Oregon State Bar CLE Seminars

Online CLE

Harmless Error: What Errors Are Harmless?

1.25 General CLE credits

From the Oregon State Bar CLE seminar *Advanced Estate Planning 2019,* presented on June 14, 2019

Chapter 4A

Harmless Error: History of the Doctrine and Recent Cases from the U.S. and Australia

Susan Gary[1]
University of Oregon School of Law
Eugene, Oregon

Contents

---

[1] The author would like to thank Abby M. Cettel, who graduated from the University of Oregon School of Law in 2019. Her law school paper, “The Harmless Error Will: How Is It Applied to Wills in the United States?” was a useful resource for this outline.

The focus of the harmless error doctrine is the intent of a decedent when the decedent created a writing the decedent may have intended to be a will. Using the harmless error doctrine, a court can excuse a defect in the execution formalities if the proponent of a will can establish by clear and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and the harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent.

I. History and Purposes of the Doctrine in the United States

A. The Uniform Probate Code § 2-503

The Uniform Law Commission added a harmless error provision to the Uniform Probate Code ("UPC") in 1990. UPC § 2-503 requires that the testator's intent that the writing be the testator's will be proved by clear and convincing evidence. The Uniform Law Commission got its inspiration from Australia but changed the standard from that used in Australia, where the standard was "beyond a reasonable doubt." The UPC also expanded application of the harmless error rule to cover revocation as well as execution.

The official Comments to UPC § 2-502 reflect the expectation, based on evidence from South Australia, that harmless error would be used primarily to address two common problems: defective attestation and attempts by a testator to amend a previously executed will without will formalities for the codicil. The first category of mistakes includes a will with only one witness or a will that is notarized but not attested. Because a holographic will, where permitted, does not require witnesses, the UPC's harmless error provision "reduces the tension between holograph wills and the two-witness requirement for attested wills…." UPC § 2-502, comment. The second category of mistake occurs when a testator strikes out a name or a gift in a will and writes in a different name or gift. In some states (not Oregon) the partial revocation will be effective, but the attempted addition will not be effective unless the change complies with will formalities. The UPC adopted harmless error with these two problems in mind, although the rule as drafted is not limited to these problems and has been applied more broadly.

The keys to the harmless error rule are that it focuses on the testator's intent that the writing be the testator's will (or a revocation of a will) and that the proponent of the writing must establish that intent by clear and convincing evidence. Because of this high standard of proof, courts are much more likely to excuse a lack of attestation than a lack of the testator's signature. The UPC Comments state, "Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement." The Comments note that the typical case in which an Australian court has excused a lack of the testator's signature has involved documents prepared for spouses who sign each other's documents. Because the decedent signed the spouse's will, the document being probated lacked the decedent's signature, but the intent of the spouses that the documents be their wills was clear. *See e.g.,* Estate of Blakely, 32 S.A.S.R. 473 (1983). A few recent cases from Australia, described later in this outline, have applied harmless error more expansively, but the goal of giving effect to the testator's intent while meeting the heightened evidentiary standard remains.

The UPC Comments emphasize that the procedural standards are "appropriate to the seriousness of the issue." The Comments explain that the goal is "to retain the intent-serving benefits of [the will formalities] without inflicting intent-defeating outcomes in cases of harmless error."

B. The Restatement

The Restatement (Third) of Property: Wills and other Donative Transfers (1999) provides another source of information about the harmless error rule. According to the Restatement:

> [T]he purpose of the statutory formalities is to determine whether the decedent adopted the document as his or her will. Modern authority is moving away from insistence on strict compliance with statutory formalities, recognizing that statutory formalities are not ends in themselves but rather the means of determining whether the underlying purpose has been met. A will that fails to comply with one or another of the statutory formalities, and hence would be invalid if held to a standard of strict compliance with the formalities, may constitute just as reliable an expression as a will executed in strict compliance. Restatement (Third) of Property: Wills & Don. Trans. § 3.03, comment b.

The Restatement also describes a sort of hierarchy of formalities, similar to that described in the UPC Comment. The Restatement explains that "[t]he requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless under the principle of [the] Restatement. Only a harmless error in executing a *document* can be excused ...." Restatement (Third) of Property: Wills & Don. Trans. § 3.03, comment b. Further, "[a]mong those defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insurmountable doubt about whether the testator adopted the document as his or her will." *Id.*

C. Enactments and Adoptions in the United States

To date, other than Oregon, six states have adopted the Uniform Probate Code's harmless error doctrine:

- Hawaii: Haw. Rev. Stat. Ann. § 560:2-503 (2019)
- Michigan: Mich. Comp. Laws Ann. § 700.2503 (2019)
- Montana: Mont. Code Ann. § 72-2-523 (2019)
- New Jersey: N.J. Stat. Ann. § 3B: 3 -3 (2019) – A bill introduced in 2018, but not enacted, would have added a requirement that the will either be signed by the decedent or be substantially in the decedent's handwriting.
- South Dakota: S.D. Codified Laws § 29A-2-503 (2019)
- Utah: Utah Code Ann. § 72-2-503 (2018)

In addition, four states have passed more limited harmless error statutes. These statutes all require the testator's signature, although Colorado and Virginia create an exception if two testators sign each other's wills.

> California: Cal. Prob. Code § 6110(c)(2) (2019). California requires the will to be in writing and signed by the testator or by someone on the testator's behalf. If the will is not signed by two witnesses, the will can be treated as if in compliance with the formalities "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.
>
> Colorado: Colo. Rev. Stat. § 15-11-503 (2019). After adopting the UPC version, Colorado amended its statute to provide that harmless error "shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse." Colo. Rev. Stat. § 15-11-503(2) (2019).
>
> Ohio: Ohio Rev. Code Ann. § 2107.24(A). Ohio's will execution rules say that a will must be (1) "signed at the end by the testator" and (2) "subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." *Id.* at § 2107.03. The state's harmless error statute, § 2107.24(A), permits a court to admit a document as a will if the proponent can establish by clear and convincing evidence the following:
>
>> (1) The decedent prepared the document or caused it 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. Ohio Rev. Code Ann. § 2107.24(A) (2019).
>
> Virginia: Va. Code Ann. § 64 .2-404 (2019). Virginia's statute says that harmless error cannot excuse a requirement for a testator's signature, with an exception if two testators sign each other's wills or a person signs the self-proving affidavit instead of a will.

The harmless error doctrine appears to have been judicially adopted in Pennsylvania by *Kajut Will,* 2 Fiduc.2d 197, 22 Pa. D. & C.3d 123 (Pa. Orphan's Ct.1981). In *Kajut*, a blind testator signed his name by making a mark on a signature line above his typed name. The Pennsylvania statute required that if a testator signed by mark, the testator's name must be "subscribed in his presence before or after he makes his mark." Kajut's lawyer had typed the name on the will before bringing the will to Kajut, so the name was not subscribed in his presence. The will was challenged for failure to meet the execution formalities, and the court considered the reasons for the formalities before stating:

> It is the conclusion of the court, under the particular circumstances of this case, that the requirements of section 2502(2), 20 Pa. C. S.A. §2502(2) were met. At the very least, there was substantial compliance with the Wills Act requirements sufficient for a court to

refuse to invalidate a will which obviously expressed the testator's intention concerning the distribution of his estate. Form should not be raised above substance to destroy a will.

