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NEW ZEALAND AND THE HOLOGRAPHIC WILL

Submitted for the LLB (Honours) Degree

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2016

Abstract

A holographic will is a document detailing the disposition of property, handwritten by its author. No other formalities, such as witnesses, the testator's signature, or dating, are required in order for the holographic will to be considered valid. Although holographic wills are not specifically provided for in New Zealand legislation, they are present in numerous jurisdictions around the world. This paper considers whether holographic wills could be validated under s 14 of the Wills Act 2007, and even if they are, whether holographic wills should be accepted as a new class of wills in their own right. This paper concludes that notwithstanding the fact holographic wills may be validated, they should be admitted as a separate form of wills in New Zealand.

Key words

Succession law, wills, Wills Act, holographic wills

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I Introduction

The word holograph means a document handwritten by its author. A holographic will is a document that is written in the handwriting of 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.

The purpose of this paper is to consider whether holographic wills can be declared valid under s 14 of the Wills Act 2007[3] (the 2007 Act), and whether holographic wills should be admitted formally as a new class of wills in New Zealand. This paper has four parts.

Part I discusses the development of the holographic will through Roman law and into France and England. It also discusses the modern holographic will, whilst not present in New Zealand law, as a valid form of will in many countries around the world.

Part II describes the New Zealand law on wills, focusing on s 14 of the 2007 Act.[4] Neither the legislation inherited from Britain, the Wills Act 1837 (UK)[5] (the 1837 Act), nor the law in the 2007 Act, specifically provides for holographic wills. However, s 14 in the 2007 Act grants the courts the power to validate wills that do not fulfil the formal requirements of s 11 in the 2007 Act.[6]

Part III considers whether there is scope for holographic wills to fit under the 2007 Act, and argues for holographic wills to be accepted as a new class of wills to New

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[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 14.

[4] Section 14.

[5] Wills Act 1837 (UK) 7 Will IV and 1 Vict c 26.

[6] Section 14.

Zealand. A holographic will that is compliant with the requirements of s 14 can be validated by the court. If it does not comply, or the courts refuse to exercise discretion under s 14, then the holographic will is invalid and cannot be admitted to probate.[7]

Part IV concludes that the majority of holographic wills are able to be validated under s 14, but that New Zealand should admit the holographic will in its own right. This would ensure that all holographic wills would be valid in New Zealand law.

[7] Section 14.

II Holographic Wills

A Definition

A holographic will is a document that provides for the disposition of a testator's property after death[8] written in the handwriting of the testator.[9]

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.[10] The reason for not prescribing any witness requirement is because the handwriting of the testator is considered to be evidence of genuineness and acts as a sufficient substitute.[11]

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.[12]

B Origins of the Holographic Will

1 Rome

Rome was the first western jurisdiction to codify wills that were akin to holographic wills.[13] Under Roman law, privileged wills were comparable to the modern holographic will because they required minimal formalities in order to be valid.[14]

Privileged wills were normally restricted to extraordinary circumstances. For example, *testamentum tempore pestis,*[15] where an unwitnessed will was held to be valid if

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[8] Robinette, above n 2, at 553.

[9] Helmholz, above n 1, at 97.

[10] Section 11(2).

[11] Helmholz, above n 1, at 97.

[12] Wills Act 2007, s 11.

[13] Robinette, above n 2, at 552.

[14] Kenneth GC Reid, Marius J de Waal, and Reinhard Zimmermann *Comparative Succession Law: Vol I: Testamentary Formalities* (Oxford University Press, New York, 2011) at 22.

[15] Reginald Parker "History of the Holograph Testament in the Civil Law" (1943) 3(1) Jurist 1 at 2.

it was executed in a time of plague.[16] Another example is *testamentum militare,* which granted soldiers the privilege of making wills without any formality.[17]

Use of privileged wills in everyday life was uncommon, but it did occur. Such an example is the descendant testament, *testamentum parentum inter liberos*.[18] It allowed a will made by a mother or father in favour of their heirs to be valid, if the date, the names of their children, and the portions of inheritance they were to receive were written in the hand of the testator.[19] The signature of the testator was not required.[20]

Outside of codified Roman law, the form of will directly analogous to the modern holographic will was the *holographa manu*.[21] This allowed a will written in the testator's hand to be held valid, despite lack of both witnesses and the testator's signature.[22]

Roman custom typically favoured solemnity in legal acts.[23] The *holographa manu*, a departure from such customs, was developed after an incident where a woman was unable to find witnesses in order to properly execute her will.[24]

The rationale for the *holographa manu* was that there may be times where there are no witnesses available to the testator,[25] and that this alone should not be allowed to defeat the testator's intentions. This is particularly relevant in emergency situations.

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[16] DJ McQuoid-Mason "Some aspects of the law of succession Rhodesia" (1974) 14(1) Zimbabwe Law Journal 23 at 26.

[17] Gordon Campbell *A Compendium of Roman Law: Founded on the Institutes of Justinian Together with Examination Questions Set in the University and Bar Examinations (with Solutions) and Definitions of Leading Terms in the Words of the Principal Authorities* (Steven and Haynes, London, 1878) at 63.

[18] Parker, above n 15, at 2.

[19] Ibid, at 4.

[20] Reid, de Waal and Zimmermann, above n 14, at 22.

[21] Ibid, at 19.

[22] Parker, above n 15, at 5.

[23] Ibid.

[24] Ibid, at 4.

[25] Ibid, at 5.

The *holographa manu* did not make it into codified law.[26] Despite this lack of codification,[27] the *holographa manu* and the principles behind it greatly influenced the development of testamentary law outside the Roman Empire.

