NEW ZEALAND AND HOLOGRAPHIC WILLS

Nicola Robbins*

This paper discusses New Zealand's law on wills and considers whether there is scope for holographic wills to be admitted under the Wills Act 2007. Based on such analysis, it is concluded that New Zealand should admit the holographic will in its own right.

Le Wills Act 2007 a substantiellement modifié, le régime antérieur du droit néo-zélandais régissant les règles de fond et de forme applicables aux dispositions testamentaires.

A l'aune des principes posés par cette importante réforme, l'article analyse les raisons pour lesquelles il devrait être dorénavant possible d'admettre en Nouvelle-Zélande la validité des testaments holographes.

I OVERVIEW OF HOLOGRAPHIC WILLS

A Definition

A holographic will is a document that is written by hand by the testator,[1] detailing the disposition of a testator's property after death.[2] It was developed to allow a testator to create a will with minimal formalities.

There is no specific recognition of holographic wills in New Zealand. A testator must satisfy the formalities required for an ordinary will under s 11 of the Wills Act 2007 (the 2007 Act).[3] However, there are many countries which admit holographic

* BA, LLB(Hons) Victoria University of Wellington.

1 R Helmholz "The origin of holographic wills in English law" (1994) 15(2) The Journal of Legal History 97 at 97.

2 JM Robinette "Wills – Holographic Wills and Testamentary intent – Extrinsic Evidence is Admissible to Prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v Estate of Fountain*, No 03-1459, 2004 WL 1475423 (Ark July 1 2004)" (2005) 27(4) U Ark Little Rock L Rev 545 at 553.

3 Wills Act 2007, s 11.

wills as a valid form of will.[4] The main difference between a holographic will and a will considered valid under s 11 in the 2007 Act is that a holographic will is unwitnessed.[5] The reason for not having any witness requirement is because the handwriting of the testator is considered to be sufficient evidence of genuineness.[6]

B Characteristics

As testamentary law has developed, so has the law relating to holographic wills. It may be necessary in addition to the handwriting requirement to satisfy other prerequisites in order to have a valid holographic will.[7] Examples of these prerequisites include evidence of testamentary intent, the testator's signature, the document being entirely written in the handwriting of the testator, and dating of the will.[8]

1 Testamentary intent

A common requirement for a holographic will is that it must show evidence of animus testandi.[9] This is the same requirement found in s 11 of the 2007 Act. It is necessary to distinguish between a document intended to be a will and a document that is either meant to take effect during the testator's lifetime, or one that does not purport to transfer property.[10] The rationale behind requiring evidence of testamentary intent is to prevent documents that are not intended to have testamentary effect from being admitted to probate.

In considering whether a document evidences testamentary intent, there are several factors a court might consider: whether the testator intended the document to make a final disposition of his or her property after his or her death, or the language used in the will.[11] Clear legalistic terms such as 'will', 'testament', 'beneficiary' or

---

4 For example, these countries include Belgium, France, Germany, and 27 states in the United States of America.

5 Other differences include that a will admitted under s 11 does not have to be handwritten, and can be written by a person other than the testator.

6 Helmholz, above n 1, at 97.

7 Frank S Berall "Oral Trusts and Wills: Are They Valid?" (2006) 33(11) Estate Planning 17 at 22.

8 Peter Wendel *Wills, Trusts, and Estates: Keyed to Dukeminier/Johanson/Lindgren/Sitkoff* (Aspen Publishers Online, New York, 2005) at 85.

9 Bruce L Stout "Handwritten wills may be valid if certain requirements are met" (2003) 30(4) Estate Planning 174 at 177. Animus testandi means the intention to make the document in question a will.