D. Oregon - ORS 112.238 – SB 379 (2015), HB 4102 (tech. amendments 2016)

The Oregon Legislature adopted a harmless error statute in 2015, as part of a probate modernization bill. The Oregon Law Commission's Probate Modernization Work Group included estate planning lawyers, elder law lawyers, probate judges and administrators, lawyers from the Department of Justice, and lawyers representing title companies and corporate fiduciaries. This section reproduces the discussion of the harmless error provision from the Report to the Uniform Law Commission from the Work Group. During hearings on the bill, the Report was submitted to the Legislature and became part of the legislative history.

Section 29: This section adopts the doctrine of harmless error. This doctrine was developed to address the problems that occur when a person's testamentary wishes are thwarted due to mistakes in the execution of a will, a codicil, or a written revocation of a will. Harmless error requires a determination by the court, based on a clear and convincing evidence standard, that the decedent intended a writing to be a will, codicil or document revoking a will.

Harmless error does not require a particular level of compliance with the execution formalities (i.e., it does not require a "near miss"), and instead focuses on proof of the decedent's intent. The doctrine will be used in situations in which a decedent thought she had executed her will but made a mistake in doing so. A person trying to prepare a will without a lawyer might have the document signed by only one witness, have two witnesses observe her sign but fail to ask the witnesses to sign the document, or have the will notarized but not witnessed. A person might write out her will and sign it but not realize that she needed witnesses.

In order to establish the decedent's intent by clear and convincing evidence, the proponent of the document should have more evidence than simply the document itself. A piece of paper and an authenticated signature should not be sufficient to show the decedent's intent. Additional evidence could include evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his intent to execute a will, testimony of people who saw the decedent prepare or sign the will, or other documents prepared by the decedent that described the will. Any circumstances that suggest fraud in the creation of the document will, of course, lead a court not to admit the document as a will.

The advantage of adopting the harmless error rule rather than relaxing the execution requirements directly or authorizing holographic wills is that a court will oversee the determination of whether a document should be admitted to probate as a will. The harmless error rule permits the court to fix a number of the problems that occur with will execution, but because the proponent must produce clear and convincing evidence, the change should not lead to a significant number of additional hearings. Most wills, codicils and documents of revocation will still be admitted to probate based on compliance with the statutory execution requirements. These requirements will remain as a safe harbor, and any lawyer assisting a client with a will should follow those requirements when the client executes the will. The Work Group found no information to suggest that states that have adopted harmless error have seen a significant rise in proceedings to establish wills using the doctrine.

Although the concept of harmless error comes from the UPC, the Work Group added several additional provisions to the new section. The section requires the proponent of the document to give notice to heirs and devisees under prior wills and then provides for a 20-day period for any person receiving notice to object before the court makes its determination. Although the document cannot be admitted to probate before the end of the 20-day period, the court can appoint a special administrator if necessary. Also, if the court determines that the writing was a will, codicil or revocation, the court must prepare written findings of fact supporting the determination and enter a limited judgment to that effect.

The Work Group proposed some technical corrections to the 2015 enactment, and the Legislature enacted these corrections in 2016. The following paragraph is a description of the section of the technical corrections bill that addressed harmless error.

Section 17: This section amends ORS 112.238, a statute added by Senate Bill 379 (2015). ORS 112.238 provides that a court can admit a writing to probate as a decedent's will if the proponent of the writing establishes, by clear and convincing evidence, that the decedent intended the writing to be a will or a revocation of a will. Technical corrections have been made to the provisions that indicate who should receive notice of a petition and now provide better coordination with the notice provisions of Chapter 113. Also, a subsection that was included in this section in error (*former* subsection (4)) is deleted. In addition, a new subsection clarifies that after a will is admitted to probate under ORS 112.238, an interested person can still challenge the will under any ground for a will contest provided under ORS 113.075, other than ineffective execution, within the time provided by ORS 113.075.

II. The Harmless Error Doctrine in Other Countries

A. Israel

Israel became the first country to adopt a form of harmless error rule in 1965. Courts interpreted the statute narrowly, and then Israel revised the statute in 2004. The revised statute requires strict compliance for fundamental parts of the will—the will must be a written document with two witnesses or a holographic will that has been entirely handwritten. The court can excuse non-compliance with other requirements, but only if the court has "no doubt that the will represents the true and free wishes of the testator…." For an explanation of Israel's harmless error statute, see Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 Est. Plan. & Community Prop. L.J. 27 (2010).

B. Australia

The harmless error doctrine has seen the greatest development and use in several Australian states. The Australian state of South Australia adopted harmless error in 1975, and the doctrine spread to other Australian states. The Australian experience proved influential in the adoption of harmless error in the United States after Professor John Langbein studied the doctrine in Australia and advocated its adoption in the U.S.

For information about harmless error in Australia, see David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2037-42 (2018); John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion,* 38 ADEL. L. REV. 1 (2017); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM L. REV. 1 (1987).

C. Canada

In 1981 a British Columbia commission produced a report recommending the adoption of a statute "permitting the court to enforce a defectively executed will if satisfied that the will reflects the testator's intention, but only on condition that the will be in writing and that the testator have signed it." Thus, the recommendation was limited to permitting the court to address attestation defects. The Uniform Laws Conference of Canada approved a harmless error measure for the Canadian Uniform Wills Act in 1987. Both Manitoba and Saskatchewan have enacted harmless error statutes. *See* Horton, *supra*, at 2040; Langbein (1987), *supra*.

III. Cases Applying the Harmless Error Doctrine

Reported cases are still rare. This section provides a review of how courts have applied the harmless error statutes.

A. U.S. Cases

1. California – *Estate of Ben-Ali*, 157 Cal. Rptr. 3d 353, 361 (Cal. Ct. App. 2013); *Estate of Stoker*, 122 Cal. Rptr. 3d 529, 534 (Cal. Ct. App. 2011)

In *Estate of Ben-Ali*, the purported will had signatures of the decedent and two witnesses, but the signature of one witness was illegible and the identity of the witness could not be determined. The court ruled that because no evidence supported a finding that the entry on the signature line was a signature of a witness, the proponent of the document had not established due execution of the will. The court turned to California's harmless error statute and the rule that the court must find by clear and convincing evidence that the decedent intended the document to be the decedent's will. The court found conflicting evidence of the provenance of the document, whether the decedent had, in fact, signed it, and whether the decedent had intended the document to be his will. The court concluded that no reasonable fact finder could conclude that the will represented the decedent's testamentary intent.

