# ORAL TRUSTS AND WILLS: ARE THEY VALID?

## ORAL TRUSTS, AND NUNCUPATIVE AND HOLOGRAPHIC WILLS--WHILE NOT GOOD ESTATE PLANNING--MAY SOMETIMES CORRECT PREVIOUS MISTAKES

**BY**

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## A. INTRODUCTION

Oral trusts, nuncupative (oral), holographic (handwritten) and joint (mutual) wills do not belong in and are rarely, if ever, found in professionally prepared estate plans. However, except for joint wills, which should never be used, establishing the validity of one of these other items may remedy an otherwise botched dispositive scheme. Jointly revocable trusts are widely used in community property jurisdictions, but elsewhere their use is controversial and is not covered in this article.

## B. ORAL EVIDENCE OF A TRUST AGREEMENT IS ADMISSIBLE

An oral trust is one either with no terms at all or else disputable ones. It has no place in professional estate planning. Establishing a trust does not require a formal instrument, nor need the trustee be notified of any transfer. Therefore, absent written evidence of a trust's existence, oral declarations about it may be received in evidence. Accordingly, oral trusts may be valid under certain circumstances, notwithstanding the aphorism that "oral trusts are not worth the paper they're printed on."

While early common law authorities made important distinctions between sealed and unsealed instruments, little importance was attached to any distinction between written and oral transactions. Modern law has minimized the importance of seals, while enlarging the distinction between written instruments and oral transactions.[1]

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[1] *1 Scott and Ascher on Trusts* (5th ed., successor edition to *Scott on Trusts*, 4th ed.) 2006, § 6.1 (hereafter *Scott*).

## 1. The Statute of Frauds

### a. In England

Prior to 1677, intervivos trusts of both real and personal property could be created in England without a written instrument.[2] Thereafter, section 7 of the *Statute of Frauds*[3] required all land trusts to be in writing,[4] except where "a trust . . . shall or may arise or result by the implication or construction of law." [5]

### b. In most states

Statutes similar to the English *Statute of Frauds* have been enacted in most American states and there is an immense body of case law construing them. While American statutes[6] have developed into what has almost become a common law requirement that a trust be in writing, a land trust can be created orally, if a memorandum about it is subsequently signed. Cases so holding have been followed, even in states where the Statute of Frauds requires that a trust be written.[7]

Thus, "either by case law or by statute, some form of § 7 [of the English Statute of Frauds] has found its way into the law of most U.S. jurisdictions." [8] The express provision that all trusts in land had to be written,[9] while "omitted from the American Statute of Frauds, . . . nevertheless it is part of our common law from the earliest days that an express trust in real estate may not be proved by parol . . ." [10]

### c. Resulting and constructive trusts need not always be written

A resulting trust essentially involves one party holding property for the benefit of another party.

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2 *Id.*.

3 Stat. 27 Hen. VIII, c.16 (1536) and Stat. 29 Chas. #, c 3 (1676), superseded by the *Law of Property Act,* Stat. 15 Geo. V., c 20, § 53 (1925).

4 *Scott, supra,* note 1, § 8 of the *Statute of Frauds.*

5 *Scott, supra,* note 1, § 6.2.

6 *Id.*

7 *Id.*

8 *I Scott On Trusts* (Frachter's 4th ed. 1987 and 2005 Cum. Supp.) §§ 40, 40.1, hereafter *Scott 2005,* cited by *Loring A Trustee's Handbook,* § 8.15.5 (2002 ed. by Charles Rounds) .

9 *3 Pomeroy, Equity Jurisprudence,* § 1006 (4th Ed.).

10 *Id.*

"As a general rule, then, with the exception of the resulting trust[11] and the constructive trust,[12] a trust concerning an interest in land requires a writing if it is to be enforceable. . . [Furthermore] § 402(a)(1) of ERISA requires that 'every employee benefit plan shall be maintained pursuant to a written instrument.' Under the Uniform Trust Code, the creation of an oral trust and its terms may be established only by clear and convincing evidence.[13]

S*cott*[14] in discussing the Statute of Frauds says "In *Sen v. Headley,*[15] . . . a man on his death bed delivered to a woman the keys to his house and to a steel box in the house which contained the title deeds to the house, saying 'The house is yours, Margaret.' It was held that there was a valid causa mortis gift which subjected the heir of the donor to a constructive trust in favor of a donee."