10 Claude W Stimson "When Is a Holographic Will Dated?" (1944) 5(1) Mont L Rev 82 at 84.

11 Stout, above n 9, at 177.

'estate' demonstrate that the testator intended the document to be their will.[12] Unclear or ambiguous language may act as evidence to the contrary. A document which is either labelled as something other than 'will' or not labelled at all requires greater investigation by the courts.[13]

2 Signature

Another common requirement is that the testator must sign the holographic will.[14] In France, a valid holographic will must be signed by the testator.[15]

A testator's nickname, an abbreviation of their name or their initials,[16] and even a familiar term, like the testator's position in their family, has been held to satisfy the signature requirement.[17] The rationale behind the signature requirement is to compensate for the lack of witnesses and ensure legitimacy.[18]

The court must be satisfied that the testator, when signing the document, intended this to be their signature.[19] Signing with intent to authenticate the will is known as animus signandi.[20] When examining animus signandi, the courts look at the entire document, not just the signature itself.[21] For example, a will beginning with the testator's name could be considered adequately signed when, if looking at the entire document, it was evident the testator intended it to be their signature.

3 Written entirely in the handwriting of the testator

The definition of a holographic will requires that the document be handwritten by the testator.[22] A more contentious aspect of this requirement is whether a holographic

12 *Re MacNeil* (2009) 10 NZCPR 770.

13 Charles M Soller "Wills: Letters as Holographic Wills: Testamentary Intent" (1948) 46(4) Michigan Law Review 578 at 579.

14 Stimson, above n 10, at 84.

15 French Civil Code, art 970.

16 Stout, above n 9, at 177.

17 Berall, above n 7, at 22.

18 Stimson, above n 10, at 84.

19 Stimson, above n 10, at 86.

20 Stout, above n 9, at 177.

21 Stimson, above n 10, at 86.

22 Helmholz, above n 1, at 97.

will has to be entirely written in the handwriting of the testator. This requirement is present in the French Civil Code[23] and 12 states in the United States of America.[24]

Courts in jurisdictions that require a holographic will to be entirely handwritten by the testator typically apply two theories when faced with a document that is not entirely handwritten by the testator. These are the intent and surplusage theories.[25]

Under the intent theory, if the testator intended the non-handwritten material to be a part of their holographic will, then it is invalid because it is not entirely in the testator's handwriting. If the non-handwritten material was not intended to be a part of the holographic will, then it is valid, but the non-handwritten material is not included.[26] The intention of the testator is determined from examining the entire document.[27] This is the harsher of the two theories and can sometimes lead to unjust results.[28]

Under the surplusage theory, if the non-handwritten material is not essential to the meaning of the holographic will, it can be disregarded.[29] Similar to the intent theory, it does involve guesswork. However, where only a limited portion of the document is printed, it is relatively safe to assume it is not essential to the holographic will.[30]

C Requirement of Date

Some countries have imposed a requirement that a holographic will be dated.[31] For example, the German Civil Code states that the testator should record the day,

---

23 French Civil Code, art 970.

24 These states include Arkansas, Kentucky, Louisiana, Mississippi, Nevada, New York, North Carolina, Oklahoma, Texas, Virginia, West Virginia and Wyoming, from "Wills laws – Information on the law about Wills" American Law and Legal Information <law.jrank.org>.

25 Stimson, above n 10, at 90.

26 Stimson, above n 10, at 90.

27 Gail Boreman Bird "Sleight of handwriting: the holographic will in California" (1981) 32(3) Hastings Law Journal 605 at 621.

28 Stimson, above n 10, at 91.

29 Stimson, above n 10, at 91.

30 Bird, above n 27, at 629.

31 EGL "Holographic Wills and Their Dating" (1918) 28(1) Yale Law Journal 72 at 72.

month and year the holographic will was written.[32] The date has to be written in the testator's handwriting.[33]

II NEW ZEALAND LAW

A Wills Act 2007

Under s 11 of the 2007 Act, a will must be in writing and signed and witnessed by the testator and two witnesses. The two witnesses must also be in the testator's presence when the testator and each witness signs the document.[34]

Compared with the Wills Act 1837 (UK), which was in force in New Zealand till 2007, the most significant change made in the 2007 Act was s 14.[35] Section 14(2) empowers the court to declare a document, which does not comply with the s 11 formalities to be a valid will if it is satisfied that the document expresses the deceased's testamentary intentions.