2 France

The *holographa manu* was brought into France, as adopted by the Visigoths in 488.[28] In the sixth century, the first real code of law for the Visigoths was issued, and it included the holographic will.[29] As contained in this code, the holographic will did not require any formalities to be valid, bar the writing in the testator's own hand.[30]

By the seventh century a holographic will had to be dated and signed by the testator, and entirely written by the testator's hand. Further, the authenticity of the handwriting and signature had to be confirmed before implementing the will.[31]

In the 14th century, holographic wills are included in French *Coutumiers* (customary law collections).[32] The appearance of holographic wills in French customary law can be attributed to the popularisation of wills between the 12th and 15th century. There was an increase in the frequency of wills, which resulted in the erosion of existing formalities in order to facilitate more informal wills.[33] By removing formalities such as the witness requirement, France effectively re-created the holographic will.[34]

From the *Coutumiers*, the holographic will passed into the Napoleonic Code in the 19th century, which sanctioned their use throughout all of France.[35] This express

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[26] Reid, de Waal and Zimmermann, above n 14, at 19.
[27] Parker, above n 15, at 2.
[28] Ibid, at 5.
[29] Gustav Haenel *Lex Romana Visigothorum* (Leipzig, Teubner, 1849).
[30] Parker, above n 15, at 7.
[31] Ibid, at 8.
[32] Ibid, at 9.
[33] Ibid, at 15–17.
[34] Helmholz, above n 1, at 98.
[35] Parker, above n 15, at 23.

recognition of the holographic will in French law had a significant influence on the law of other countries.[36]

3 England

Holographic wills are not part of current English law,[37] but they were a valid form of will until abolished in the 1837 Act.[38]

The origins of holographic wills in England are unclear.[39] Scholarly opinion suggests that holographic wills in England came from a customary deviation from the *comparatio literarum* procedure found in *ius commune*.[40] *Comparatio literarum* involved comparing the testator's handwriting in the will to other documents written by the testator in order to determine whether or not the testator wrote the will.[41]

Originally a test used in contract law for verifying the authenticity of contracts, using *comparatio literarum* in English testamentary law was controversial. However, taking law from one area and using it for another was common practice in England at the time,[42] and allowing holographic wills meant that the courts could enforce the testator's last wishes, regardless of non-compliance with formalities. Enforcement of testamentary intent had long been the most important objective in English testamentary law.[43]

Additionally, there were long-standing exceptions to the witness formality in English law.[44] The most notable of these was the military will, better known as the Soldiers' and

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[36] EGL "Holographic Wills and Their Dating" (1918) 28(1) Yale Law Journal 72 at 72–3.

[37] R Helmholz "The transmission of legal institutions: English law, Roman law, and handwritten wills" (1994) 20 Syracuse Journal of International Law and Commerce 147 at 148.

[38] Section 9.

[39] Lindsay Dean Breach "The Civil Law Influence on the Evolution of Testamentary Succession" (Master of Laws Thesis, University of Canterbury, 2013) at 197.

[40] Helmholz, above n 1, at 99.

[41] Breach, above n 39, at 201.

[42] Helmholz, above n 1, at 99.

[43] Helmholz, above n 37, at 156–7.

[44] Helmholz, above n 1, at 102.

Sailors' will.[45] This details that any will written by a soldier in actual military service did not require attestation.[46]

Therefore, despite initial resistance, by the end of the 17th century holographic wills had become an established part of English law.[47]

C Modern Holographic Wills

In the absence of statutory validation, holographic wills are not authorised.[48] If, like in New Zealand, there is no specific recognition of holographic wills in statute, then the fact that a will is written in the testator's hand has no special significance.[49] The testator must satisfy the formalities required for an ordinary will in New Zealand law under s 11.[50]

There are many countries that do authorise holographic wills as a valid form of will, including Belgium, France, and Germany,[51] as well as 27 states in the United States of America.[52] Although the definition of a holographic will is 'a document disposing of property handwritten by the testator', as testamentary law has developed, so has the law relating to holographic wills. It may be necessary to satisfy additional statutory requirements in order to have a valid holographic will.[53] Examples of these requirements include evidence of testamentary intent, the testator's signature, whether the document is entirely written in the handwriting of the testator, and dating of the will.[54]

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[45] Wills Act 1837 (UK) 7 Will IV and 1 Vict c 26, s 11.
[46] Helmholz, above n 37, at 148.
[47] Helmholz, above n 1, at 99.
[48] Bruce L Stout "Handwritten wills may be valid if certain requirements are met" (2003) 30(4) Estate Planning 174 at 174–5.
[49] Gail Boreman Bird "Sleight of handwriting: the holographic will in California" (1981) 32(3) Hastings Law Journal 605 at 607.
[50] Wills Act 2007, s 11.
[51] EGL, above n 36, at 72.
[52] Stout, above n 48, at 174.
[53] Frank S Berall "Oral Trusts and Wills: Are They Valid?" (2006) 33(11) Estate Planning 17 at 22.
[54] Peter Wendel *Wills, Trusts, and Estates: Keyed to Dukeminier/Johanson/Lindgren/Sitkoff* (Aspen Publishers Online, New York, 2005) at 85.

1 Testamentary intent

A common requirement for a holographic will to be valid is that it must show evidence of *animus testandi*, which is the intention to make the document in question a will.[55] For example, in Arkansas in the United States of America,[56] in order for a holographic will to be valid, the document must show testamentary intent.[57] This is the same requirement found under s 11 in the 2007 Act.[58]

It is therefore 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.[59] 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 carries testamentary intent, there are several factors a court might consider. For example, whether the testator intended the document to make a final disposition of his or her property after his or her death. Another example is the language used in the will.[60] Clear legalistic terms such as 'will', 'testament', 'beneficiary' or 'estate' demonstrate that the testator intended the document to be their will.[61] Unclear or ambiguous language will act as evidence to the contrary.

Establishing testamentary intent is particularly problematic for informal documents, due to their lack of labelling.[62] Although a document does not have to be specifically

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[55] Stout, above n 48, at 177.

[56] Robinette, above n 2, at 554.

[57] Ark Code Ann § 28-25-104 (Supp 1991).

[58] Section 11; and Claude W Stimson "When Is a Holographic Will Dated?" (1944) 5(1) Mont L Rev 82 at 84.

[59] Ibid.

[60] Stout, above n 48, at 177.

[61] Ibid; and *Re MacNeil* (2009) 10 NZCPR 770.

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

labelled as a testator's 'will',[63] more informal documents, either labelled as something other than 'will' or not labelled at all, require greater investigation by the courts.[64]

Despite this, testamentary intent is frequently found in less serious or non-legal documents,[65] for example, a love letter,[66] a suicide note,[67] and the back of a blank cheque.[68] This demonstrates the flexible approach of the courts to finding testamentary intent in informal documents.[69]

2 *Signature*

Another common requirement is that the testator must sign the holographic will.[70] This is present in the French Civil Code. In France, a holographic will must be signed by a testator in order to be valid.[71] It was also adopted in the definition of a holographic will in Montana in the United States of America.[72]

The testator's nickname, an abbreviation of their name or their initials,[73] and even a familiar term, like the testator's position in their family, has been held to satisfy the signature requirement.[74] The rationale behind the signature requirement is that it works to compensate for the lack of witnesses required for a holographic will, and helps ensure legitimacy.[75]

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[63] Stout, above n 48, at 177.
[64] Soller, above n 62, at 579.
[65] Berall, above 53, at 22.
[66] Robinette, above n 2, at 554.
[67] *Re Estate of Wong* [2014] NZHC 2554.
[68] Robinette, above n 2, at 556.
[69] Stout, above n 48, at 177.
[70] Stimson, above n 58, at 84.
[71] French Civil Code, art 970.
[72] MT Code (2015) §72-2-522; and Stimson, above n 58, at 82.
[73] Stout, above n 48, at 177.
[74] Berall, above n 53, at 22.
[75] Stimson, above n 58, at 84.

