 288 (S.D. 1977).
- ¹¹³ Langbein, *Harmless Error*, *supra* note 15, at 4.
- ¹¹⁴ *See, e.g.*, *In re Graves' Estate*, 259 P. 935, 937 (Cal. 1927); *Parish v. Parish*, 704 S.E. 2d 99, 105-06.
- ¹¹⁵ Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1 cmt. a (2003).
- ¹¹⁶ *Cf. In re Teubert's Estate*, 298 S.E. 2d 456, 460 (W.Va. 1982) (stating a presumption in favor of validity for holographs).
- ¹¹⁷ *See, e.g.*, *Mason v. Mason*, 268 S.E. 2d 67, 68 (W.Va. 1980); *Vaught v. Vaught*, 444 S.W. 2d 104, 106 (Ark. 1969).
- ¹¹⁸ *See, e.g.*, *In re Kelleher*, 259 P. 437, 437 (Cal. 1927).
- ¹¹⁹ *See Teubert's Estate*, 298 S.E. 2d at 460.
- ¹²⁰ UNIF. PROB. CODE § 2-503.
- ¹²¹ Langbein, *Harmless Error*, *supra* note 15, at 35.
- ¹²² *See Glover, Minimizing Probate-Error Risk*, *supra* note 12.
- ¹²³ *Cf. id.*
- ¹²⁴ *Cf. Langbein, Harmless Error*, *supra* note 15, at 23-24 (noting that if a court used the harmless error rule to probate an unsigned document, “a risk [would] arise[] that any unsigned draft, any scrap of paper, can be argued to be an intended but unexecuted will”).
- ¹²⁵ *See, e.g.*, *In re Button's Estate*, 287 P. 964, 967 (Cal. 1930); *Miller, Part One*, *supra* note 9, at 277-78; UNIF. PROB. CODE § 2-503.
- ¹²⁶ *See DUKEMINIER & SITKOFF*, *supra* note 25, at 208.
- ¹²⁷ UNIF. PROB. CODE § 2-503 (1990).
- ¹²⁸ *Cf. Langbein, Harmless Error*, *supra* note 15, at 6.
- ¹²⁹ *See supra* notes 97-111 and accompanying text.
- ¹³⁰ UNIF. PROB. CODE § 2-502(c) (1990).
- ¹³¹ *See In re Estate of Kuralt*, 981 P.2d 771, 776 (Mont. 1999).
- ¹³² Sitkoff, *supra* note 12, at 647.
- ¹³³ Langbein, *Substantial Compliance*, *supra* note 32, at 512.
- ¹³⁴ The most famous Canadian holographic will is an example. For a discussion of the valid holograph scratched on a tractor fender while the testator was pinned beneath the tractor, see generally Geoff Ellwand, *An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History*, 77 SASK. L. REV. 1 (2014).
- ¹³⁵ *In re Laurin's Estate*, 424 A.2d 1290, 1290 (Penn. 1981); *Estate of Logan*, 413 A.2d 681, 684 (Penn. 1980).
- ¹³⁶ *Blake's Estate v. Benza*, 587 P.2d 271, 272 (Ariz. Ct. App. 1978).
- ¹³⁷ *In re Kimmel's Estate*, 123 A. 405, 405 (Penn. 1924).
- ¹³⁸ *In re Estate of Kuralt*, 981 P.2d 771, 774 (Mont. 1999).
- ¹³⁹ *See supra* note 88 and accompanying text.
- ¹⁴⁰ *In re Button's Estate*, 287 P. 964, 965 (Cal. 1930) (en banc).
- ¹⁴¹ *In re Laurin's Estate*, 424 A.2d 1290, 1294 (Penn. 1981).
- ¹⁴² UNIF. PROB. CODE § 2-503 (1990).
- ¹⁴³ UNIF. PROB. CODE § 2-502(b) (1990).