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Application of the Harmless Error Doctrine in California and Beyond

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THE HARMLESS ERROR DOCTRINE

The traditional definition of a "will" is changing. Historically, courts insisted on strict compliance with will formalities. In California, this meant that a will had to be signed by the testator, or in the testator's name by another person in the testator's presence and under the testator's direction. In addition, the will had to be witnessed by at least two persons, each of whom were present at the same time to either witness the testator signing the will or to acknowledge his signature on the will, and each of whom must understand that the instrument they sign is the testator's will.

Alternatively, California also recognizes holographic wills, which do not need to be witnessed, provided the signature and material provisions of the will are in the testator's handwriting. It is not necessary for a holographic will to be dated in California, as long as the lack of a date does not create doubt as to whether a different will with inconsistent provisions is controlling.

Finally, California also recognizes a very specific form of statutory will, as provided in Probate Code sections 6223, 6240, and 6241.

Against this backdrop of will formalities, the harmless error doctrine was initially promulgated by the Uniform Probate Code in 1990. The current version provides as follows:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502 [witnessed or holographic wills], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
>
> (1) the decedent's will,
> (2) a partial or complete revocation of the will,
> (3) an addition to or an alteration of the will, or
> (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

The harmless error doctrine was a departure from the prior relaxation of strict compliance with will formalities. Whereas previous departures focused on whether the document in question was in "substantial compliance" with will formalities, the harmless error doctrine focuses on the decedent's intent.

Since the enactment of Uniform Probate Code section 2-503 in 1990, six states have adopted the section in its entirety – Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah. Four other states (California, Colorado, Ohio, and Virginia) have adopted some version of the harmless error doctrine. Before turning to California's application of the harmless error doctrine, we will review a few notable decisions from other jurisdictions.

APPLICATION OF HARMLESS ERROR ACROSS SELECTED JURISDICTIONS

Harmless Error in Ohio

Ohio has not adopted the UPC harmless error doctrine in its entirety. Rather, Ohio's version of harmless error, Ohio Revised Code section 2107.24, provides as follows:

> (A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code [witnessed will], that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
>
> (1) The decedent prepared the document or caused the document to be prepared.
>
> (2) The decedent signed the document and intended the document to constitute the decedent's will.
>
> (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.
>
> (B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established by clear and convincing evidence the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document.

In 2013, section 2107.24 was applied to validate an electronic will drafted on a Samsung Galaxy tablet in *Estate of Castro*. In that case, Javier Castro was admitted to a hospital and advised that he would die without a blood transfusion. He declined the transfusion for religious reasons, and then began talking with his two brothers about his will. Neither of his brothers had a pen or pencil, so one brother took notes on a Samsung Galaxy tablet. The "will" was then read aloud to Javier, who signed the tablet with a stylus. Three witnesses also signed the tablet, and Javier died shortly thereafter.

After his death, one of Javier's brothers printed a copy of the electronic will and petitioned to probate Javier's will. The court treated it as any other will and first found that Javier met the

general requirements in Ohio to execute a will – he was of sound mind, was not acting under coercion, and knew what his assets were and any persons to whom he owed an obligation. The court then concluded that the will satisfied Ohio's harmless error statute, including clear and convincing evidence of three required elements: (1) the decedent prepared the document or caused it to be prepared, (2) the decedent signed the document with the intent that it constitute his or her last will, and (3) the decedent signed the document in the "conscious presence" of two or more witnesses. The court found that all three elements were satisfied and admitted Javier's will to probate. Notably, *Castro* was an uncontested proceeding, so there was no one arguing that Javier's should *not* be admitted to probate.

Harmless Error in New Jersey

New Jersey is one of the few states that has adopted the Uniform Probate Code harmless error section in its entirety. New Jersey Statute section 3B:3-3 provides as follows:

> Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2 [witnessed or holographic wills], the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

In 2012, New Jersey applied its harmless error doctrine to admit an unsigned document to probate in *Estate of Ehrlich*. Ironically, the decedent in *Ehrlich* was a trust and estate lawyer.

When Richard Ehrlich died in 2009, his only relatives were the three children of his deceased brother. An unsigned will was found in his home that left the bulk of his estate to one of the three children, Jonathan, with smaller bequests for the other two children. Although unsigned, the will was typewritten on legal paper with Richard's name and law office address printed in the margin. There was also a handwritten note that indicated the original will had been mailed to his named executor in 2000. Apparently, the executor predeceased Richard, and the original will was never returned to Richard.