The court must be satisfied that the testator, when signing the document, intended this to be their signature.[76] Signing with intent to authenticate the will is known as *animus signandi*.[77]

When examining *animus signandi*, the courts look at the entire document, not just the signature itself.[78] 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.

The location of the signature on the will is important in some jurisdictions. In the United States of America, the following states require the signature of the testator to be at the end of the will: Arkansas, Florida, Ohio, Oklahoma, Kansas, New York and Pennsylvania.[79] If it is statutorily required that the signature be at the end of the document, then that is where the signature must be in order for the will to be valid.[80] In New Zealand, the position of the signature is not important,[81] although historically wills were required to be signed at the foot of the document.[82]

3 Written entirely in the handwriting of the testator

The definition of a holographic will includes that the document must be handwritten by the testator.[83] A more contentious element to this requirement is whether a holographic will has to be 'entirely' written in the handwriting of the testator. This

[76] Ibid, at 86.
[77] Stout, above n 48, at 177.
[78] Stimson, above n 58, at 86.
[79] Arkansas (AR Code § 28-25-103), Florida (FL Stat § 732.502), Ohio (Ohio Rev Code § 2107.03), Oklahoma (OK Stat § 84-55), Kansas (KS Stat § 59-606), New York (NY Est Pow & Trusts L § 3-2.1) and Pennsylvania (20 PA Cons Stat § 2502).
[80] Berall, above n 53, at 22.
[81] Wills Act 2007.
[82] Wills Act 1837 (UK) 7 Will IV and 1 Vict c 26, s 9.
[83] Helmholz, above n 1, at 97.

requirement is present in the French Civil Code[84] and 12 states in the United States of America.[85]

Jurisdictions that require a holographic will to be entirely handwritten by the testator are often plagued with issues when assessing this requirement. Courts typically apply two theories when faced with a document that is not entirely handwritten by the testator. These are the intent and surplusage theory.[86]

Under the intent theory, if the testator intended the non-handwritten material to be a part of his or her holographic will, then it is invalid, because it is not entirely in the testator's handwriting. If not, then the holographic will is valid, but the non-handwritten material is not included.[87] This is to be determined from examining the entire document.[88] This is the harsher of the two theories, and can sometimes lead to unjust results.[89]

The surplusage theory is relatively less stringent. If the non-handwritten material is not essential to the meaning of the holographic will, then it can be disregarded.[90] This does involve guesswork, interpreting what is and what is not meaningful to the testator's will, which can be hazardous. However, when only a limited portion of the document is printed, it is relatively safe to assume it is not essential to the holographic will.[91]

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[84] French Civil Code, art 970.

[85] 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 <http://law.jrank.org/pages/11862/Wills.html>.

[86] Stimson, above n 58, at 90.

[87] Ibid.

[88] Bird, above n 49, at 621.

[89] Stimson, above n 58, at 91.

[90] Ibid, at 90.

[91] Bird, above n 49, at 629.

4 *Requirement of date*

Less common is the requirement that a holographic will must be dated.[92] It has not always been an essential requirement for the validity of a holographic will. For example, in France prior to 1735,[93] a holographic will did not require a date in order to be held valid.[94] Since 1735, French law requires a holographic will to be signed, written and dated by the testator.[95]

Numerous other countries and states have also imposed dating in their statutory law regulating holographic wills.[96] The German Civil Code states that the testator should record the time (day, month and year) the holographic will was written.[97] Where this requirement is present, the date will be a necessary addition to the document alleged to be a holographic will in order for the courts to accept it as valid.[98]

There is a general agreement amongst jurisdictions that require holographic wills to be dated that the date has to be written entirely in the testator's handwriting.[99] This requirement 'entirely' has been a particularly litigious issue.[100]

5 *A New Zealand definition*

If holographic wills were accepted as a new class of wills in New Zealand, the preferred definition for a holographic will is a document providing for the disposition of a testator's property after death,[101] that is written[102] and signed[103] in the handwriting of the testator, demonstrating testamentary intent.

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[92] EGL, above n 36, at 72; and Berall, above n 53, at 22.
[93] Parker, above n 15, at 21.
[94] Stimson, above n 58, at 87.
[95] Parker, above n 15, at 21.
[96] EGL, above n 36, at 72.
[97] German Civil Code, s 2247.
[98] Stimson, above n 58, at 87.
[99] Ibid.
[100] Ibid, at 90.
[101] Robinette, above n 2, at 553.
[102] Helmholz, above n 1, at 97.

As evidenced from other jurisdictions, requiring the satisfaction of requirements like ‘written entirely in the handwriting of the testator’ or ‘dating’ has resulted in much litigation and often in frustration of testamentary intent.

[103] Stimson, above n 58, at 84.

III Law of Wills in New Zealand

A Wills Act 1837 (UK)

Under the English Laws Act 1858,[104] the laws of England existing on 14 January 1840 were to be applied in New Zealand, in so far as they were applicable to the circumstances.[105] This included the 1837 Act, which regulated testamentary law in the United Kingdom. The Imperial Laws Application Act 1988 included the 1837 Act in the Schedule of Imperial laws still in force in New Zealand.[106]

The 1837 Act was old and difficult to understand. The sections were lengthy and inaccessible.[107] In its report, *Succession Law: A Succession (Wills) Act,*[108] the Law Commission recommended several changes. These included, for example, restating the law in plain and contemporary language, and giving better effect to testamentary intent.[109] Such changes were necessary to modernise the law on wills.