In *Estate of Stoker*, a handwritten will created in 2005 did not meet California's will formalities because it lacked the signatures of two witnesses. The 2005 will was held to be valid over a 1997 will that did meet the formal requirements of the California Probate Code. The main difference between the two wills was the removal of the appointment of the testator's prior girlfriend as executor of the estate. The court found clear and convincing evidence that the testator intended the 2005 will to be his final will due to his destruction of his previous will, his signature on the 2005 document, his prior discussion with friends that the document was his will, and the testimony of two friends that they saw him sign the document.

Estate of Stoker also discussed the retroactivity of California's harmless error statute, which was enacted in 2009. The court noted that before 2009 the 2005 will could not have been probated, but that the testator did properly revoke his 1997 will regardless of the new statute. The 2009 statute applied to the 2005 will only because of the revocation of the 1997 will. The 2005 document was the decedent's only will at the time of his death due to the revocation of the 1997 will. The court felt it was appropriate to apply the harmless error rule to the 2005 will because that will was the only will available.

2. Colorado - *In Re Estate of Wiltfong*, 148 P.3d 465 (Colo. App. 2006); *In re Estate of Sky Dancer*, 13 P.3d 1231 (Colo. App. 2000)

At a dinner party with two friends, Ronald Wiltfong gave his domestic partner of more than 20 years, Randell Rex, a birthday card with a typed, signed note that said that if anything happened to Wiltfong he wanted all his property to go to Rex. Wiltfong died a year later, and Rex attempted to probate the letter as Wiltfong's will. Wiltfong had signed the letter, but the trial court erroneously thought he also needed to acknowledge the document as his will. The Court of Appeals said the statute required *either* a signature or acknowledgment, so the signature was sufficient. The court remanded the case for the critical step: a determination of whether Wiltfong intended the document to be his will.

The Court of Appeals commented that harmless error in Colorado is limited to minor flaws in execution. The court explained that Colo. § 15-11-503(2) "establishes the condition precedent that a document be "signed or acknowledged by the decedent as his or her will" before a court may move to the next step and decide whether there is clear and convincing evidence the decedent intended the document to be a will." *In re Estate of Wiltfong*, 148 P.3d 465, 468 (Colo. App. 2006).

The court, citing the Restatement, commented further:

> Thus, the question is whether a defect is harmless in light of the statutory purposes, not in light of the satisfaction of each statutory formality, viewed in isolation. To achieve those purposes, the issue is whether the evidence of the conduct proves the decedent intended the document to be a will. *Id.*

The court distinguished an earlier Colorado case, *In re Estate of Sky Dancer*, in which the court had refused to use harmless error to probate a document as a will. The court explained:

> Here, the letter and the circumstances surrounding it are manifestly distinguishable from the document the division invalidated in *In re Estate of Sky Dancer, supra.* The purported will discussed in that opinion was flawed by more than technical drafting mistakes. For example, information produced in a police investigation suggested the proponent of the document may have been involved in causing the decedent's death. The dispositive portion of the document was neither signed by the decedent nor written in her hand. There was no evidence the decedent told anyone the document was to serve as her will. Last, the division indicated there was a possibility another person had created the dispositive portions of the document. *In re Estate of Wiltfong*, 148 P.3d 465, 469–70 (Colo. App. 2006).

The court explained that in determining Wiltfong's intent, the court could consider extrinsic evidence such as the decedent's statements to others about the letter. The court could also consider the language of the letter, including whether the letter disposed of all the decedent's property and whether it identified a beneficiary.

3. Michigan – *In re Estate of Horton*, 925 N.W. 2d 207 (2018); *In re Estate of Attia*, 895 N.W.2d 564, 568 (Mich. Ct. App. 2016)

Shortly before his death by suicide, Duane Horton handwrote a journal entry stating that a document titled "Last Note" was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton's death, the court concluded that the note evidenced his testamentary intent as to the disposition of his property. The court permitted the probate of the Last Note under Michigan's harmless error statute.

Horton reflects the difficulties posed by electronic documents that individuals intend to be dispositive documents. One case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), examined whether electronic writing—a will written with a stylus on an electronic tablet—is "writing" for purposes of the execution formalities. *Castro* concluded that it was. In that case the testator and two witnesses had signed the tablet using the stylus, so the execution formalities had been met as long as the electronic writing counted as writing.

In *In re Estate of Attia* the only issue on appeal was whether the signature of the decedent was a requirement before a will could be admitted to probate under the harmless error statute. The court held that a signature was not necessary, and it remanded the case for further deliberation. The document in the case was a draft will prepared by a lawyer but unsigned when the decedent died. The court provided no guidance as to factors that should be considered on remand.

4. Montana - *In re Estate of Hall*, 51 P.3d 1134 (Mont. 2002)

Jim Hall and Betty Lou Hall had a joint will prepared by their lawyer. The lawyer mailed them a draft, and after reviewing it they met with the lawyer to make some changes. The lawyer agreed to prepare a final version of the will. Before they left the lawyer's office, Jim asked if they could sign the draft (with changes noted on it) and have that document stand as their will until the lawyer sent the final version. The lawyer said they could, and Jim and Betty signed the joint will. The lawyer notarized it, but no one else was in the office, so no one attested the will as a witness. When Jim and Betty got home, Jim directed Betty to tear up his prior will. Although Jim lived more than a year after they signed of the draft, the final version was never signed.

After Jim's death, Betty Lou requested probate of the will, and the District Court admitted the will under the harmless error statute. Jim's children from a prior marriage contested its admission to probate. The Court of Appeals described the facts surrounding the execution, including the revocation, and stated, "The only question before this Court, therefore, is whether the District Court erred in concluding that Jim intended the Joint Will to be his will under § 72-2-523, MCA. We conclude that the court did not err." *In re Estate of Hall,* 51 P.3d 1134, 1136 (Mont. 2002).

5. New Jersey - *In re Estate of Ehrlich*, 47 A.3d 12 (N.J. Super. Ct. App. Div. 2012); *In re Prob. of Will & Codicil of Macool*, 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010)

Two months after Richard Ehrlich died, a document titled "Last Will and Testament" was found in his house. It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document lacked a signature but did include notations in the decedent's handwriting in the margins. The document had been created on May 20, 2000, shortly before Ehrlich underwent surgery. Later in life, Ehrlich referred to a will he had created when he discussed making changes to it. The court admitted the document as Ehrlich's will, stating that "the trend toward excusing harmless errors is based on a growing acceptance of the broader principle that mistake, whether in execution or expression, should not be allowed to defeat intention nor to work unjust enrichment." *In re Estate of Ehrlich*, 47 A.3d 12, 23 (N.J. Super. Ct. App. Div. 2012).

In New Jersey, the harmless error statute requires evidence that the decedent actually reviewed the document in question and thereafter gave the decedent's final assent to it. Ehrlich, a lawyer, had prepared the document. A handwritten notation at the top of the first page included a date and a comment that he had mailed the original copy to his executor. In the opinion of the court, this evidence was enough to satisfy the requirement that the testator gave his final assent and considered the document his will. The court did not comment on the fact that a lawyer should have known that the will was not valid without attestation. A strongly worded dissent argued that a document without the decedent's signature should not be admitted to probate as a will.

