

RESOLUTION 11-01-2007

DIGEST

Execution Of Holographic Wills: Invalidity Of “Deathbed” Wills

Amends Probate Code section 6111 to invalidate holographic wills in favor of non-family member beneficiaries that are executed in a hospital, hospice, or skilled nursing home.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 6111 to invalidate holographic wills in favor of non-family member beneficiaries that are executed in a hospital, hospice, or skilled nursing home. This resolution should be disapproved because it substantially interferes with a testator’s ability to designate the disposition of his or her estate.

This resolution presumes that all holographic wills executed in hospital or hospice situations which favor non-family members are procured because of fraud or undue influence. On the contrary, many perfectly competent and unpressured testators discover a need to make a will while hospitalized or in a skilled nursing facility. They should not be arbitrarily and absolutely precluded from utilizing a holographic form of will. Those wills that favor caregivers are already invalidated by the restrictions contained in Probate Code section 21350. All others can be also be invalidated where appropriate, upon proof of lack of capacity, undue influence or fraud.

SECTION/COMMITTEE REPORT

TRUSTS & ESTATES SECTION

DISAPPROVE

The Trust & Estates Section does not understand the rationale for this change. The location of the testator in a nursing home or other facility should not affect his/her ability to make a valid testamentary instrument. Abuses, if any, can be adequately addressed by existing law on duress, undue influence, etc.

This position is only that of the TRUST & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUST & ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend§ 6111 to the Probate Code to read as follows:

- 1 §6111
2 (a) Except as provided in Section 6111 (d), a will that does not comply with
3 Section 6110 is valid as a holographic will, whether or not witnessed, if the signature and
4 the material provisions are in the handwriting of the testator.
5 (b) Except as provided in Section 6111 (d), ~~If~~ a holographic will does not contain a
6 statement as to the date of its execution and:
7 (1) If the omission results in doubt as to whether its provisions or the inconsistent
8 provisions of another will are controlling, the holographic will is invalid to the extent of the
9 inconsistency unless the time of its execution is established to be after the date of execution
10 of the other will.
11 (2) If it is established that the testator lacked testamentary capacity at any time
12 during which the will might have been executed, the will is invalid unless it is established
13 that it was executed at a time when the testator had testamentary capacity.
14 (c) Except as provided in Section 6111 (d), ~~A~~any statement of testamentary intent
15 contained in a holographic will may be set forth either in the testator's own handwriting or
16 as part of a commercially printed form will.
17 (d) Section 6111 does not apply to a holographic will signed by the testator while he
18 or she is in a hospital, hospice facility or skilled nursing home if the named beneficiary is
19 not a family member.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Fernando Valley Bar Association

STATEMENT OF REASONS

Existing Law: Does not protect a person in a hospital, hospice, skilled nursing home from undue influence by allowing the execution of a "death bed" Will without witnesses naming none family members as beneficiaries.

This Resolution: Would protect the heirs at law from Testator executing an unwitnessed "death bed" Will designed to defeat inheritance rights. Probate Code section 6110 requires the witnessing of a Will and section 6111 provides exceptions to the witnessing of a Will. The exceptions under section 6111 would not apply to testators in a hospital, hospice, skilled nursing home executing a "death bed" Will naming none family members as beneficiaries.

The Problem: There is an increase in "death bed" Wills where a friend, care giver, acquaintance or facility employee becomes a beneficiary to assets owned by a person in a hospital, hospice, skilled nursing home through an unwitnessed Will.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Marlene S. Seltzer, 20350 Ventura Boulevard, Suite 110, Los Angeles, CA 91364, telephone (818) 887-3333, fax (818) 716-9275, e-mail marlene@salvolaw.com.

RESPONSIBLE FLOOR DELEGATE: Marlene S. Seltzer

COUNTERARGUMENT

BAR ASSOCIATION OF SAN FRANCISCO

This resolution is similar to Resolutions 01-03 and 05-06, although it carries less baggage than those two resolutions. Among other things, it is limited to holographic wills making someone other than a family member the beneficiary. However, it provides no “escape hatches” for a situation where the will reflects the true intent of the testator and was not obtained by fraud, duress or undue influence. For example, a terminally ill person who has no immediate family members might wish to bequeath his or her property to a worthy charity or educational institution. That could not be done with a holographic will if this resolution were to become law. Nevertheless, the risk of fraud or undue influence under the circumstances covered by the resolution is real. Therefore, the Bar Association of San Francisco could support the resolution if it included two exceptions: 1) that the will is valid if the testator survives for some significant period of time, and 2) if the beneficiary can establish by clear and convincing evidence that the will was not the product of fraud, duress or undue influence.