Regardless of criticism, the 1837 Act remained the foundation of testamentary law in New Zealand until the 2007 Act.[110] After November 2007, all wills are judged by the 2007 Act, regardless of the date they were created.[111]

B Wills Act 2007

The current requirements for a valid will are set out in s 11 of the 2007 Act.[112] In order to be valid, a will must be in writing and signed and witnessed by the testator and

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[104] English Laws Act 1858 (UK).
[105] David V Williams "Application of the Wills Act 1837 to New Zealand: Untidy Legal History" (2014) 45(4) VUWLR 637 at 637–8.
[106] Imperial Laws Application Act 1988.
[107] Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R41, 1997) at 2.
[108] Ibid, at 41.
[109] Ibid, at 2.
[110] Williams, above n 105, at 645–6.
[111] Nicola Peart and Greg Kelly "The Scope and the Validation Power in the Wills Act 2007" (2013) 1 NZ L Rev 73 at 74.
[112] Section 11.

two witnesses. The two witnesses must also be in the testator's presence when the testator and each witness signs the document.[113]

Section 11 was not intended to make radical changes to the formalities in s 9 of the 1837 Act.[114] The only change made was the removal of the requirement that the signature must be placed at the end of will.[115]

The most significant change is in s 14 of the 2007 Act.[116] Section 14(2) empowers the court to declare a document, that does not comply with the s 11 formalities, a valid will if it is satisfied that the document expresses the deceased's testamentary intentions.[117] Given the precedents before s 14 came into force, this was significant. It curtailed the impact that the s 11 formalities have in law.

The rationale behind such change was to ensure that the deceased's testamentary intentions are not unnecessarily frustrated by unfulfilled formalities.[118] There is no reason why the courts should be limited to the formal requirements when trying to ascertain a deceased's genuine intentions.[119] The change followed similar legislative change in both Australia[120] and the United Kingdom.[121]

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

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[113] Section 11(4).
[114] Peart, above n 111, at 75.
[115] Law Commission, above n 107, at 3.
[116] Peart, above n 111, at 73.
[117] Wills Act 2007, s 14(2).
[118] *Re Estate of Beaumont* [2013] NZHC 2719, at [10].
[119] Law Commission, above n 107, at 27.
[120] Wills Act 1936 (SA), s 12(2).
[121] Wills Act 1837 (UK) 7 Will IV and 1 Vict c 26, s 11.

Zealand.[122] If these requirements are met, the court has the power to validate the document as a will.

In order to exercise this power, the court has to be satisfied on the balance of probabilities that the document expressed the deceased's testamentary intentions.[123] There must be cogent evidence to support this finding.[124] 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".[125]

Additional evidence that may be taken into consideration by the courts has been expressed in case law. There are many different types. For example, where there has been a delay between the testator giving instructions to his or her lawyer and the testator's death, the court can take this into account.[126] In *Amundson v Raos*,[127] the court held that the length of time between two such instances is a factor that requires examination.[128] However, Moore J also noted that a lengthy delay and a failure to sign a draft will does not necessarily mean that an application for validation will be rejected.[129] There are many reasons why the testator may not sign a draft before their death. They might have changed their mind, overlooked or forgotten to sign, or finally, they might not think further action needs to be taken. In the event of the latter, a court is most likely to grant validation.[130]

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[122] Wills Act 2007, s 14.
[123] Wills Act 2007, s 14(2).
[124] *Re Zhu (Deceased)* HC New Plymouth CIV-2010-443-21, 17 May 2010 at [7].
[125] Wills Act 2007, s 14(3).
[126] *Tamarapa v Byerley* [2014] NZHC 1082 at [26].
[127] *Amundson v Raos* [2015] NZHC 2422, [2015] NZAR 1772.
[128] Ibid, at [23].
[129] Ibid, at [24].
[130] *Re Estate of Hickford (deceased)* HC Napier CIV-2009-441-000369, 13 August 2009 at [9]–[10].

Another example is evidence of the relationship between the deceased and the intended beneficiary or beneficiaries of the document that is proposed to be a valid will. In *Tamarapa v Byerley,* evidence of the longstanding and close relationship between the deceased and the intended beneficiary supported the finding that the document reflected the deceased's testamentary intentions.[131] Similarly, s 14 applications for validation have succeeded where the intended beneficiary was related to the deceased, either as their spouse, child, or through some other familial connection.[132]

The courts may also take into account whether the application for validation is unopposed.[133] In other words, whether those persons in a position to contest the application do so or not.[134] In the case *Re Estate of McDonald*,[135] the deceased executed a valid will leaving his entire estate to his wife. A few years later, the deceased instructed his lawyer to prepare a new will to divide his estate equally amongst his children.[136] This will was never signed. The deceased's children applied for an order declaring the later draft will valid,[137] and the deceased's wife consented to this application.[138] Evidence of consent, or more simply, a lack of opposition, will support the applicant's case for validation.

Ultimately, what evidence will be sufficient to surmount the threshold of proving testamentary intent is dependent on the unique facts of each case.[139]

Under s 14, even if a document fulfils the requirements in s 14(1) and (2), the court does not have to make an order of validation. This is because the court has discretion in

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[131] *Tamarapa,* above n 126, at [34].
[132] *Re Anderson* [2016] NZHC 626.
[133] *Loffhagen v Paterson* [2016] NZHC 1178 at [21]; and *Re Estate of White* [2016] NZHC 1214 at [10].
[134] Peart, above n 111, at 91.
[135] *Re Estate of McDonald* [2016] NZHC 1577.
[136] Ibid, at [2].
[137] Ibid, at [1].
[138] Ibid, at [5].
[139] *Kirner v Falloon* [2015] NZHC 1873 at [32].

whether or not to not make an order.[140] However, the exercise of discretion to decline is not unprincipled.[141] Refusing validation of a document that represented the deceased's testamentary intent requires "[g]ood reasons".[142] The court therefore cannot decline to validate a document because the terms are unfair, morally repugnant, or in breach of a legal duty.[143]

In *Balchin v Hall*, Courtney J described the power to refuse validation of a document as largely "residual".[144] This is reflected in its lack of use. Since the introduction of s 14 in 2007 to July 2014, there had been approximately 80 applications, and only in two cases was an application declined despite the document concerned satisfying the requirements under s 14.[145]

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

[141] Ibid, at [8].

[142] Ibid, at [11].

[143] Peart, above n 111, at 88.

[144] At [11].

[145] *Re Estate of Campbell* [2014] NZHC 1632, [2014] 3 NZLR 706 at [17].

IV Holographic Wills in New Zealand

A Could a Holographic Will be Accepted under s 14?

Section 14 has been utilised numerous times. In the majority of cases, the applicant was successful in validating the document as a will. The types of documents in these cases vary widely, including unsigned drafts of wills,[146] wills that have not satisfied the witness formality under s 11,[147] a letter named as a will,[148] a series of notes written in informal language,[149] and suicide notes.[150] Whilst this is only a small selection of the variety of documents that have been processed under s 14, it is evident that the courts approach to the validation application process is both liberal and flexible.