A bill was introduced in 2018 with the goal of overturning the result in *Ehrlich*. Assembly Bill No. 1176 proposed adding the following requirement to New Jersey's harmless error statute: "the document or writing is signed by the testator or is substantially in the testator's handwriting…." The legislature did not enact the bill. 2018 N.J.A.B. 1176 and Statement.

In *Macool*, Louise McCool visited her lawyer with notes of what she wanted included in a new will. The lawyer dictated the will while she was in his office, and she left. The will was typed later that day or the next morning, but because McCool died an hour after leaving the lawyer's office, she never saw the typed document. The court, in holding that the proponent of the unsigned document had not met the clear-and-convincing burden, said, "The proponent of the writing intended to constitute such a will must prove, by clear and convincing evidence, that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. *In re Prob. of Will & Codicil of Macool,* 416 N.J. Super. 298, 310, 3 A.3d 1258, 1265 (App. Div. 2010).

The court noted that this ruling disposed of the case, but "in the interest of completeness" went on to overrule the trial court's ruling that the lack of signature disqualified the document as a will. The court opined that the statute did not require the testator's signature. *Id*. at 1265-66.

6. Ohio – *In re Estate of Shaffer*, 2019 WL 337011 (2019); *In re Estate of Hand*, 73 N.E. 3d 880, 884 (Ohio Ct. App. 2016)

In re Estate of Shaffer involved a writing signed by the decedent in the presence of two people who saw him write and sign the document but who did not sign it themselves. Before going to the hospital, Shaffer asked for a piece of paper. He wrote "My estate is not completely settled" and then made some dispositive statements. He wrote the date on the paper and signed his full name. Although the trial court refused to admit the paper as a will, the Court of Appeals reversed. The court found clear and convincing evidence that the decedent intended the paper to be his will. Two people had observed him write the statement on the paper and sign the paper, so the formalities required under Ohio law for application of harmless error were met.

In *In re Estate of Hand*, the court refused to probate a document decedent had written. After Eric Anthony Hand died, his surviving spouse asked the court to recognize as his will a "love letter" Hand had written to her. The final paragraph of the letter began, "[a]s my last will and testament…" and the paragraph then provided directions for the distribution of Hand's property. Hand had signed the letter with a formal signature, unlike other love letters he had written to his spouse. The surviving spouse also found a printed document titled "The Law Will and Testament of Eric Hand," that had not been signed. The document had been prepared using LegalZoom software the day before Hand wrote the love letter.

The trial court concluded that clear and convincing evidence did not exist to prove that Hand intended the love letter will to be his will. The evidence that he had used LegalZoom to prepare a will at about the same time he had written the love letter undercut the argument that the love letter will represented his final wishes and should be treated as a valid will. The court did not review the case de novo and affirmed the trial court's decision that the decedent did not intend the love letter to be his will.

B. Recent Cases from Australia

In recent years courts in some states in Australia have moved beyond the more limited application of the harmless error doctrine to give effect to an "unsent text" and a videotape of a decedent's wishes. The Australian statutes require a "document" rather than a "writing," which is required in the UPC. The Acts Interpretation Act § 36 defines "document" to include: "(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)." Other cases had determined that the statute covers electronic writing as well as video recordings, so the cases described here turned on whether the decedent intended the document to represent the decedent's final wishes with respect to distribution of property.

1. *Alan Yazbek v Ghosn Yazbek &* Anor [2012] NSWSC 594 [New South Wales Supreme Court]

Daniel Yazbek committed suicide and shortly thereafter an investigator found a document titled "Will" on his laptop computer. The court concluded that the Word document was a document for purposes of the statute, that the document stated his testamentary intentions, and that Daniel intended the document to be his will.

2. *In re Yu*, [2013] QSC 322 [Queensland Supreme Court]

Before he committed suicide, Karter Yu wrote several documents on his iPhone. One began, "This is the Last Will and Testament" and it named an executor and provided instructions for Yu's property. The court determined (1) that the iPhone document was a document for purposes of the statute, (2) that the document set forth Yu's testamentary wishes, and (3) that the Yu intended the document to be his will. The court admitted the document to probate.

3. *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220

Mark Nichol left an unsent text message on his phone before committing suicide. The phone was found next to his body. The text read as follows:

> "Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636
>
> MRN190162Q [Mark Nichol's initials and birthdate]
>
> 10/10/2016
>
> My will"

The words "My will" had a paperclip symbol on one side and a smiley face on the other. The text was addressed to the decedent's brother, David Nichol, whose entry in the phone was "Dave Nic."

The court reviewed evidence of the decedent's relationships with people named in the text and with other family members. The court also considered the decedent's behavior in the months before his death, his conversations concerning his property, and the text itself – the wording and where it was found. The court found the evidence sufficient to determine that the decedent intended the text to be his will.

4. *Radford v White* [2018] QSC 306 (17 December 2018)

Jay Schwer made a video recording at the request of his girlfriend before he picked up a motorcycle. That same day he suffered a serious head injury while riding the motorcycle. He lived several years after the accident but did not prepare a formal will before his death. The court considered the video recording a "document," so the issue the court addressed was whether the decedent intended the document to be his will. The court said:

> [18] When the question is whether an informal statement of testamentary intention is intended to operate as a will, other considerations may intrude. For example, the document may be a note or record of a person's testamentary intentions, in the sense that it records what they then intend will be put in a will to be made, but the document itself is not intended to operate as the will. That is why draft formal wills prepared for a person to execute do not qualify as an informal will.
>
> [19] A number of cases have considered whether an informal document, prepared as a stop gap, can operate as a will. [citations omitted] In the present case, in my view, there is no significant difficulty. First, at the time of making the video recording, Mr. Schwer clearly intended that it was to operate in the event of his death, possibly in the near future from riding his motorcycle. Second, that he stated that he intended to "fill out the damn forms" at some time in the future did not displace his intention that the video recording was to operate as his will in the meantime. Third, the delay in Mr. Schwer attending to "fill out the damn forms" subsequently is readily explained by his head injury suffered in the motorcycle accident and associated loss of memory of the day on which he made the video recording.

The court concluded that Schwer did intend the video recording to serve as his will and therefore allowed it to be probated.

5. *In the Estate of Leslie Wayne Quinn* (deceased) [2019] QSC 99 (17 April 2019)

About four years before his death, Leslie Quinn made a video recording on his iPhone. He showed it to his wife and told her that it was his will. When he died, his wife could not access his iPhone because it was password-protected, but she found a copy of the video recording on his computer. She had a transcript of the video recording produced. No other will was found.

The court applied Queensland's harmless error rule, which requires the following:

1. Is there a document by the deceased person?

2. Does the document fail to comply with the execution requirements found in [the Queensland Succession Act]?
3. Does the document purport to state the testamentary intentions of the deceased person?
4. Is the court satisfied that the deceased person intended the document to form the person's Will?