This change was made for a good reason. Due a strict insistence on compliance with s 9 of the Wills Act 1837 (UK), wills were often declared invalid due to technicalities or minor mistakes.[36] This frustrated testamentary intention. In *Millar (deceased), Re*, the testator wrote directions for her burial beneath her signature. The High Court did not admit these directions to probate, holding that any words written below the signature of the testator had to be excluded.[37]

In *Costelloe v Costelloe,*[38] the testator allegedly signed the will in the presence of two witnesses, who also signed the document. However, both witnesses later denied seeing the testator sign the document.[39] One of them claimed that the signature on

32 German Civil Code, art 2247.

33 Reginald Parker "History of the Holograph Testament in the Civil Law" (1943) 3(1) Jurist 1 at 21.

34 Wills Act 2007, s 11(4).

35 Nicola Peart and Greg Kelly "The Scope and the Validation Power in the Wills Act 2007" (2013) 1 NZ L Rev 73 at 73. This paper is essential background reading on this area of law.

36 *Re Estate of Beaumont* [2013] NZHC 2719, at [10]; and Nicola Peart "Where There is a Will, There is a Way – A New Wills Act for New Zealand" (2007) 15 Waikato Law Review 26 at 30.

37 *Miller (deceased), Re* HC Auckland CP1362/86, 26 July 1988 at [12].

38 *Costelloe v Costelloe* HC Auckland CIV-2007-404-922, 10 August 2007.

39 At [11].

the will was not his own, and that the testator "had on previous occasions forged my signature".[40] The will was declared invalid.[41]

In *Re Colling*,[42] the testator asked a nurse and a fellow patient to witness his signature to his will. The nurse was called away before the testator could finish his signature. The testator completed his signature in the nurse's absence. This signature was witnessed by the patient who also signed the will. When the nurse returned, the testator acknowledged his signature and she signed the will. The will was held to be invalidly executed[43] because the partially completed signature witnessed by the nurse could not be regarded as the testator's signature.[44]

B Exercising the Power in s 14 of the Wills Act 2007

There are four requirements in s 14(1) that must be fulfilled before the power can be exercised. Section 14 will apply only if there is a document that appears to be a will, that does not comply with the formalities required by s 11, and that was made in or out of New Zealand. If these requirements are met, the court may validate the will.

In order to exercise the power under s 14(2), the court must be satisfied on the balance of probabilities that the document expressed testamentary intent. There must be cogent evidence to support this finding.[45] Section 14(3) lists several factors that may be taken into account. These include but are not limited to "(a) the document; and (b) evidence on the signing and witnessing of the document; and (c) evidence on the deceased person's testamentary intentions; and (d) evidence of statements made by the deceased person".

Case law provides additional factors that may be taken into consideration as evidence of testamentary intent. First, the court can consider any delay between the testator giving instructions to his or her lawyer and the testator's death.[46] In

40 At [9].

41 At [21].

42 *Re Colling* [1972] 3 All ER 729: [1972] 1 WLR 1440.

43 Peart and Kelly, above n 35, at 31.

44 J G Miller "Substantial Compliance and the Execution of Wills" (1987) 36(3) International and Comparative Law Quarterly 559 at 561.

45 *Re Zhu (Deceased)* HC New Plymouth CIV-2010-443-21, 17 May 2010 at [7].

46 *Tamarapa v Byerley* [2014] NZHC 1082 at [26].