The trial court admitted the will to probate, and the two "snubbed" relatives appealed. The New Jersey Court of Appeal affirmed. The Court of Appeal noted that a signature is "the hardest deficiency to justify, as it raises serious *but not insuperable* doubt" as to the testator's intent. Here, the Court of Appeal relied on a number of facts to surmount the absence of Richard's signature, including the facts that the will was obviously professionally prepared, the dispositions were to the natural objects of Richard's bounty (his closest living relatives), there was evidence that Richard assented to the document by his handwritten notation that the original had been sent to his named executor, and Richard had confirmed to third parties his intent to leave the bulk of his estate to his nephew Jonathan and his belief that he had prepared a valid will.

The *Ehrlich* case appears to be one of the most liberal applications of harmless error around the country, in that the court actually admitted an unsigned document to probate. But under the circumstances of the case, the admission of Richard's will arguably supports the stated goal of harmless error, which is to give effect to the decedent's intent.

Harmless Error in California

Against the backdrop of these selected cases from other jurisdictions, California's version of the harmless error doctrine, Probate Code section 6110(c)(2), provides as follows:

> If the will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

The plain language of the statute excludes the application of harmless error to cure defective revocations, alterations, or revivals, which is permitted under the Uniform Probate Code. In other words, California's harmless error doctrine would seem to apply only to the execution of a will.

Application of Harmless Error to Admit Defective Wills to Probate

One of the first cases to consider the harmless error statute was *Estate of Stoker*. In *Stoker*, the decedent Steven Stoker executed a will and trust on May 22, 1997, leaving the majority of his assets in trust for the benefit of his then-girlfriend, Destiny Gularte. After Steven's death in 2008, Destiny filed a petition to probate his 1997 will. Destiny served notice on Steven's children, one of whom filed objections and claimed that her father had executed a more recent will in 2005.

At trial, Steven's children produced evidence that Steven dictated the terms of his 2005 will to his good friend Anne Marie Meier. wrote the will "word for word" from Steven's dictation:

> To Whom It May Concern:
> I, Steve Stoker revoke my 1997 trust as of August 28, 2005. Destiny Gularte and Judy Stoker to get nothing. Everything is to go to my kids Darin and Danene Stoker. Darin and Danene are to have power of attorney over everything I own.

Ironically, both of Steven's children's names were misspelled in the 2005 will. The correct spellings were Darrin and Danine.

Steven then signed his will, but no witnesses signed the will. For good measure, Steven also urinated on his original 1997 will and then burned it. Although the appellate opinion does not mention this fact, further research revealed that Steven was severely dyslexic and could not read or write. Presumably, his good friend Ms. Meier wrote Steven's 1997 will for him because Steven could not write it himself.

Both the trial court and the Court of Appeal agreed that the 2005 will satisfied section 6110(c)(2). Destiny argued that subsection (c)(2) did not apply to handwritten non-holographic wills, but the Court of Appeal disagreed.

> This statute applies to wills that are "in writing" and signed by the testator. (§ 6110, subd. (a); *id*., subd. (b)(1).) The 2005 document is a written will signed by the decedent. The statute contains no language to indicate that the wills covered by this

> section are limited to typewritten wills. Consequently, handwritten non-holographic wills are not excluded from the scope of this statute.

In addition, the Court of Appeal further noted that the goal of the harmless error doctrine was to uphold the decedent's intent notwithstanding the absence of certain formalities. "The broad and remedial goal of this provision is to give preference to the testator's intent instead of invalidating wills because of procedural deficiencies or mistakes."

However, the reasoning of the *Stoker* court then shifts to shakier ground. Notwithstanding California's clear rejection of the Uniform Probate Code's provision for harmless error to establish the revocation of a will (*see* UPC section 2-503(2)), the Court of Appeal held that the 2005 will was a valid revocation of Steven's 1997 will.

The Court of Appeal reasoned that the 2005 will was not a valid will at the time of Steven's death because section 6110(c)(2) was not effective until January 1, 2009, and Steven died in 2008. However, they further reasoned that the 2005 will was "evidence of an unequivocal revocation of decedent's prior will and trust."

The Court held:

> A revocation may be accomplished without the formalities of a formal will. (§ 6120.) "In determining whether a will has been revoked, courts may consider extrinsic evidence of the testator's intent." (*Estate of Anderson* (1997) 56 Cal. App. 4th 235, 247, 65 Cal. Rptr. 2d 307.) This is precisely what the trial court did, and it reasonably could find there was a compelling showing of an intent to revoke the 1997 will and trust based on the 2005 document and the other evidence presented at trial.

In other words, the *Stoker* court appears to have reached the conclusion that harmless error can be applied to establish the revocation of a will, although the version of harmless error adopted in California excludes that application, while the Uniform Probate Code clearly permits revocation through harmless error. This interpretation has been adopted in at least one other case, *Mendoza v. Luquin*. "An instrument that purports to be a will or trust may validly revoke or amend an earlier will or trust even if the instrument fails to meet the technical requirements for an enforceable will or trust."