Other courts had already held that a DVD and a document written on an iPhone met the definition of document, so the court relied on the earlier cases to conclude that the video recording was a document. The court then turned to the issue of whether the decedent intended the video recording to be his will. The court concluded, based on the evidence, that he did.

C. Oregon – *Matter of Estate of Boysen*, 297 Or. App. 21 (2019)

One reported case in Oregon considered the harmless error statute but did not reach a determination as to whether a document should be probated as a will. The court held that the determination of whether the decedent considered a writing to be the decedent's will must be based on evidence of the decedent's intent at the time the decedent created the writing. The trial court had refused to admit the will to probate but in reaching its decision had relied on evidence of the decedent's intent at times other than when the decedent wrote the document. The Court of Appeals remanded the case for a determination based on the decedent's intent at the time of the writing.

Shortly after her spouse's death, Marilyn Boysen wrote a document in the presence of Toni Horn, her grandchild, and David Horn, Toni's spouse. Boysen signed the document, put it in an envelope and gave the envelop to Toni Horn to hold until Boysen died. The document began with a statement that her spouse had died five days earlier. The writing then said, "In the event of my death, Marilyn Boysen, I leave my worldly possessions…" and described her dispositive wishes for her property. She signed and dated the writing.

The court described evidence considered by the trial court, including a statement Boysen made to one of the beneficiaries that she had made her will and given it to Horn, Boysen's state of mind after her husband's death, acrimony in the family at the time the document was written and at later times, and statements and actions by Boysen after the date of the document that were inconsistent with the gifts made in the document.

The Court of Appeals found that the trial court had not focused its analysis on Boysen's intent at the time she wrote the document. The court explained that when determining a decedent's intent with respect to a will and when determining whether a decedent intended a document to serve as a will, the court must consider the decedent's intent at the time of execution of the document. The court remanded the case for the court to evaluate the facts as of the time Boysen created the writing.

IV. Conclusion

A few general conclusions can be drawn from the statutes, the Restatement, and the existing cases:

- In the United States a writing is required, and under the current UPC and current statutes, a video recording cannot serve as a will.

- A hierarchy of defects exists. Courts are more likely to fix problems with attestation than the lack of the testator's signature. If the testator's signature is missing, the court will look carefully at whether the testator intended the document to be the testator's will at a specific moment, usually when created. If two testators mistakenly sign each other's wills, a court is likely to use harmless error to validate each will, but in other cases the testator's missing signature is difficult to excuse. Four of the 11 states with harmless error statutes require the signature of the testator.

- In applying a harmless error statute, a court will focus on the intent of the testator that the document be the testator's will. The intent is related to the document itself, not the testator's generally expressed testamentary wishes.

The Restatement (Third) of Property: Wills and Other Donative Transfers, § 3.03, p. 218, comment b provides a good summary. The comment explains, "The trend toward excusing harmless errors is based on a growing acceptance of the broader principle that mistake, whether in execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment." Accordingly, when applying the harmless error doctrine "[t]he purposive question is whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner, that the testator adopted the document as his or her will." *Id.*

Chapter 4B

Harmless Error

John Draneas
Draneas and Huglin PC
Lake Oswego, Oregon

Contents

No. 159 April 10, 2019 21

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Estate of
Marilyn Boysen, Deceased.

Erik CULVER
and Toni Horn,
Appellants,

v.

Beth DEAVER,
Debra Whitaker, and Jill Lane,
Respondents.

Deschutes County Circuit Court
16PB08219; A165172

Alta Jean Brady, Judge.

Argued and submitted January 9, 2018.

Lawrence W. Erwin argued the cause for appellants. Also on the briefs was Law Office of Lawrence W. Erwin.

Matthew L. Mohill argued the cause and filed the brief for respondents.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.*

ORTEGA, P. J.

Vacated and remanded.

____

* Egan, C. J., *vice* Garrett, J. pro tempore.

ORTEGA, P. J.

Toni Horn and Erik Culver, decedent's grandchildren, appeal a limited judgment that denied their petition to admit a writing into probate as a will or to open a small estate under ORS 112.238. That statute provides that a writing that does not satisfy the statutory will formalities may nonetheless be probated if it is proven by clear and convincing evidence that decedent intended that writing to be his or her will. Because we conclude that the probate court did not base its decision on decedent's intent at the time she created the writing, we vacate and remand to the probate court to make that determination.

Declining appellants' request for *de novo* review, we review for legal error and are bound by the probate court's factual findings if there is evidence to support them. ORS 111.105(2); *Hobbs v. Harrington*, 284 Or App 125, 127, 391 P3d 915 (2017). We state the facts in accordance with that standard.

Five days after her husband's death, decedent Marilyn Boysen, in the presence of Horn and her husband David, prepared a handwritten document. She signed the writing, placed it in an envelope with the words "To Toni [Horn] from Grandma" on the outside, and gave it to Horn with instructions to hold it until she died. The writing states:

> "Bill Boysen, my husband, died May 22, 2008, early morn-[ing], leaving myself, his wife, Marilyn Boysen, his sole heir.
>
> "In the event of my death, Marilyn Boysen, I leave my worldly possessions to our two grandchildren Toni Culver Horn and Erik Culver.
>
> "Bill's approximately 1 1/4 carat ring to Erik Culver.
>
> "Bill's 1 carat wedding band to David Horn.
>
> "My jewelry to Toni Horn.
>
> "All real property and personal property to be divided between Toni [Horn] and Erik [Culver]. They can sell everything or whatever they wish.
>
> "Any real property, if they decide to keep it must remain in their two names and pass on to Bill and Marilyn Heirs.
>
> "[s/ Marilyn Boysen] 05/27/2008"

Horn complied with decedent's instructions and kept the writing in her safe until decedent's death on November 5, 2016. After decedent died, Horn and Culver petitioned the probate court to admit the writing to probate. In support of their petition, Horn and her husband David submitted sworn declarations in which they averred the above facts and that decedent "went to great length[s] explaining what [Horn and Culver] needed to know about what was valuable, what things were family heirlooms, and what specific items she wanted each of us to have, and how important it was to her to be buried next to [her husband] when she passed."

At a hearing on the petition, Horn and David testified to the above facts, though, on cross-examination, David testified that decedent did not explain to him the value of the items listed in the writing. Culver testified that, about one month after decedent made the writing, decedent told him "I've given Toni [Horn] a will. Don't speak of it. She has it and she'll know what to do when my time comes." Appellants also submitted documents with decedent's handwriting and signature, which matched the writing submitted for probate.

Respondents, Beth Deaver, Debra Whitaker, and Jill Lane, who are decedent's three daughters and intestate heirs, presented evidence that decedent never told them or decedent's friend, Cheryl Woltz, about having a will. Additionally, Deaver and Whitaker testified that decedent was "in a real bad state" after her husband's death and that, during the years preceding her death, decedent asked them to place sticky notes on the items they wanted to keep after she passed. Finally, Whitaker testified that Horn and Culver did not see decedent for several years because of family disagreements and that, consequently, Whitaker doubted that decedent remembered creating the writing.