Amundson v Raos,[47] Moore J held that this was a factor that required examination,[48] although a lengthy delay does not necessarily mean the will is invalid.[49]

Second, the relationship between the testator and the intended beneficiary or beneficiaries of the will is a factor that requires examination. Section 14 applications have typically been successful where the intended beneficiary was closely related to the testator.[50] In *Tamarapa v Byerley,* evidence of a long and close relationship between the testator and the intended beneficiary supported the finding that the document reflected testamentary intent.[51]

Third, the courts may take into account whether the application is opposed.[52] A lack of opposition or evidence of consent is indicative of a valid will. In *Re Estate of McDonald*,[53] the testator executed two wills. The first will, held to be valid, left the testator's entire estate to his wife. The second will divided the testator's estate equally amongst his children.[54] This was never signed. The testator's children applied for an order declaring the later draft will valid,[55] and the testator's wife consented.[56]

Ultimately, evidence sufficient to prove testamentary intent is dependent on the facts of each case.[57]

Even if a document fulfils the requirements in s 14(1) and (2), the court still has a discretion not to validate it.[58] This discretion is not unprincipled.[59] Refusing

47 *Amundson v Raos* [2015] NZHC 2422, [2015] NZAR 1772.

48 At [23].

49 At [24].

50 A closely related beneficiary could be a spouse, child, or some other familial connection; see *Re Anderson* [2016] NZHC 626.

51 *Tamarapa,* above n 46, at [34].

52 *Loffhagen v Paterson* [2016] NZHC 1178 at [21]; and *Re Estate of White* [2016] NZHC 1214 at [10].

53 *Re Estate of McDonald* [2016] NZHC 1577.

54 At [2].

55 At [1].

56 At [5].

57 *Kirner v Falloon* [2015] NZHC 1873 at [32].

58 *Balchin v Hall* [2016] NZHC 837 at [7].

59 At [8].

validation of a will demonstrating testamentary intent requires "[g]ood reasons";[60] a court cannot decline to validate a document because the terms are unfair, morally repugnant or in breach of a legal duty.[61]

III HOLOGRAPHIC WILLS IN NEW ZEALAND

A Holographic Wills under s 14

A holographic will as defined in Part I of this paper could be validated under s 14 of the 2007 Act.

1 A document

Under s 14(1) there must be a document in order for the court to exercise its validation power. Document is defined in the 2007 Act as "any material on which there is writing".[62] 'Writing' is defined in the Interpretation Act 1999 as "reproducing words, figures, or symbols in a visible and tangible form and medium".[63] This excludes oral wills and audio and visual recordings of persons making such wills. The defining feature of a holographic will is that it is handwritten by the testator.[64] It would therefore fit within the definition of document under s 14(1).

2 Appears to be a will

Section 14(1)(a) requires that the document in question must appear to be a will. It is prescribed in the 2007 Act as a document that disposes of property after death or appoints a testamentary guardian.[65] As evidenced by case law, a document handwritten by the testator can appear to be a will, whether or not it is labelled as 'will'. In *Re MacNeil*, the testator left a suicide note entitled "this is my will and testament".[66] The Court held that because the document was headed as a will, it obviously appeared to be a will.[67] Similarly, a document found within a sealed envelope entitled "will and testament" was held to fulfil s 14(1)(a) in *Re Estate of Wright*.[68] In *Re Van den Berg*, Andrews J emphasised that the document did not need

60 At [11].

61 Peart and Kelly, above n 35, at 88.

62 Wills Act 2007, s 6.

63 Interpretation Act 1999, s 29.

64 Helmholz, above n 1, at 97.

65 Wills Act 2007, s 8.

66 *Re MacNeil*, above n 12, at [2].

67 *Re MacNeil*, above n 12, at [3].

68 *Re Estate of Wright* [2013] NZHC 9 at [1].

to be headed "Will and Testament" to be a will.[69] A holographic will, even if untitled, is therefore likely to satisfy s 14(1)(a).

3 Does not comply with s 11

Under s 14(1)(b), the document must not comply with the requirements in s 11.[70] A will that satisfies the s 11 requirements, but is found to be invalid for another reason cannot be validated under s 14. A holographic will is by definition unwitnessed.[71] It would therefore satisfy s 14(1)(b).

4 Came into existence in or out of New Zealand

Under s 14(1)(c), the document must have come into existence in or out of New Zealand. This clarifies that the validation power available to the courts under s 14 can be used for documents made both abroad and within New Zealand.[72] A holographic will would satisfy this requirements.