Under such a wide approach, the courts could approve a holographic will as a valid will. A recent example can be found in *Re Estate of Webster*.[151] The document concerned, found inside the deceased's notebook, was "written in the deceased's handwriting and signed with her usual signature".[152] The text of the document is described as the deceased's "last will in intestinat [sic]."[153] Brown J issued a validation order for the document under s 14.[154] On the facts of *Re Estate of Webster*, the document concerned can be accurately described as a holographic will. It was handwritten by the testator, it detailed the disposition of the testator's property after death, and it was also signed by the testator.[155]

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[146] *Tamarapa v Byerley,* above n 126; *Re Estate of McLauchlan* [2014] NZHC 1040; and *Re Estate of Meecham* [2014] NZHC 2303.
[147] *Re Wheeler* [2014] NZHC 3118; and *Re Estate of Aramoana* [2014] NZHC 537.
[148] *Re Estate of Wright* [2013] NZHC 9.
[149] *Re Van den Berg* [2013] NZHC 1028.
[150] *Re Estate of Clark* [2016] NZHC 78; *Re Estate of Wong*, above n 67; and *Re Estate of Jefferies* [2014] NZHC 1996.
[151] *Re Estate of Webster* [2016] NZHC 1834.
[152] Ibid, at [3].
[153] Ibid, at [2].
[154] Ibid, at [10].
[155]Robinette, above 2, at 553; and Helmholz, above n 1, at 97.

Holographic wills are therefore capable of being validated under s 14. Whether they will be validated is dependent on the satisfaction of the four requirements of s 14(1).

1 A document

Under s 14(1) there must be a document in order for the Court to exercise its validation power.[156] Document is defined in the 2007 Act as "any material on which there is writing".[157] 'Writing' is defined in s 29 of the Interpretation Act 1999 as "reproducing words, figures, or symbols in a visible and tangible form and medium".[158] 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.[159] It would therefore fit within the definition of document under s 14(1).

Further, because the writing can be on 'any material', even a holographic will that was transcribed on less than traditional or more obscure material would satisfy the requirement. This is important due to the extraordinary circumstances in which a holographic will can be made. For example, in Saskatchewan, Canada, the holographic will of Cecil George Harris was scratched into the fender of the tractor he was pinned under.[160] The Saskatchewan Surrogate Court granted the Harris will probate.[161] The words written by Harris, "in case I die in this mess I leave all to the wife",[162] are arguably the most famous example of a holographic will written on an unusual surface.

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[156] Wills Act s 14(1)
[157] Section 6.
[158] Section 29.
[159] Helmholz, above n 1, at 97.
[160] Geoff Ellwand "An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way into Legal History" (2014) 77(1) Sask L Rev 1 at 5.
[161] Ibid, at 21.
[162] Ibid, at 1.

2 *Appears to be a will*

More contentiously, s 14(1)(a) requires that the document in question must appear to be a will.[163] The definition of a will is found in s 8 of the 2007 Act. It describes a document that disposes of property after death or appoints a testamentary guardian.[164]

The definition of a will is easily satisfied in cases where the document concerned is prepared by a lawyer.[165] This is because the intentions of the testator are evident through their interactions with the third party, the lawyer. However, a holographic will must be handwritten by the testator.[166] A will drafted by a lawyer or a will written by anyone other than the testator, even if on the testator's instructions, is not a holographic will.

When examining a holographic will, the courts often do not have recourse to third party evidence, therefore making it harder to prove that the document is intended to be the testator's will.

Despite this difficulty, case law in New Zealand demonstrates that a document handwritten by the testator can appear to be a will. In *Re MacNeil*, the deceased left a suicide note entitled "this is my will and testament".[167] The Court held that because the document was headed as a will, it obviously appeared to be a will.[168] Similarly, a document found within a sealed envelope entitled "will and testament of Alan Frederic Wright" was also held to fulfil s 14(1)(a) in *Re Estate of Wright.*[169]

A document does not have to be identified as a will in order to satisfy s 14(1)(a). In *Re Estate of Wong*, a suicide note addressed to a friend of the testator, detailing instructions of what to do with the testator's possessions and beloved pets, was held to

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[163] Wills Act 2007 s 14(1)(a).
[164] Section 8.
[165] *Tamarapa,* above n 126; *McLauchlan,* above n 146; and *Meecham,* above n 146.
[166] Helmholz, above n 1, at 97.
[167] *Re MacNeil*, above n 61, at [2].
[168] Ibid, at [3].
[169] *Re Estate of Wright,* above n 148, at [1].

the valid will of the testator.[170] This was despite the absence of any reference to the document being the testator's will. More conclusively, in *Re Van den Berg*, Andrews J specifically held that the fact the suicide notes in question were not headed "[t]his is my Will and Testament" did not make a significant difference in concluding that the document was be a will.[171]

It is apparent that whilst titling the document as 'will' or 'last testament' is helpful for the court, lack of it does not act as a bar to a validation order by the court.[172] A holographic will, even if untitled, is therefore likely to satisfy s 14(1)(a).[173] This is important because of the informal nature of holographic wills. They may not always be clearly labelled as the deceased's will.

3 Does not comply with s 11

Under s 14(1)(b), the document must not comply with the requirements in s 11.[174] A will that satisfies the s 11 requirements, but is found to be invalid for another reason cannot be validated under s 14. This is because s 14(1)(b) specifically refers to non-compliance with the requirements set out in s 11.[175]

A holographic will is a document that by definition is unwitnessed.[176] It would therefore satisfy s 14(1)(b).

[170] *Re Estate of Wong,* above n 67, at [15].
[171] *Re Van den Berg,* above n 149, at [15].
[172] Ibid.; and *Re Estate of Wong,* above n 67.
[173] Wills Act 2007, s 14(1)(a).
[174] Peart, above n 111, at 81; and Wills Act s 14(1)(b).
[175] Wills Act 2007, s 14(1)(b).
[176] Helmholz, above n 1, at 97.

4 Came into existence in or out of New Zealand

Lastly, under s 14(1)(c), the document must have come into existence in or out of New Zealand.[177] 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.[178]

This requirement will likely be satisfied by a holographic will. In fact, it is particularly useful for the validation of holographic wills, a type of will that was originally created for use in emergency situations.[179] It is reasonably foreseeable that such circumstances may arise outside of New Zealand.

This will only apply to those wills made outside of New Zealand that are not otherwise valid under s 22 of the 2007 Act.[180]

B Should New Zealand Admit Holographic Wills as a Class?

Whilst not disregarding the fact that holographic wills are capable of being validated under s 14, holographic wills should be admitted as valid in their own right under New Zealand law.