Also, according to *Scott,*[16] a constructive trust "arises when the title holder of property is subject to an equitable duty to convey it to someone else, on the ground that permitting the title holder to retain the property would result in unjust enrichment." This concept is the basis of the constructive trust. "Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property."[17] Most states require that a constructive trust be in writing.[18]

"[A] resulting trust arises in favor of the person who transferred the property or caused it to be transferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest."[19]

Ensured that true intention is honoured

A resulting trust is an implied trust that comes into existence by operation of law, where property is transferred to someone who pays nothing for it; and then is implied to hold the property for the benefit of another person.

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11 *Restatement (Second) of Trusts* § 40, comment (d) (1959).

12 *Id.*

13 *Uniform Trust Code*, § 407.

14 *Scott 2005, supra*, § 40 at p.83.

15 *Sen v. Headley*, [1991] Ch. 425, [1991] 2 All. E.R. 636 (C.A.).

16 *Scott 2005, supra*, note 8, § 404.2.

17 *Scott 2005, supra*, note 8, § 404.2 cites cases from California (but see *American Motorists Ins. Co. v. Cowan*, 127 Cal. App. 3d 875, 179 Cal. Rptr. 747 (1982) (citing Restatement (Second) of Trusts § 404 and the preceding section and holding that a duty to convey property acquired through mistake is a resulting trust); Michigan: *Potter v. Lindsay*, 337 Mich. 404, 60 N.W.2d 133 (1953) (quoting *Restatement of Trusts* § 404*);* Nebraska: *Holbein v. Holbein*, 149 Neb. 281, 30 N.W.2d 899 (1948) (quoting *Restatement of Trusts* § 404); North Dakota: *Hendrickson v. Syverson*, 82 N.W.2d 827 (N.D. 1957)(quoting the text and *Restatement and Restitution* § 160, Comment b); Pennsylvania: *Jenkins v. Jenkins*, 65 D.&C.2d 48 (Pa. 1973); South Dakota: *Knock v. Knock*, 120 N.W.2d 572 (S.D. 1963); Texas: *Sheldon Petroleum Co. v. Peirce*, 546 S.W.2d 954 (Tex. Civ. App. 1977); West Virginia: *Kinney v. Kinney*, 304 S.E.2d 870 (W. Va. App. 1983), quoting text; and Wyoming: *McConnell v. Dixon*, 68 Wyo. 301, 233 P.2d 877 (1951) (citing the text).

18 *Scott 2005, supra*, note 8, § 482.

19 *Scott 2005, supra*, note 16.

### d. Most states require land trusts to be written

The statutes of thirty-eight states and the District of Columbia require a writing to create a trust of real property; many of them using the language of the English Statute of Frauds.[20] "In some of the states in which there is no statute requiring a writing for the creation of a trust, there is authority to the effect that a writing is necessary when the owner of land transfers it in trust for his or her own benefit, but not when the trust is for a third person. There is also some authority to the effect that a writing is necessary when the owner of land declares himself or herself trustee, but not when he or she makes a transfer to another in trust.

In a few states in which there is no statute requiring a writing for the creation of a trust, the courts have permitted the creation of oral trusts, whether the landowner declares himself or herself trustee of transfers the land to another in trust. In these states, however, the courts generally refuse to enforce oral trusts upon proof by a mere preponderance of the evidence. Indeed, the courts, in these states and elsewhere, almost always insist on proof that leaves little doubt of an oral trust's existence, such as proof by 'clear and convincing evidence.'"

American statutes require a writing for creation of trusts usually including trusts "of land" or "an interest in land." Cases hold this applicable to any interest in land, whether real estate or personal property and whether a freehold or a leasehold estate. It also applies to other interests in land, such as easements and rent charges.

A self-declaration of trust of land is usually signed at the time of the declaration.[21] The writing can be signed by the settlor prior to the creation of the trust, if it refers to the declaration of trust or subsequently adopted at that time or thereafter.[22]

A landowner can sign an instrument purporting to declare himself [23] a trustee although he does not intend to create a trust then. If he subsequently indicates orally that he intends one, whether by delivering an instrument to the beneficiary or otherwise, this satisfies the requirements of the Statute of Frauds.

The same is true if he signs a letter stating he expects to create a trust with the terms of the proposed trust and then subsequently orally declares that he holds the interest on those terms. Similarly, if a landowner agrees in writing to hold land in trust for someone, if he will live with

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[20] *Scott, supra*, note 1, § 6.1.1, footnote 1, pp. 279-280. The states are: Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin.