B Should New Zealand Admit Holographic Wills as a Class?

Holographic wills are capable of being validated under s 14, but it is submitted that they should be admitted as valid in their own right under New Zealand law. This subpart discusses arguments for and against introducing holographic wills and considers the benefits holographic wills offer testators.

1 Exception to s 11 formalities

The fundamental difference between a holographic will and a formal will is the requirements of s 11. These formalities were introduced to protect testators from forgery, coercion and rash decisions.[73] They also provide structure to testamentary law, as compliance is required in order to have a valid will. Critics are fearful of admitting holographic wills as a class in New Zealand because this would create an exception to s 11, frustrating the purpose of formalities and rendering them less effective.

---

69 *Re Van den Berg* [2013] NZHC 1028 at [15]; also see *Estate of Wong* [2014] NZHC 2554.

70 Peart and Kelly, above n 35, at 81.

71 Helmholz, above n 1, at 97.

72 *Re Rejouis* [2010] 3 NZLR 422; *Re Prince* [2012] NZHC 1058; and *Estate of Pinker v Pinker* [2015] NZHC 660, (2015) 30 FRNZ 174.

73 Caroline Sawyer and Miriam Spero *Succession, Wills and Probate* (3rd ed, Routledge, New York, 2015) at [5.1.1].

In reality, there are already several legislative exceptions to s 11, none of which has had a detrimental impact on s 11. The most notable is s 14, but ss 22 and 34 also allow wills that do not satisfy the s 11 formalities to be admitted to probate.

Section 22 in the 2007 Act regulates the disposition of movable property. Under s 22(3), a will made in New Zealand by any person, regardless of their domicile, can be admitted to probate if the will complies with the law of the place where the testator was domiciled when the will was made or when the testator died. If a testator is domiciled or dies in a jurisdiction where holographic wills are provided for in law, and the testator's will complies with the requirements of that law, a holographic will would be admitted in New Zealand.

Section 34 allows a military or seagoing person who is on operational service or at sea to make a will that would otherwise not be valid under s 11. The rationale is that, in the circumstances in which members of the New Zealand Armed Forces operate, it is unreasonable to expect them to satisfy the formalities of s 11.[74]

2 Witness requirement

The most significant formality in s 11 is the witness requirement. The purpose of having witnesses present when signing a will is two-fold: evidential and protective.[75] Requiring two independent witnesses to be present has evidentiary value because it provides concrete proof of the facts of execution.[76] As to the protective function, the witness requirement provides a guarantee that the contents of the will were neither forged nor achieved through fraudulent means.[77] Witnesses also work to protect the will-maker from any immediate duress or undue influence.[78] As holographic wills are typically unwitnessed documents, critics argue they lack the guarantees and protections that witnesses provide.[79]

However, holographic wills do not have to be unwitnessed. The fact that a holographic will is witnessed does not deny its being a holographic will.[80] Notwithstanding this, the importance of witnesses for evidentiary purposes has eroded over time. A witness does not have to know that the signing of witnesses and

---

74 Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R41, 1997) at 12–13.

75 Bird, above n 27, at 608.

76 Richard Lewis Brown "The Holograph Problem" (2006) 74(1) Tenn L Rev 93 at 97.

77 Bird, above n 27, at 609.

78 At 608.

79 At 632.

80 French Civil Code; and *Jones v Kyle* 168 La 728, 123 So 306 (1929) in Philip Mechem "The Integration of Holographic Wills" (1934) 12(3) N C L Rev 213 at 217–8.

the document signed is a will in order for it to be valid.[81] Further, the evidence of witnesses is unlikely to be required for holographic wills as the majority of s 14 applications proceed without objection.[82]

The protective role served by witnesses may be doubted. Described as a "relic of history",[83] the efficiency of using witnesses as protectors is limited in modern times.[84] Moreover, the requirement that a holographic will must be written in the testator's handwriting is an effective substitute for the witness requirement.[85]