This subpart will discuss the impact of introducing holographic wills on the s 11 formalities.[181] It will also address the issue of defects in wills and the legislative protections available to correct them. Lastly, this subpart considers the benefits holographic wills offer testators.

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[177] Wills Act 2007, s 14(1)(c).

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

[179] Parker, above n 15, at 2.

[180] Section 22.

[181] Wills Act 2007, s 11.

1 Holographic wills and the s 11 formalities

The fundamental difference between a holographic will and a formal will is the formalities required for a valid will under s 11.[182]

The s 11 formalities in the 2007 Act were introduced in New Zealand law to protect testators from forgery, coercion, and rash decisions.[183] Admitting holographic wills, a form of will that requires no formalities, would arguably frustrate the positive impact s 11 formalities have in testamentary law. It would also significantly increase the breadth of what is constituted a valid will under New Zealand law.

In reality, admitting holographic wills would not cause any additional difficulties in testamentary law, nor would it significantly increase the jurisdiction of the courts in determining what constitutes a valid will. This is firstly because the most significant formality under s 11, the witness requirement,[184] has reduced in importance over time, and secondly because there are already legislative exceptions to the s 11 formalities.

(a) The importance of the witness requirement has eroded

The purpose of having witnesses present when signing a will is two-fold: evidential and protective.[185] Requiring two independent witnesses to be present has evidentiary value because it provides concrete proof of the facts of execution.[186] It is also works to provide evidence of testamentary intent from two neutral sources when a will is contested. This is useful because interested parties often cannot be relied upon to provide an unbiased viewpoint.

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182 Wills Act 2007, s 11; and Bird, above n 49, at 608.
183 Caroline Sawyer and Miriam Spero *Succession, Wills and Probate* (3rd ed, Routledge, New York, 2015) at [5.1.1].
184 Wills Act 2007, s 11(2).
185 Bird, above n 49, at 608.
186 Richard Lewis Brown "The Holograph Problem" (2006) 74(1) Tenn L Rev 93 at 97.

As to the protective function, the witness requirement seeks to provide a guarantee that the contents of the will were neither forged nor achieved through fraudulent means.[187] Witnesses also work to protect the will-maker from any immediate duress or undue influence they may be faced with when writing their will.[188]

As holographic wills are typically unwitnessed documents, critics argue they lack the guarantees and protections witnesses provide.[189] However, holographic wills do not have to be unwitnessed. The fact a holographic will is witnessed does not destroy it as a holographic will.[190]

Further, the presence of witnesses only carries evidentiary value if they know what they are signing. Under s 12(2) in the 2007 Act, the "validity of a will is not affected by the fact that a witness did not know that the document he or she was signing was a will".[191] If a witness is unaware that the document in question is a will, then they are limited in the evidence they can provide.

Additionally, holographic wills are rarely contested. This is evidenced both from jurisdictions abroad where holographic wills are permitted,[192] and from analogous examples under s 14. As the majority of validation applications under s 14 proceed without objection, the evidence of witnesses is not required.[193]

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[187] Bird, above n 49, at 609.
[188] Ibid, at 608.
[189] Ibid, at 632.
[190] 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.
[191] Section 12(2).
[192] 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.
[193] Ibid, at 53.

The protective purpose of witnesses is also doubted. Using witnesses as 'protectors' has been described as a "relic of history".[194] Whilst relevant when wills were typically made on the testator's deathbed, their efficiency is limited in modern times.[195]

Moreover, the deceased's handwriting is acknowledged as an effective substitute for the witness requirement. It works to fulfil the protective function that witnesses would otherwise perform.[196]

(b) Legislative exceptions to s 11

A rule already derogated is susceptible to further derogation. There are already several exceptions in the 2007 Act to the s 11 formalities.[197] The jurisdiction of the courts is already wide. Permitting holographic wills as a new class of wills is unlikely to widen it any further.

The most notable exception is s 14.[198] Many applications made under s 14 have related to documents that were holographic wills in all but name.[199] Examples of cases in 2016 where holographic wills were validated under s 14 include *Re Estate of Webster, Re Estate of Torkington*, *Richards v French*, *Landreth v Moore*, *Re Estate of Lord*, and *Re Estate of Clark.*[200] It is therefore well established that holographic wills can be validated under s 14.

A benefit of admitting holographic wills as a new class is that it would remove holographic wills from the rigmaroles of the s 14 process. A holographic will valid in its

[194] Brown, above n 186, at 97.
[195] Ibid, at 97–8.
[196] Bird, above n 49, at 609.
[197] Sections 14, 22, and 34.
[198] Section 14.
[199] For example, a suicide note in *Jefferies,* above n 146; and a letter in *Wright*, above n 144.
[200] *Re Estate of Webster*, above n 151; *Re Estate of Torkington* [2016] NZHC 1902; *Richards v French* [2016] NZHC 1647; *Landreth v Moore* [2016] NZHC 648; *Re Estate of Lord* [2016] NZHC 202; and *Clark*, above n 146.

own right would not need a court declaration to be valid. Except for probate, court and the associated costs could be avoided.

Providing for holographic wills independently from s 14 would also remove the risk of the court refusing to exercise discretion under s 14 to validate the will.[201] Further, it would reserve the discretion in s 14 to deal with real exceptions.

A more general exception to s 11 is found in s 22, which regulates the disposition of movable property.[202]

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 was made as required by the law of the place the testator was domiciled when the will was made, or the place the testator was domiciled when he or she died.[203]

Therefore, a holographic will distributing movables can be admitted in New Zealand if the 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. For example, if a testator dies in France and has a valid French holographic will, there is no issue of it applying in New Zealand.

This provision is equally applicable for wills made outside of New Zealand under s 22(5).[204] Under this section, a holographic will can also be admitted to probate in New Zealand if it was made as required by the law of the place the will was made, or the law in force when the will was made in the place the person had their domicile of origin.[205]

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[201] Peart, above n 111, at 88.
[202] Wills Act 2007, s 22.
[203] Wills Act 2007, s 22(3).
[204] Wills Act 2007, s 22(5).
[205] Section 22(5).

Section 22 essentially allows for the validation of holographic wills if they are valid in overseas jurisdictions, on the basis that if it is good aboard, then it is good in New Zealand. Given that holographic wills are already accepted under s 14, there is no real reason why a holographic will made by a New Zealand citizen who either dies or is domiciled in New Zealand should not be recognised as a valid will in New Zealand.