The probate court issued a letter opinion, which found:

> "[T]he document is one page, handwritten on yellow lined paper. It is dated May 27, 2008. The document first states that decedent's husband had died five days earlier. Testimony suggests that decedent was distraught and 'in a bad state' for several months following his death. The

document is signed by decedent and the signature is consistent with her signature on other documents. No witnesses signed the document. The document identifies only the two beneficiaries, without reference to the natural heirs, and bequests everything to the two (with the exception of a ring for one of the beneficiaries' husband). The two beneficiaries were present in her home and saw decedent write the document, sign it and place it in a plain envelope with the words 'To Toni From Grandma' on the outside. Toni Horn testified that decedent told her to keep it unopened until her death. A portion of the testimony at the hearing is inconsistent with statements made in the sworn declarations of the beneficiaries. There was no opportunity for reflection of what decedent wrote, nor did decedent access legal or other professional advice. Decedent did not tell anyone about the document she gave to * * * Horn. Statements made by decedent on several occasions after the document was written were inconsistent with the document. Testimony at the hearing suggests there was significant family acrimony at the time the document was written, and even more so in the following years."

Based on those findings, the probate court denied the petition to admit the writing to probate and ordered the estate to pass by intestate succession. Appellants timely appealed, arguing that the probate court erred by not authenticating the writing as a will for probate.

Generally, in order to execute a legally enforceable will, a testator must follow the formalities set out in ORS 112.235.[1] However, ORS 112.238 excuses those statutory formalities and provides:

---

[1] ORS 112.235 provides:

"(1) Except as provided in ORS 112.238, a will shall be in writing and shall be executed in accordance with the following formalities:

"(a) The testator, in the presence of each of the witnesses, shall:

"(A) Sign the will;

"(B) Direct one of the witnesses or some other person to sign the name of the testator and the signer's own name on the will; or

"(C) Acknowledge the signature previously made on the will by the testator or at the testator's direction.

"(b) At least two witnesses shall each:

"(A)(i) See the testator sign the will;

"(ii) Hear the testator acknowledge the signature on the will; or

> "(1) Although a writing was not executed in compliance with ORS 112.235, the writing may be treated as if it had been executed in compliance with ORS 112.235 if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the writing to constitute:
>
> "(a) The decedent's will;
>
> "(b) A partial or complete revocation of the decedent's will; or
>
> "(c) An addition to or an alteration of the decedent's will."

Here, the writing that appellants submitted for probate does not satisfy the statutory formalities of ORS 112.235. Additionally, appellants do not contend that the writing revokes, adds to, or alters a formally executed will. Therefore, unless they can prove by clear and convincing evidence that decedent intended the writing to be her will, her estate passes by intestacy.

Appellants contend that, once the proponent of a noncompliant will establishes that the offered document has been signed by the decedent and the document is authenticated, the court should look within the four corners of the document to see if it looks like a will. Essentially, they urge us to adopt the proverbial "duck test": if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck. *See Nat'l Prods Inc. v. Belkin Int'l, Inc.*, No C16-402 TSZ, 2017 WL 3084435 at *7 (WD Wash July 19, 2017).

Respondents, on the other hand, argue that we should look to the decedent's testamentary intent at the time

---

"(iii) Hear or observe the testator direct some other person to sign the name of the testator; and

"(B) Attest the will by signing the witness' name to the will within a reasonable time before the testator's death.

"(2) The signature by a witness on an affidavit executed contemporaneously with execution of a will is considered a signature by the witness on the will in compliance with subsection (1)(b)(A)(iii) of this section if necessary to prove the will was duly executed in compliance with this section.

"(3) A will executed in compliance with the Uniform International Wills Act shall be deemed to have complied with the formalities of this section.

"(4) As used in this section, 'writing' does not include an electronic record, document or image."

of her death. The Supreme Court has made clear, however, that, when evaluating a compliant will, courts look to the testator's *intent at the time of execution*. *See In re Estate of Nawrocki*, 200 Or 660, 677, 268 P2d 363 (1954) ("A will speaks as of the time of the testator's death, but the intent of the testator is manifested as of the time when the will is executed."); *see also Putnam et ux v. Jenkins et ux*, 204 Or 691, 710, 285 P2d 532 (1955) ("[I]t is recognized by the great weight of authority that evidence of the facts and circumstances existing at the time of the execution of the will, and known to the testator, is admissible * * * to enable the court to place itself in his situation, to see things as he saw them, and to apply his language as he understood and intended it.") (internal quotation marks omitted); *Gomoll v. Temple*, 145 Or 299, 301, 27 P2d 1018 (1933) ("In construing a will the vital requirement is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded him when it was made."). There is nothing in the text of ORS 112.238, that statute's legislative history, or ORS chapter 112, that suggests that courts should adopt a different focus when analyzing a noncompliant will under ORS 112.238. Therefore, an evaluating court must look for clear and convincing evidence of whether the decedent intended the specific writing at issue to be his or her will at the time of its creation.[2] *See Estate of Whitlatch v. Richardson*, 99 Or App 548, 553, 783 P2d 46 (1989) (drawing a distinction between a decedent's intent with respect to the disposition of property and the intent that a specific document be his or her last will).

ORS 112.238 was enacted in 2015 as a part of a larger effort to clarify and modernize sections of the Oregon probate statutes. Or Laws 2015, ch 387, § 29. This statute has not yet been examined by our court. "Our goal in interpreting statutes is to discern, to the extent possible, what the legislature intended a provision to mean. *State v. Gaines*,

[2] One legal scholar describes this as operative testamentary intent, which is "concerned with whether the decedent intended a document that expresses donative testamentary intent to be legally effective." *See generally* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 Geo Mason L Rev 569, 589 (2016) (providing a taxonomy for testamentary intent and exploring its application to various components of the law of wills).

346 Or 160, 171-72, 206 P3d 1042 (2009). We examine the statutory text in context along with its legislative history[.]" *Lake Oswego Preservation Society v. City of Lake Oswego*, 360 Or 115, 124, 379 P3d 462 (2016). The statutory text is clear in that it allows a noncompliant will to be probated if clear and convincing evidence shows that the decedent intended it to be his or her will. The only remaining question is what is required to satisfy the clear and convincing evidence standard.