C Holographic Wills Already Provided for

It may be argued that holographic wills do not need to be independently provided for, because applications decided under s 14 commonly involve documents that are holographic wills in all but name.[86] For example, in *Re Estate of Webster*, the document validated by Brown J was "written in the deceased's handwriting and signed with her usual signature"[87] and described as the testator's "last will in intestinat [sic]."[88] This document is a holographic will: it was handwritten and signed by the testator, and it detailed the disposition of her property after death.[89]

However, holographic wills are a burden on s 14. Since its introduction in 2007, over 160 s 14 validations have been granted. Out of these, 27 clearly satisfied the definition of a holographic will.[90] Admitting holographic wills as a separate class

---

81 Wills Act 2007, s 12(2).

82 Holographic wills are rarely contested, as evidenced from jurisdictions where holographic wills are permitted. See Stephen Clowney "In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking" (2008) 43(1) Real Property, Trust and Estate Law Journal 27 at 52-53.

83 Brown, above n 76, at 97.

84 Brown, above n 76, at 97–8.

85 Bird, above n 27, at 609.

86 For example, a suicide note in *Re Estate of Jefferies* [2014] NZHC 1996; and a letter in *Wright*, above n 68.

87 *Re Estate of Webster* [2016] NZHC 1834 at [3].

88 At [2].

89 Robinette, above 2, at 553; and Helmholz, above n 1, at 97.

90 *Re Goodwin* [2017] NZHC 1826; *Hemopo v Public Trust* [2017] NZHC 1735; *Re Estate of White* [2017] NZHC 220; *Re Estate of Poon* [2017] NZHC 199; *Re Estate of Torkington* [2016] NZHC 1902; *Webster*, above n 87; *Richards v French* [2016] NZHC 1647; *Re Estate of Taneao* [2016] NZHC 883; *Re Estate of Cleveland* [2016] NZHC 601; *Re Estate of Clark* [2016] NZHC 78; *Re Estate of Parsons* [2015] NZHC 3133; *Re Marsden* [2015] NZHC 2885; *Re Estate of Alder* [2015] NZHC 2117; *Re Estate of Cleven* [2015] NZHC 966; *Re Whitney* [2014] NZHC 2442; *Re Estate of Jefferies*, above n 86; *Re Estate of Morton* [2014] NZHC 1825; *Re Estate of Murphy* [2014] NZHC 548; *Re Estate of Heka* [2012] NZHC 2824; *Re Estate of Keenan* [2012] NZHC 2376; *Re Smith*

would reserve the discretion in s 14 for other exceptions to s 11.[91] Court proceedings and the associated time and costs involved in an s 14 application would be avoided.

Further, the court can currently refuse to exercise the discretion to validate even where a will satisfies the requirements in s 14(1) and (2). Providing for holographic wills independently of s 14 eliminates this risk.

D Ambiguities in Wills

A will compliant with the s 11 formalities is typically drafted by a lawyer. A holographic will, being home-made, is usually created by a lay person.[92] A lay will-maker typically does not possess the basic skills of estate planning, nor a comprehensive understanding of the substantive law of wills.[93] Due to this lack of knowledge, it has been argued that holographic wills are more likely to be poorly drafted and prone to errors such as the use of incorrect, ambiguous, or unclear language.[94] A poorly drafted will makes it difficult to understand how the testator intended to dispose of the property.[95] This puts the testator's intentions at risk. In comparison, a competent lawyer will possess the basic skills of estate planning.[96] This should ensure that a testator's intentions are accurately and clearly expressed by preparing a carefully considered and well planned will.[97] However, lawyers are capable of making mistakes, as evidenced by the statistics generated from the Lawyers Complaints Service. In 2015, the main area of law in which complaints arose was Trusts and Estates at 21 per cent.[98]

In the event that wills are incorrectly or poorly drafted, there are legislative protections to correct them. These protections are extensive and will protect both the testator and those affected by the will from the negative effects of poor will-drafting. Section 31 allows the courts to correct clerical errors and failures in a will, if the will

---

[2012] NZHC 2061; *Re Estate of Paul* [2012] NZHC 1657; *H v P* [2012] NZHC 753; *Re Estate of Stuart-Menteath* HC Rotorua CIV-2011-463-621, 6 October 2011; *Stephenson v Rockell* (2010) 28 FRNZ 168; HC Napier CIV-2010-441-596, 13 December 2010; *Re Zhu (Deceased),* above n 45; and *Re MacNeil*, above n 12.