[21] *Scott, supra*, note 1, § 6.3.

[22] *Scott, supra*, note 1, § 6.3.1.

[23] Author's note re use of gender terms: wherever the words "he", "his", "him", "man", "men" or comparable words or parts of words appear in this outline, they have been used solely for literary purposes in the interest of having a smooth reading text. They are meant to include all persons--whether male or female.

the owner, and that person does so, the letter is a sufficient memorandum of the trust, as is a written agreement to hold in trust certain land to be acquired thereafter.[24]

Even if the landowner signs the memorandum, declaring himself trustee of the land while he signs it after the trust's creation, the memorandum is sufficient to satisfy the statute of frauds requirement.

## 2. Oral Trusts of Land

Thus, an oral declaration that the landowner is trustee of the interest, followed by a written instrument admitting he holds the interest in the trust he previously orally declared, makes the trust enforceable.[25]

A trust is enforceable even though at the time the settlor signed the memorandum he did not intend to create it, since the memorandum or letter supplies the required corroboration of the previously declared oral trust. Courts so holding have relied on the original Statute of Frauds. This did not require the trust to be created in writing, but merely that it be manifested and proved in writing.

Even states where the statute of frauds requires that the trust be created by a written instrument, the courts have usually followed the English cases holding the subsequent memorandum sufficient, although at the time when the settlor signed it is no longer able to create the trust because of third parties' intervening claims. However, if the settlor has transferred the interest to a third party, a subsequent signed writing by him is insufficient to satisfy the statute of frauds.[26]

States without a statutory requirement of a writing when a trust of land is created have some authority that where land is transferred in trust for the owner, a writing is necessary, but if it is in trust for a third person, no writing is required.[27] A few states without a statute requiring creation of a trust to be in writing have cases holding that an enforceable trust can be created by parol, whether the landowner declares himself trustee or transfers the land to another in trust.[28]

Courts in states permitting land trusts be created without a writing insist that an oral trust will not be enforced merely because the weight of evidence proves its creation. In these cases,

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[24] *Scott, supra*, note 1, § 6.3.2.

[25] *Scott, supra*, note 1, § 6.4.3.

[26] *Id.*

[27] *Scott 2005, supra*, note 8, § 38, footnote 10, citing Arizona and North Carolina cases.

[28] *Scott 2005, supra*, note 8, § 40.1, footnote 3, citing cases in Delaware, Kentucky, North Carolina, Tennessee, Texas, Virginia, and West Virginia.

the trust must be proved by evidence leaving small doubt of its existence, such as "clear and convincing" evidence or "unequivocal" evidence.[29]

It is possible to create an enforceable oral trust of a debt, although secured by a mortgage on land. The debt itself is not an interest in land. Thus, a trust of the debt can be created by parol, with the security interest in equity following the debt.[30]

If a landowner transfers his land into an oral trust and the transferee subsequently admits in writing that he holds the interest on the oral trust transferred to him, the trust is enforceable, even though at the time of the transferee's signature, he repudiates the trust, since his written admission of the transfer to him is sufficient to bind him.

In the absence of a writing, it is immaterial if the transferee would be permitted to keep the land free of trust or (in a few jurisdictions) compelled to hold it in a constructive trust for the transferor. Thus, where land is transferred in an oral trust, a memorandum with the transferee's signature is sufficient, although signed after he became insolvent or after his creditors have attached the land or obtained a judgment lien on it.

Where land is conveyed in an oral trust, although the latter is unenforceable unless and until a written memorandum of the trust is signed, it is not void. After the signature, the trust is as valid as though it had been initially evidenced by a written instrument.

The same is true where the trustee of an oral trust, instead of signing a memorandum evidencing the trust, performs it by transferring the property to the beneficiary. Although he could not have been compelled to convey, the conveyance was effective and could not be set aside by his creditors.[31] Where the trustee of an oral trust of land signs a memorandum stating that he holds the property on a different trust, the oral trust is not enforceable.[32]

A property owner who creates an oral trust whose trustee, relying on the Statute of Frauds, refuses to perform the trust or to sign a memorandum acknowledging it, may be considered to be holding it in a constructive trust in certain situations, such as where the transferee obtained the transfer by fraud or was in a confidential relation to the transferor. The transferee's creditors cannot reach the property, whether or not he signed a memorandum.[33]

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[29] *Scott 2005, supra*, note 8, § 40.1, footnote 4, which cites cases in Arkansas, Florida, Illinois, Kentucky, Montana, Nebraska, New Mexico, North Carolina, New York, Ohio, Tennessee, Texas, Virginia, Washington and West Virginia.