Clear and convincing evidence is a common standard and means that "the truth of the facts asserted is highly probable." *Krueger v. Ropp*, 282 Or 473, 478, 579 P2d 847 (1978). Because the legislative history is helpful in this case, we consider it to the extent that it provides context to what the clear and convincing evidence standard requires under ORS 112.238 specifically. *See Lake Oswego Preservation Society*, 360 Or at 142. The legislative history reveals that, in the context of ORS 112.238, the clear and convincing evidence standard requires more than presenting the document itself or the document and an authenticated signature. Exhibit 2, Senate Committee on Judiciary, SB 379, Mar 18, 2015 (amendments to the Oregon Probate Code Work Group Report prepared by Susan Gary). Although the document and an authenticated signature are certainly relevant, the standard requires more and may be satisfied with, for example, "evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his [or her] intent to execute a will, testimony of people who saw the decedent prepare or sign the will, or other documents prepared by the decedent that described the will."[3] *Id.*

Here, the probate court's findings indicate that its analysis was not focused on the decedent's intent at the time of the writing. That is, on this record, several of the probate court's findings had little to no bearing on decedent's intent at the time of the writing's creation. First, the probate court found that the writing "identifies only the two beneficiaries, without reference to the natural heirs, and bequests

[3] The list is described as illustrative of facts a court may consider and not exhaustive.

everything to the two (with the exception of a ring for one of the beneficiaries' husband)."[4] Under the circumstances here, these facts have little bearing on decedent's intent at the time of the writing.

The probate court also found that "[s]tatements made by decedent on several occasions after the document was written were inconsistent with the [writing]. Testimony at the hearing suggests there was significant family acrimony *** in the [years following the execution of the writing]." These findings likewise have little bearing on decedent's intent, because, as noted, the court's role is to determine whether decedent intended the writing to be her will *at the time* she wrote it, not to determine how, at the time of decedent's passing, she spoke about how her assets would be distributed. How decedent viewed her relationships after the writing was made or at the time of decedent's death does not explain, in these circumstances, decedent's intent when she prepared the writing and, thus, reflects an incorrect analysis of what was required of the probate court.[5]

Lastly, the findings that the probate court did make concerning the circumstances at the time of the writing include the findings that the document was written and signed by the decedent, with a signature that matched other documents, and that it was written, signed and placed in an envelope in the presence of Horn and Culver. The probate court did not make an express finding of decedent's intent at the time of the writing. In light of the focus of the court's findings on events outside of the central question in the analysis, we conclude that the probate court did not

[4] We note that there is no suggestion that decedent lacked capacity to create a will when she drafted the document, nor is there a suggestion that the writing was created as a result of fraud, duress, or undue influence.

[5] We note that the probate court found that decedent "did not tell anyone about the [writing] she gave to *** Horn." Culver testified that decedent did tell him about the writing, referred to the writing as her will, and implied that she intended him to be a beneficiary after her death, which he likely would not have been under the intestacy statutes. Respondents testified that decedent did not tell *them* about a will, which could nevertheless be consistent with Culver's testimony. It is not clear that the probate court's finding was based on a credibility determination. Because the case will be remanded to the trial court we need not address whether this finding was supported by the evidence.

correctly make its determination based on decedent's intent at the time the writing was created.

Because we conclude that the probate court incorrectly failed to focus its analysis on decedent's intent that the writing function as her will at the time it was created, and that formed the basis for the probate court's determination that the estate must pass by intestate succession, the probate court erred as a matter of law. Therefore, we vacate and remand for the court to evaluate the facts under the correct standard.

Vacated and remanded.

“WHAT’S IN A NAME? WRITINGS INTENDED AS WILLS,” BY ANTHONY R. LA RATTA AND MELISSA B. OSORIO, *PROBATE & PROPERTY* (MAY/JUNE 2014)

Download the article here: https://www.archerlaw.com/wp-content/uploads/2016/09/Probate_and_Property-c.pdf. The article discusses:

> “. . . The type of writing necessary to create a valid will is evolving, and courts are moving away from adherence to strict compliance. Probate courts across the country, faced with everything from DVDs to post-it notes, are admitting to probate these nontraditional “documents” as writings intended as wills.
>
> “This trend away from strict formalities has developed in large part by the adoption of section 2-503 of the Uniform Probate Code in 1990. . . . This doctrine is known by various names, including, but not limited to, ‘dispensing power,’ ‘excused non-compliance,’ and most commonly, ‘harmless error.’ Id. The adoption of the harmless error doctrine is changing the landscape of estate litigation and bringing new meaning to the term ‘last will and testament.’
>
> “. . . .
>
> “The concept of writings intended as wills can be expected to continue to evolve—and provide fertile ground for estate litigation—in those cases involving nontraditional testamentary ‘documents.’ Undoubtedly, states and courts will continue to grapple with the question: What is a will?”

4/24/2018 10:54 AM
18PB03350

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

Probate Department

In the Matter of the Estate of CHRISTIAN GERALD ROEBACK, Deceased.	))))))))	Case No. _______________ **PETITION FOR APPOINTMENT OF PERSONAL REPRESENTATIVE AND PROBATE OF WILL, AND DETERMINATION UNDER ORS 112.238**

Diane Perry, petitioner alleges:

1.

The following information is given with regard to the decedent:

(a) Name: Christian Gerald Roeback

(b) Birth Date: January 1, 1946

(c) Domicile: Washington County

(d) Post Office Address: 651 SW Trillium Creek Terrace, Beaverton, OR 97225

(e) Date of Death: January 12, 2018

(f) Place of Death: Oregon City, Oregon

2.

The decedent died testate.

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

3.

Venue is established in the County of Clackamas, State of Oregon, in that, the decedent died in said county. ORS 113.015(c).

4.

Diane Perry is a cousin of decedent and nominated as personal representative under the writings which petitioner asserts were intended to be the will and codicil of decedent. ORS 113.085(1)(b). Diane Perry is qualified to act as personal representative and is not disqualified to serve as personal representative under the provisions of ORS 113.095. The decedent's intended will waives any bond requirement and specifies that no bond will be required of any personal representative of the decedent's will. Her mailing address is 39959 Hidden Bunker Court, Antioch, IL 60002, and her telephone number is 224-754-9329.

5.

Decedent left a writing that he signed and had notarized on April 18, 2016, a copy of which is attached as Exhibit A ("the Writing"). The Decedent intended the Writing to serve as his will. Although the Writing was not executed with all the statutory formalities, petitioner requests the court to make a determination of decedent's intent under ORS 122.238 (2). The Writing incorporated by reference a pre-existing document, a draft will of February 2016, which is attached as Exhibit B.; <u>Accord</u> ORS 112.255 (a). Together the Writing and draft will constitute a writing that should be admitted as a will for the following reasons:

a. The Writing was signed by testator;

b. The Writing was witnessed by two people, Father Thomas Coughlin and a notary, although only the notary signed the Writing. <u>See</u> Dec. of Father Thomas Coughlin ¶ 8;

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

c. The Writing incorporated by reference a pre-existing document, a will drafted in February 2016 by attorney Scott Howard; and

d. The attached affidavit of Father Thomas Coughlin attests to the genuineness of decedent's signature on the Writing. See Affidavit of Witness to Will by Father Thomas Coughlin, attached as Exhibit C.