Subsequent cases have also relied on section 6110(c)(2) to admit nonconforming wills to probate. In *Estate of Reese*, the Court of Appeal upheld a will prepared by an attorney, signed by the decedent Norminel Reese, and witnessed by Norminel's then-girlfriend. The will gave specific gifts to two of Norminel's sons and left the remainder of his estate to his daughter. The Court of Appeal credited the unbiased testimony of the drafting attorney, Norminel's girlfriend, and Norminel's brother, who all testified that Norminel intended to leave the bulk of his estate to his daughter.

The court found clear and convincing evidence to support Norminel's will in that Norminel contacted his attorney to draft his will, he wrote handwritten instructions to his attorney with regard to the distribution, he wrote letters which were consistent with the provisions of the will, he signed the will and had it witnessed by his girlfriend, he contacted his daughter Michelle to inform her that he had mailed important documents to her, he followed up with Michelle to make

sure she received the documents, he instructed her to make copies of the will for all of the people who were named in it, he told his girlfriend, his attorney, and his younger brother that he was leaving the bulk of his estate to Michelle, and he placed Michelle as a co-owner on his bank accounts.

Similarly, in *Estate of Lara*, the Court of Appeal upheld the trial court's decision to admit decedent Ruben Lara's will to probate. Ruben's will was drafted on a computer, signed by Ruben, and signed by three witnesses, but there was evidence that the witnesses signed a blank document several years before decedent finally executed his will. There was also evidence of another very similar will bearing the same date and signed by the same three witnesses, and evidence of another later document found on the decedent's computer that contained a list of assets and the decedent's purported wishes for distribution. So the court had to evaluate whether there was clear and convincing evidence to admit any of the documents as a valid will under section 6110(c)(2).

The Court of Appeal affirmed the trial court's decision to admit one of the documents as the decedent's will based on the testimony of Ruben's son Robert that he received the original will in the mail from the decedent, and that the signature on the will was the decedent's. Robert also testified that he and the decedent had conversations about the will before and after Robert received it. In the will itself, the decedent expressly declares that it is his will and he provides for the distribution of certain property to his wife and two adult children. The decedent also refers to it as his updated will in the accompanying note he sent to his son Robert, and he requests that Robert keep the will safe along with a trust document.

These cases give some guidance as to the type of clear and convincing evidence the courts have considered in applying the harmless error doctrine to admit non-confirming wills to probate.

Harmless Error Not Sufficient to Admit Defective Will

In one of the few other published decisions interpreting section 6110(c)(2), *Estate of Ben-Ali*, the Court of Appeal reached the opposite conclusion, and reversed the trial court's order admitting a non-confirming will to probate. The Court of Appeal found the will's proponent did not satisfy the clear and convincing evidence standard, and denied admission of the will.

In *Ben-Ali*, the father of decedent Taruk Ben-Ali discovered his son's body after a drug overdose. But rather than report the death, the father hid his son's body in the wall of an apartment building they owned in Berkeley for four years. During that time, the father, Hassan Ben-Ali, forged his son's name on documents, and then himself committed suicide. After the father's suicide, Taruk's alleged will was found in the father's possession, and the will left Taruk's valuable real estate to his father.

> Taruk was only 34 years old when he allegedly executed his will. No witness in this case knew anything about the will or the circumstances of its execution. There was no evidence Taruk had spoken about his testamentary intentions with anyone, or that [his wife] ever mentioned the will to anyone between 2002 and its discovery in 2008 — despite the fact that her husband's decision not to provide for her in his will would presumably have been a topic of some interest to her. There was also no testimony as to how the typewritten will had been prepared, who had drafted it, or

> who Taruk might have consulted about its terms or phrasing. Significantly, no original or copy of the will was found at Taruk's residence or among his belongings. The will was found among the belongings of Taruk's father, Hassan. The evidence showed Hassan was a man willing to go to extremes of fraud and dishonesty in order to protect his financial interests and, in particular, to retain control of the Ashby property — which was both his residence and a major source of his income. Before taking his own life, Hassan had hidden his son's body behind a wall, perpetrated a callous fraud on Taruk's mother, spouse, and friends about Taruk's fate, and had impersonated Taruk and forged his name to multiple documents, all apparently for financial reasons connected to the property.

Under all of these circumstances, the Court of Appeal was not convinced that clear and convincing evidence of the son's intent was provided and remanded the matter to the trial court for further proceedings.

Ultimately, it appears that California courts are willing to apply the harmless error doctrine to admit otherwise defective wills when the evidence strongly supports the decedent's intent to execute such a will. But when the evidence is suspect, as in the *Ben-Ali* case, the courts have taken a tougher stance. This strikes a prudent balance between the benefits of harmless error – namely, the execution of the decedent's intent – and the perceived harms, in the potential for fraud and abuse. Time will tell how the courts continue to interpret this evolving doctrine.

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