91 This is its intended purpose, evident from s 14(1)(b) in the 2007 Act.

92 Brown, above n 76, at 95.

93 Clowney, above n 82, at 36; and Brown, above n 76, at 121.

94 Brown, above n 76, at 122.

95 At 123.

96 At 121–2.

97 At 100.

98 "Lawyers Complaints Service, 2010 to 2015" New Zealand Law Society <www.lawsociety.org.nz>.

does not carry out the testator's intentions.[99] This is not a general power to correct. For example, in *Re Robertson,* the solicitor preparing the testator's will incorrectly recorded his instructions.[100] This error was replicated in the testator's will, which therefore did not give effect to the testator's instructions.[101] Under s 31(2), the Court made an order correcting the will.[102]

Another example is found in *Re Estate of Nolan*, where a lawyer was instructed to draft a mirror will for the testator. The testator's will was to be the same as his wife's will, but with the necessary changes made. These changes included changing the word "him" to "her" and "husband" to "wife".[103] Unfortunately, the changes were not made. The Court ruled that this was obviously a clerical error made by the lawyer and ordered a correction under s 31(1).[104]

If a will contains terms that are ambiguous or uncertain, s 32 permits the use of external evidence to interpret and correct the will. For example, in *Bowness v Bowness*, the testator referred to his beneficiaries as "children", which by definition included his natural children but not his step-daughter. An application was made to include the step-daughter in the distribution of property to the testator's "children".[105] The Court allowed the correction after examining external evidence, including an affidavit from the deceased's brother, who affirmed that the deceased had always treated his step-daughter as his own child.[106]

Section 32 was also successfully used in *Glass v Anthony* to demonstrate that the phrase "my bank accounts" extended to cover the deceased's term deposits.[107] In reaching this conclusion, Fogarty J considered the surrounding circumstances,[108] the

99 *Re Jensen* [1992] 2 NZLR 506 at 8–9.

100 *Re Robertson* [2013] NZHC 2723 at [5].

101 At [16].

102 At [22].

103 *Re Estate of Nolan* [2014] NZHC 1499 at [3].

104 *Nolan*, above n 103, at [4–5].

105 *Bowness v Bowness* [2015] NZHC 339 at [4].

106 At [12].

107 *Glass v Anthony* HC Christchurch CIV-2008-409-455, 9 July 2008 at [28].

108 At [10].

deceased's testamentary intent, and the handwritten notes of the deceased's solicitor.[109]

In the event ss 31 and 32 fail to present a satisfactory solution, there are three additional pieces of legislation that can provide relief for those adversely affected. Firstly, the Property (Relationships) Act 1976 entitles the surviving partner of the deceased to apply for division of the couple's relationship property without reference to succession law. Secondly, the Family Protection Act 1955 grants the court the power to make provision for the proper maintenance and support of family members of the deceased. Thirdly, the Law Reform (Testamentary Promises) Act 1949 allows the court to enforce an undertaking to reward the applicant for services rendered.

E Benefits of Holographic Wills

In comparison to formal wills, holographic wills have several benefits. Firstly, creating a holographic will is cheap. There are minimal costs, as a testator will commonly not seek professional legal advice. Whilst there is no fixed price for creating a formal will, an average face-to-face meeting with a lawyer has been estimated at $195.[110]

Additionally, changes can be made to a holographic will at the testator's convenience and at no cost. Circumstances are always changing:[111] relationships end; children become adults; assets appear or disappear. The New Zealand Law Society recommends that testators review their wills every 5 years.[112] Any alterations made to a will by a lawyer based on such a review will involve additional costs.