Additionally, considering the increasing migrant population, consistency in international law is desirable where it can be achieved.[206]

Lastly, s 34 creates an exception to the s 11 formalities for members of the New Zealand Armed Forces in a fashion reminiscent of the historical *testamentum militare*.[207] It 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.[208]

The rationale behind s 34 is that, in the circumstances members of the Armed Forces operate, it is unreasonable to expect them to satisfy the usual formalities required by s 11.[209] Limiting use of holographic wills to a particular profession is arbitrary. There is no good reason why it should not be available to everyone, especially considering the acceptance of holographic wills under s 14.[210]

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[206] Hamish Rutherford "Record migration boosts growth short term, but will it make NZ richer?" *Stuff* (online ed, New Zealand, 24 November 2015) <http://www.stuff.co.nz/business/74358744/Record-migration-boosts-growth-short-term-but-will-it-make-NZ-richer>.

[207] Campbell, above n 17, at 63.

[208] Section 34.

[209] Law Commission, above n 107, at 12–13.

[210] If the proposal to admit holographic wills in their own right is accepted, then there would be no need to make exceptions for those in the Armed Forces, as the exception would become the rule.

2 Ambiguities in wills: lay will-makers v lawyers

A will compliant with the s 11 formalities, also known as a formal will, is usually drafted by a lawyer. Dissimilarly, a holographic will, being invariably home-made, is typically created by a lay will-maker.[211]

A lay will-maker describes a person who does not have professional qualifications or expert knowledge in will-making. Unlike a lawyer, a lay will-maker typically does not possess the basic skills of estate planning, nor a comprehensive understanding of the substantive law of wills.[212]

Due to the lay will-maker's lack of knowledge, it has often been argued that holographic wills are more likely to be poorly drafted and prone to certain errors, namely the use of incorrect, ambiguous, or unclear language.[213] A poorly drafted will makes it difficult to understand how the testator intended to dispose of their property.[214] This puts the testator's intentions at risk.

In comparison, a testator's intentions are likely to be followed if they are presented in a well drafted will. A competent lawyer will possess the basic skills of estate planning.[215] Such a lawyer could ensure that a testator's intentions are accurately and clearly expressed by preparing a carefully considered and well planned will.[216]

However, a holographic will does not need to be the original thought of a lay will-maker. For example, a lay will-maker may take legal advice and rewrite it in their own hand. This would still constitute a holographic will.

[211] Brown, above n 186, at 95.
[212] Clowney, above n 192, at 36; and Brown, above n 186, at 121.
[213] Brown, above n 186, at 122.
[214] Ibid, at 123.
[215] Ibid, at 121–2.
[216] Ibid, at 100.

Further, lawyers are human. They too are capable of making mistakes. This is evidenced by the trends and statistics generated from the Lawyers Complaints Service. Complaints can be made about a lawyer's conduct, poor service, costs, and failure to comply with orders.[217] In 2015, the main area of law in which complaints arose was Trusts and Estates at 21 per cent.[218]

Examples of errors made in will-making include incorrectly recorded instructions,[219] misspelled names, use of incorrect pronouns,[220] and use of ambiguous or uncertain terms.[221] In order to correct these errors, a rectification power was developed in the courts and codified under s 31 of the 2007 Act. This is not a general power to correct. It allows the court to correct clerical errors and failures in a will, if the will does not carry out the testator's intentions.[222]

An example of a drafting error that was able to be corrected by the court under s 31 is seen in *Re Robertson,* where the solicitor preparing Mr Robertson's will incorrectly recorded Mr Robertson's instructions.[223] This error was replicated in Mr Robertson's will, which therefore did not give effect to Mr Robertson's instructions.[224] Under s 31(2) the court made an order correcting the will.[225]

Another example is found in *Re Estate of Nolan*, where a lawyer was instructed to draft a mirror will for the deceased. This means that the deceased's will was to be the same as his wife's will, but with the necessary changes made. These changes included

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[217] "Lawyers Complaints Service" New Zealand Law Society <https://www.lawsociety.org.nz/for-the-community/lawyers-complaints-service>.
[218] "Lawyers Complaints Service, 2010 to 2015" New Zealand Law Society <https://www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/legal-complaints-service,-2010-to-2015>.
[219] *Re Robertson* [2013] NZHC 2723.
[220] *Re Estate of Nolan* [2014] NZHC 1499.
[221] *Bowness v Bowness* [2015] NZHC 339.
[222] *Re Jensen* [1992] 2 NZLR 506 at 8–9.
[223] *Robertson*, above n 14, at [5].
[224] Ibid, at [16].
[225] Ibid, at [22]; and the Wills Act 2007, s 31(2).

changing the word “him” to “her” and “husband” to “wife”.[226] Unfortunately the changes were not made. The court ruled that this was obviously a clerical error made by the lawyer under s 31(1), and ordered a correction.[227]

If a will contains terms that are ambiguous or uncertain, s 32 permits the court to use external evidence to interpret the will.[228] Incorrect use of the word “children” is an example of an ambiguous term that can be corrected under s 32. For example, in *Bowness v Bowness*, the deceased referred to his beneficiaries as “children”, which 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 deceased’s “children”.[229] The court granted the correction after examining external evidence. This evidence included an affidavit from the deceased’s brother, who affirmed that the deceased had always treated his step-daughter as his own child.[230]

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.[231] In reaching this conclusion, Fogarty J considered the surrounding circumstances,[232] the deceased’s testamentary intent, and the handwritten notes of the deceased’s solicitor.[233]

These examples demonstrate two important points. Firstly, poor will-drafting is not unique to holographic wills, even if it is thought it would be more prevalent. Secondly, in the event that a lay will-maker does draft a holographic will poorly, ss 31 and 32 are able to correct any potential ambiguities or errors. They are extensive and will protect both the testator and those likely to be affected by the will from the effects of poor will-drafting.

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[226] *Nolan*, above n 220, at [3].
[227] Ibid, at [4–5].
[228] Wills Act 2007, s 32.
[229] *Bowness,* above n 221, at [4].
[230] Ibid, at [12].
[231] *Glass v Anthony* HC Christchurch CIV-2008-409-455, 9 July 2008 at [28].
[232] Ibid, at [10].
[233] Ibid, at [18].

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.[234] This Act 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, which grants the court the power to make provision for the proper maintenance and support of family members of the deceased.[235] Thirdly, the Law Reform (Testamentary Promises) Act 1949, in the event that the deceased does not fulfil a promise to reward the applicant for services rendered, the court can enforce the undertaking. [236]

3 *Benefits of holographic wills*

When compared to a formal will, a holographic will has several benefits. Firstly, creating a holographic will is cheap. There are minimal costs, as a testator will commonly not seek professional legal advice. Additionally, changes can be made to a holographic will at no cost. In fact, a testator could create an entirely new holographic will freely if they had a pen and paper on hand.