[30] *Scott 2005, supra*, note 8, § 40.2, footnote 1 and *I Scott* § 52.

[31] *Scott 2005, supra*, note 8, § 42.3.

[32] *Scott 2005, supra*, note 8, § 42.4.

[33] *Scott 2005, supra*, note 8, § 42.5.

Although a trustee may be insolvent at the time of signing a memorandum about an oral trust, the beneficiaries can enforce it. They are protected if the trustee performs the trust, even though at that time he was insolvent.[34]

Where a landowner transfers the property on an oral trust for a third person, authority exists that if the trustee, relying on the Statute of Frauds, refuses to perform it, a constructive trust can be enforced by the settlor in his own favor, compelling the trustee to reconvey the property to him. But the settlor cannot compel him to reconvey if the trustee is willing to perform the trust.[35]

The majority rule is that the transferee of land under an oral trust may retain it.[36] The policy of the Statute of Frauds does not prevent an oral trust or contract for all purposes. In certain instances a constructive trust will be enforced. Even in the absence of fraud or undue influence or a confidential relationship, it is permissible to show an oral trust or contract for the purpose of preventing unjust enrichment. Thus, an obligation is imposed to prevent unjust enrichment. The Statute of Frauds is not violated by allowing proof of the oral agreement to show that the defendant would be unjustly enriched were he permitted to refuse to perform his promise and retain the consideration he received.[37]

The weight of American authority permits the transferee of land on an oral trust or contract to retain it. Although this might not violate the letter of the Statute of Frauds to show the oral trust or a contract for the purpose of raising a constructive trust, it violates the underlying policy. The latter is that the purpose of the statute is to prevent proof of an oral trust or contract, not merely for the purpose of enforcing it, but also for the purpose of restoring the status quo. But this policy does not prevent showing an oral trust or contract for all purposes. Where a transfer of land on an oral trust or contract to reconvey it is procured by fraud, duress or undue influence, courts impose a constructive trust, even though to prove the transferee was guilty of a wrong in obtaining the land that is necessary to prove the oral trust or contract.[38]

Only where a trust is to hold an interest in land must it be in writing under the Statute of Frauds both under the English statute and American statutes in all but one or two states. But leasehold and freehold interests in land are covered by the statute.

### 3. Oral Trusts of Personalty

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34 *Scott 2005, supra*, note 8, § 43.

35 *Id.*

36 *Scott 2005, supra*, note 8, § 44, listing cases from Alabama, Arizona, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia and Wisconsin.

37 *Scott 2005, supra*, note 8, § 44.

38 *Id.*

Where the property transferred is not an interest in land, the transferor's intention can be shown by his oral language or by his conduct indicating an intention to create a trust, except where such evidence is excluded under the parol evidence rule.

Where there is an express agreement by the transferee to hold property in trust for the transferor, if it is written or relates to personal property it can be enforced as an express trust. But if it is oral and relates to land enforcing it as an express trust would violate the Statute of Frauds. In England, a constructive trust would be raised in favor of the transferor, to prevent the transferee from being unjustly enriched.

Georgia, Indiana, West Virginia and New York require that a trust of personalty be written.[39] Although an interest in land may be incidentally created by an oral trust in personalty, the latter is enforceable. But an orally declared trust of personalty must be proved by clear and convincing evidence.[40]

The terms of an oral trust of personalty can be shown not only by extrinsic evidence relating to the circumstances under which it was created, but also by words spoken by or conduct of the settlor prior to or contemporaneously with its creation .[41]

Where the transferee has notice of the existence of a trust, but there is no written instrument or no written instrument of which he knows, he should make such inquiry as to the authority of the trustee as a reasonable man would make under the circumstances. He should at least inquire of the trustee as to the extent of his authority; and if other lines of inquiry are available, he should make such further inquiry as is reasonable under the circumstances. If a reasonable inquiry shows that the trustee apparently has authority to make the transfer, and there is nothing in the nature of the transaction to indicate a breach of trust, the transferee is protected.[42]

Whether an oral trust is revocable depends on the settlor's intent, as determined by his words and conduct in the light of all circumstances. In a manner similar to trusts created in a written instrument, the ordinary inference is that the trust is irrevocable, absent an intention to reserve a revocation power that can be gathered from the settlor's language or from the trust's character or the circumstances of its creation.[43]

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39 *Scott 2005, supra*, note 8, § 52, footnote 3 and 4.