A testator unable to afford the costs typically involved with creating a formal will has limited options. If admitted as a valid form of will in New Zealand, a holographic will would provide an affordable alternative for those unable to pay legal fees.

Secondly, a holographic will can be created quickly with minimal effort. This benefit is particularly pertinent when time is of the essence, for example, where the testator is of an advanced age or is unwell. In comparison, a formal will typically takes longer to prepare. When procured from a lawyer, will making is confined to business hours. It is therefore unlikely to be completed on the same day as it is requested by the client. For example, in *Re Estate of McLauchlan* the lawyer visited

---

109 At [18].

110 Diana Clement "Online options can make writing a will an easy task" *The New Zealand Herald* (online ed, New Zealand, 30 May 2015) <www.nzherald.co.nz>.

111 Clement, above n 110.

112 "Making a Will and Estate Administration" (March 2013) New Zealand Law Society <www.lawsociety.org.nz>.

the client and took instructions for preparing a new will on 15 March 2010.[113] It took ten days to prepare and send the will to the client, and nearly three months for an appointment to be arranged for signing. At that point, the client was too ill to sign the will.[114]

Similarly, in *Re Estate of Smith,*[115] the lawyer visited the client on 20 December 2012 to update the client's will.[116] The lawyer told the client that the new will would be unable to be signed before Christmas.[117] The will was misplaced in the New Year, and the client died in February 2013 without the will being returned to him to be signed.[118]

As evidenced in *Re Estate of McLauchlan* and *Re Estate of Smith,* a testator does not always have time to wait. Further, the more complicated a will is, the more time it will take to prepare. Holographic wills are not limited by such administrative delays.

Lastly, whatever the limitations, having a holographic will is better than having no will. The frequency of will-making in New Zealand increases as people age, but about five per cent of the population die without a will.[119] This may be due to an unwillingness to go to a lawyer or to intervening and extraordinary circumstances. Without a will, the deceased's property is distributed according to New Zealand's intestacy legislation.[120] This system is based on the intentions of the average person, but how an individual wishes to dispose of their possessions is unique.[121] The exact wishes of the deceased therefore often fail to be satisfied under intestacy legislation.[122]

---

113 *Re Estate of McLauchlan* [2014] NZHC 1040 at [7].

114 At [7].

115 *Re Estate of Smith* [2013] NZHC 2429.

116 At [2].

117 At [3].

118 At [4].

119 Catherine Harris "Making sure your will works well" *Stuff* (online ed, New Zealand, 31 January 2015) <www.stuff.co.nz>; and Geoff Adlam "But are you sure there is no will?" (7 April 2016) New Zealand Law Society <www.lawsociety.org.nz>.

120 Section 77 of the Administration Act 1969 allocates the deceased's possessions to persons that are most closely related to the deceased by marriage, blood and other relationships recognised by law. The Family Protection Act 1955 s 4 is not precluded by the Administration Act 1969.

121 Clowney, above n 82, at 53–4.

122 At 53.

IV CONCLUSION

There is scope in New Zealand's domestic legislation for holographic wills, and holographic wills should be admitted in their own right.

Section 14 does not amount to the acceptance of holographic wills,[123] only that a testator in New Zealand could have a valid will without complying with the s 11 formalities. Waivers of s 11 formalities are no longer limited to members of the Armed Forces[124] or wills made overseas or compliant with overseas laws.[125]

A holographic will is cheap, timely, and is better than intestacy. It provides the testator with an alternative to the s 11 form. Given the existing exceptions to s 11, the accommodation for holographic wills in the current law, and the benefits holographic wills provide, it is appropriate that the 2007 Act be amended to provide for holographic wills as a separate class of wills.

123 The 2007 Act also has scope for holographic wills to be admitted under ss 22 and 34.

124 Wills Act 2007, s 34.

125 Wills Act 2007, s 22.