The costs involved with creating a formal will are larger than a holographic will because a lawyer is often involved. Whilst there is no fixed price for creating a will amongst the legal profession,[237] because lawyers usually charge based on time and services provided,[238] an average face-to-face meeting with a lawyer has been estimated at $195.[239] A breakdown of these costs typically includes drafting, witnessing, and alterations.

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[234] Property (Relationships) Act 1976.

[235] Family Protection Act 1955.

[236] Law Reform (Testamentary Promises) Act 1949.

[237] "Writing a will" (15 October 2015) Citizens Advice Bureau <http://www.cab.org.nz/vat/fp/d/pages/wills.aspx>.

[238] "Making a will" Community Law <http://communitylaw.org.nz/community-law-manual/chapter-23-wills/making-a-will-chapter-23/>.

[239] Diana Clement "Online options can make writing a will an easy task" *The New Zealand Herald* (online ed, New Zealand, 30 May 2015) <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11456989>.

Subsequent changes that a testator needs or wants a lawyer to make to their will are often a major contributing factor to costs. This is because circumstances are always changing[240] – relationships end, children become adults, assets appear or disappear – a will made by a middle-aged testator may no longer reflect their testamentary intent fifty years later. The New Zealand Law Society recommends that testators review their wills every 5 years.[241] Any alterations made to a will by a lawyer based on such a review will involve additional costs.

Further charges may apply if the lawyer is also going to administer the testator's estate after death.[242]

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 exorbitant legal fees.

Secondly, a holographic will can be created quickly with minimal effort. This is because holographic wills do not require any external formalities to be fulfilled in order for them to be held valid. 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 by a lawyer, a will 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* Miss Erkkila visited Miss McLauchlan and took instructions for preparing a new will on 15 March 2010.[243] It took ten days to prepare and send the will to Miss McLauchlan, and

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[240] Ibid.

[241] "Making a Will and Estate Administration" (March 2013) New Zealand Law Society <https://www.lawsociety.org.nz/__data/assets/pdf_file/0019/69220/Making-a-Will-19-Mar-2013-WS.pdf>.

[242] Ibid.

[243] *McLauchlan*, above n 146, at [7].

nearly three months for an appointment to be arranged for signing. At that point, Miss McLauchlan was too ill to sign the will.[244]

Similarly, in *Re Estate of Smith,*[245] Mr Smith's lawyer, Mr Dalziel, visited Mr Smith on 20 December 2012 to update Mr Smith's will.[246] Mr Dalziel told Mr Smith that the new will would be unable to be signed before Christmas.[247] The will was misplaced in the new year, and Mr Smith died in February 2013 without the will being returned to him to be signed.[248]

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.[249] Holographic wills are not limited by such administrative delays.

Lastly, whatever its limitations, a holographic will is better than having no will at all. The frequency of will making in New Zealand increases as people age, but about five per cent of the population die without a will, intestate.[250] This may be due to either 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 inflexible intestacy legislation.

Section 77 of the Administration Act 1969 (the 1969 Act)[251] allocates the deceased's possessions to persons that are most closely related to the deceased by marriage and

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[244] Ibid.

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

[246] Ibid, at [2].

[247] Ibid, at [3].

[248] Ibid, at [4].

[249] "Writing a will", above n 237.

[250] Catherine Harris "Making sure your will works well" *Stuff* (online ed, New Zealand, 31 January 2015) <http://www.stuff.co.nz/business/money/65619785/Making-sure-your-will-works-well%20/>; and Geoff Adlam "But are you sure there is no will?" (7 April 2016) New Zealand Law Society <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-885/but-are-you-sure-there-is-no-will>.

[251] Family Protection Act 1955 s 4 is not precluded by the Administration Act 1969.

blood.[252] This system is based on the intentions of the average person, but how an individual wishes to dispose of their possessions is unique.[253] The exact wishes of the deceased therefore often fail to be satisfied under intestacy legislation.[254] For example, the deceased may have wanted their possessions to be distributed amongst their friends rather than their family. Unfortunately, the rigid framework under s 77 would not accommodate this request. Additionally, gifts to specific persons and gifts to charitable organisations are not provided for in the 1969 Act.[255]

In comparison to New Zealand's rigid intestacy legislation, having a holographic will is better than dying without a will. A holographic will ensures that testamentary intent is given effect to regardless of any unfulfilled formalities.[256] It also provides greater flexibility and control.[257] A testator can decide how their possessions are disposed of whilst avoiding the formalised s 11 will-making process.

[252] Section 77; and Clowney, above n 192, at 53.
[253] Clowney, above n 192, at 53–4.
[254] Ibid, at 53.
[255] Section 77.
[256] Parker, above n 15, at 5.
[257] Adlam, above n 250.

V Conclusion

This paper sought to ascertain whether there was scope in New Zealand's domestic legislation for a holographic will, and whether holographic wills should be admitted in their own right.

Even without s 14, the 2007 Act had scope for holographic wills to be admitted under ss 22 and 34.[258] The significant change introduced by s 14 was therefore not the acceptance of holographic wills in domestic law, but the fact that any testator in New Zealand could have a valid holographic will.[259] It was not limited to wills made by members of the Armed forces,[260] or wills made in or compliant with overseas jurisdictions.[261]

Given the accommodation for holographic wills under s 14 and other express circumstances where a holographic will can be admitted, it is appropriate that an amendment be made to permit holographic wills as a separate class of wills. The impact of the introduction of holographic wills on the s 11 formalities will not be destructive due to the failing importance of the witness requirement, as well as existing legislative exceptions. A holographic will simply provides the testator with another alternative.

Further, any defects that may be caused by a lay will-maker can be remedied by legislative provisions, as they currently are for s 11, by ss 14, 31 and 32.[262] This is backstopped by the Property (Relationships) Act 1976,[263] the Family Protection Act 1955,[264] and the Law Reform (Testamentary Promises) Act 1949.[265]

Lastly, a holographic will is cheap, timely, and is better than intestacy.

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[258] Sections 22 and 34.
[259] Section 14.
[260] Wills Act 2007, s 34.
[261] Wills Act 2007, s 22.
[262] Wills Act 2007, ss 31 and 32.
[263] Property Relationships Act 1976.
[264] Family Protection Act 1955.
[265] Law Reform (Testamentary Promises) Act 1949.

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Word count

The text of this paper (excluding abstract, key words, table of contents, footnotes, and bibliography) comprises approximately 7,887 words.