40 *Scott 2005, supra*, note 8, § 52, footnote 7.

41 *Scott 2005, supra*, note 8, § 164.1, pgs. 258-259.

42 *Scott 2005, supra*, note 8, § 297.4, note 5. *See Kurowski v. Burch*, 8 Ill. App. 3d 716, 290 N.E.2d 401 (1972) (citing the text and *Restatement of Trusts* § 296), *aff'd* 57 Ill. 2d 292, 312 N.E.2d 284 (1974) (citing *Restatement of Trusts* §§ 284, 288, 296).

43 *Scott 2005, supra*, note 8, § 330.2 citing cases in California, Idaho, Indiana, Kansas, Nebraska and Pennsylvania.

An express trust of property other than an interest in land can be terminated by a conveyance or release by the beneficiaries of their interests to the trustee. It need not be in writing, but if the property is an interest in land such a conveyance or release is ineffective unless written and signed by the beneficiaries. Similarly, a resulting trust beneficiary can extinguish his interest by an oral conveyance or release to the trustee if the property is not an interest in land.[44]

## C. NUNCUPATIVE (ORAL) WILLS

A nuncupative will is an "oral will declared or dictated by the testator in his last sickness before a sufficient number of witnesses, and afterwards reduced to writing. A will made by the verbal declaration of the testator and usually dependent merely on oral testimony for proof. Such wills are invalid in certain states and in others are valid only under certain circumstances." [45]

If the applicable Statute of Frauds provides wills must be in writing, without exception in favor of nuncupative wills, the latter are prohibited. Where recognized by law, they are not favored by the courts, because of the opportunity for fraud and perjury.[46]

Statutes permitting oral wills usually restrict them to the testator's last illness, requiring that the will be spoken in the presence of a certain number of witnesses and reduced to writing within a given time after it is orally made, require that it be made only in certain locations, and limit the amount and kind of property that can be passed by one.

There is no statutory definition of the term "last sickness". However, "last illness" undoubtedly means the illness of which the testator actually died. Thus, if he makes an oral will believing he is in his last illness and then he recovers, the will is invalid.[47]

Under the Statute of Frauds, nuncupative wills must be made "in the house of his of her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such wills, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."[48] The oral wills of soldiers engaged in actual military operations and sailors at sea do not have to comply with all of these requirements.[49] As previously mentioned, this English statute has been enacted in a similar form in many American states.[50]

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44 *Scott, supra*, note 8, § 429.

45 Black's Law Dictionary, p. 1069 (6th ed., West Publishing Company, 1990).

46 2 *Page on Wills*, § 20.14 (2003), hereafter *Page*.

47 *Page, supra*, note 45, § 20.15.

48 29 Car 2, c. 3, § 19.

49 *Page, supra*, note 45, § 20.16.

50 *Supra*, Part B, 1, b.

While it is unnecessary for the testator's intention to make a will to be formally expressed, the words used by him must show his intent to make one.[51] However, oral instructions for a written will which is not properly executed including oral declarations revoking an existing written will does not produce a valid nuncupative will.[52]

The most common formality required for a valid nuncupative will is that the testator must call upon one or more persons, in the presence of the requisite number of witnesses, to bear witness that his words are his last will.[53] The Statute of Frauds requires that the testimony of the witnesses or its substance must be written within six days after the making of the will. This type of statute generally exists where nuncupative wills are permitted in the United States.[54]

The execution formalities, insofar as the presence of the witnesses simultaneously with the testator at his execution of the nuncupative will and the number of witnesses, are generally the same requirements that the state in question makes with respect to written wills. The disqualification as a witness of a beneficiary or his loss of his legacy if he does witness the will depends upon applicable state law.[55]

Most state statutes permit only a bequest of personalty by a nuncupative will, except possibly in Ohio.[56] Some statutes limit the amount and kind of personalty that may be bequeathed.[57]

## D. HOLOGRAPHIC (HANDWRITTEN) WILLS

A holographic or olographic will is an unwitnessed, unattested will which is entirely in "the testator's handwriting."[58] The lack of a requirement of witnesses is because of the substitute guarantee of genuineness because the will has to be totally in the testator's handwriting. Only 19 states authorize holographic wills.[59]

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[51] *Page, supra,* note 45, § 20.17.

[52] *Page, supra,* note 45, § 20.18.

[53] *Page, supra,* note 45, § 20.19.

[54] *Page, supra,* note 45, § 20.22.

[55] *Page, supra,* note 45, § 20.21.

[56] *Page, supra,* note 45, § 20.23. *Gillis v. Weller,* 10 Ohio 462, held the term "estate" to include realty as well as personalty. *Cannon v. Seyboldt,* 55 Id. 796, 48 P.2d 406 and *Plomteaux v. Salono,* 25 N.M. 24, 176 P. 77.

[57] Texas Probate Code §§ 65, 86.

[58] *Page, supra,* note 45 § 20.1.

[59] *Id.* The states are: Arizona, Arkansas, California, Iowa, Kentucky, Louisiana, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming, as well as the Commonwealth of Puerto Rico.

The testator's signature is always required and, in some states, the date, as well as additional formalities. The usual meaning of the term "holographic will" is an unwitnessed and completely handwritten one.

Because holographic wills are not usually drafted by attorneys, courts are more inclined to give effect to the language of the lay testator in accordance with his subjective intent and not according to the technical meaning of the words. The Model Probate Code and the Model Execution Of Wills Act recognize and authorize them.[60] Formal execution provisions involving publication and attestation are not required. Holographic wills are frequently in the form of informal writings.

Problems of ascertaining the testator's intent, the purpose and nature of the will and the meaning of its words and phrases arise much more frequently with holographic wills than they do with attested ones.[61] In the absence of a statute, a holographic will is not authorized and one must comply with the statutory formalities to be valid. The latter dealing with execution are mandatory and not directory.

Signature by an abbreviation, initials or the word "father" or "mother" or even by a nickname is a sufficient signature if intended to be as such, as is signature of the holographic will by the decedent's first name.[62] If a state statute requires that wills must be signed at the end, then either a holographic or even an attested will that is not so signed is invalid.[63] Subscribing witnesses to the will are unnecessary and beneficiaries may testify as to it without losing their legacies.[64]

Some state statutes require a holographic will to have been found at testator's death among his "valuable papers."[65] If a holographic will is written on different pieces of papers, they need not be fastened together.[66]

## E. JOINT AND MUTUAL WILLS

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[60] 9 ULA 422, § 5 (1951). This uniform law requires that while no witness is necessary, the signature and all material provisions must be in the testator's handwriting. The latter has to be proven by two witnesses.

[61] *Page, supra,* note 45, § 20.3.

[62] *Page, supra,* note 45, § 20.7.

[63] *Page, supra,* note 45, § 20.8.

[64] *Page, supra,* note 45, § 20.10.

[65] *Page, supra,* note 45, § 20.11.

[66] *Page, supra,* note 45, § 20.12.

A joint and mutual will is a single document serving as the will of two people (often, but not necessarily, they are spouses), under which the survivor receives the property of the first to die and their combined assets pass in a mutually agreed manner on the death of the survivor. Since such a will often leads to allegations that an underlying contract precludes alteration or revocation by the survivor, the Uniform Probate Code specifies that execution of a joint will or mutual will does not create a presumption that a contract exists with respect to it.[67]

Among many reasons to avoid their use are that such wills may be accompanied by and therefore controlled by a contract relating to them; they are litigation breeders, particularly if the survivor tries to alter or revoke the will; there is an incorrect assumption that a joint or mutual will is less expensive than would be separate wills (or trusts) for two individuals; among the extra costs are that a contract relating to the joint or mutual agreement must be properly prepared; provisions in joint wills are ordinarily not standard ones and; administration of an estate under a joint or mutual will is unlikely to generate cost savings. Furthermore, there may be other complications caused by the arrangements and unexpected adverse tax consequences.[68]

## F. CONCLUSION

The trusts and wills (except for joint trusts in community property jurisdictions) described above are not devices to be used by knowledgeable estate planners. But where problems in estate administration arise, arguing that one was created may enable a fiduciary or his attorney to prevent what otherwise could be an expensive problem.

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[67] One *Casner & Pennell, Estate Planning* § 3.7 (Sixth ed. with 2005 Supplement), hereafter *Casner*, and UPC § 2-514, last sentence, 1990 version.

[68] *Casner*, *supra*, note 66, §§ 3.7 and 3.7.1.