But for the fact that Father Thomas Coughlin did not sign the Writing, the Writing would meet the statutory formalities of ORS 112.235. This case falls squarely under the "harmless error" rule, whereby decedent showed his clear intent to create a will. See ORS 112.238. See also Declarations of Father Thomas Coughlin and Ron Rice.

In the Writing, decedent states "I am in good health and mind…I wish to bequest my real estate property in Portland, Oregon to my living relative: Diane Perry. What you have included in your draft of my will regarding my directives to Diane Perry and other people are correct." Dec. of Father Thomas Coughlin, Exhibit 1. The draft will of February 11, 2016 (incorporated by reference in the Writing and therefore a part thereof), bequeaths all personal property (apart from special gifts) to Diane Perry, as well as the residue of his estate to her. The Writing also includes the following specific devises:

- To Steve Michals, decedent bequests the sum of $1,500.
- To Gregory Michalski, decedent bequests the sum of $5,000.
- To his friends, Vincent Romano and Barbara Barberie, decedent bequeaths his 2007 Airstream.

Exhibit 1 at Art. IV. See also Dec. of Father Thomas Coughlin, Exhibit 2.

///

///

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

6.

Petitioner also requests the court to make a ruling as to a codicil of the will under ORS 112.238. On November 19, 2016, decedent wrote a letter to his attorney, Scott Howard, requesting a revision to his will: to increase the bequest to his cousin Steve Michals from $1,500 to $5,000, attached hereto as Exhibit D. Scott Howard revised the draft will on December 2016 to reflect this change. See Exhibit E. This final draft corroborates decedent's final wishes to bequeath all of his personal property (apart from three specific gifts) and all of the residue of his estate to his cousin Diane Perry.

Although the writing intended to be a codicil does not meet the statutory formalities of ORS 112.235, decedent showed his intent to revise his will by signing the letter of November 19, 2016. He shared the letter and his intentions with Father Thomas Coughlin in directing his attorney to make the change in his will. Dec. of Father Thomas Coughlin, ¶ 12. Petitioner recognizes, however, that the signed letter of November 19, 2016 was not notarized or witnessed and meets fewer of the statutory formalities of a will than the Writing. Therefore, petitioner does not take a position on the validity of the November 2016 letter as a codicil, but merely asks the court to make a determination of its validity under ORS 112.238.

7.

Both the Writing and potential codicil are presented to this court herewith pursuant to ORS 112.238(2). In compliance with ORS 112.238(2), notice of these writings was provided to the heirs and devisees.

///

///

///

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

Probate Department

In the Matter of the Estate of CHRISTIAN GERALD ROEBACK, Deceased.	)))))))	Case No. 18PB03350 **MEMORANDUM IN SUPPORT OF PROBATE OF WILL AND DETERMINATION UNDER ORS 112.238**

The Oregon legislature has recently adopted the doctrine of the harmless error ORS 112.238. This doctrine (set forth in the Uniform Probate Code §2-503) was developed to address the problems that occur when a person's testamentary wishes are thwarted due to mistakes in execution of a will or codicil. As explained in the legislative history (Oregon Law Commission, Amendments to the Oregon Probate Code, Work Group Report, SB 379-3 (2015)):

> "Harmless error does not require a particular level of compliance with the execution formalities (i.e., it does not require a "near miss"), and instead focuses on proof of the decedent's intent. The doctrine will be used in situations in which a decedent thought she had executed her will but made a mistake in doing so. A person trying to prepare a will without a lawyer might have the document signed by only one witness, have two witnesses observe her sign but fail to ask the witnesses to sign the document, or have the will notarized but not witnessed. A person might write out her will and sign it but not realize that she needed witnesses. In order to establish the decedent's intent by clear and convincing evidence, the proponent of the document should have more evidence than simply the document itself. A piece of paper and an authenticated signature should not be

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

sufficient to show the decedent's intent. Additional evidence could include evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his intent to execute a will, testimony of people who saw the decedent prepare or sign the will, or other documents prepared by the decedent that described the will.***”

No Oregon decision exists on point interpreting ORS 112.238, but other jurisdictions have adopted §2-503 of the Uniform Probate Code, and have provided guidance on the harmless error doctrine.

In *Estate of Stoker*, 193 Cal. App. 4th 236, 122 Cal. Rptr. 3d 529 (Ct. App. 2011), the court interpreted a harmless error statute similar to ORS 112.238. In *Stoker*, the trial court found a purported will was valid because the testator who signed the will intended it as his will. Though the testator lacked two witnesses’ signatures, the writing was hand-written, signed by the testator, and two witnesses were present when he executed his will. Both witnesses saw him sign the will and verified that the signature was genuine. One of the witnesses testified that at the time the decedent was discussing his estate plan, he asked the witness to get a pen and paper so he could dictate the terms of the new will. The testator looked at it, signed in front of both witnesses, and stated it was his last will and testament. The two witnesses also saw the testator desecrate his previous will and then burn it. Both the appellate and trial court found these facts established clear and convincing evidence that the testator intended the writing to be his last will despite his failure to obtain two witness signatures. In the above-captioned case, decedent Christian Roeback similarly signed the writing of April 16, 2016, had two witnesses observe his signing, but only one witness signed the writing.

One of the most liberal applications of the harmless error doctrine was by the New Jersey Appellate Division *In re Estate of Ehrlich*, 427 N.J. Super. 64, 47 A.3d 12 (Super. Ct. App. Div. 2012) *appeal dismissed*, 64 A.3d 556 (NJ 2013). The Appellate Court upheld the probate of an unsigned document as a valid writing intended to be a will. The testator was a trust and estate attorney for 50 years. The testator’s only next of kin were his deceased brother’s three children, two of whom he had not seen for 20 years. After the testator died, a copy of his fourteen page

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

"Last Will and Testament" was found in his home. The writing did not contain the signature of decedent, or any witnesses. The testator did, however, include in decedent's own handwriting a notation on the right-hand corner of the cover page that he had mailed the original to his executor who had since died and the original will lost.

The court in *Ehrlich* explained the New Jersey equivalent to harmless error, NJ State Ann § 3B:3-3 "places on the proponent of the document the burden of proving by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent and was thereafter assented to by the testator." *Id.* at 18. The Appellate Court noted the decedent undeniably prepared and reviewed the challenged documents. In disposing of his entire estate and making specific bequests, the testator's purported will contained both a level of formality and expressed sufficient testamentary intent. In the case at hand, decedent Roeback signed the writing of April 16, 2016, which incorporated by reference a draft will of February 2016 which was professionally prepared and complete. Unlike *Ehrlich*, two witnesses saw decedent Roeback sign the will and one attached their own signature. (*See also In re Estate of Attia*, 317 Mich. App. 705, 895 N.W.2d 564 (Mich. Ct. App. 2016) ("A will does not need to be signed by the testator in order for the will to be admitted to probate").

Decedent Christian Roeback had no spouse or children of his own. Decedent expressed his testamentary wishes, not only in his letter of April 16, 2016 and in the two drafts of his will prepared by attorney Scott Howard, but also in repeated statements to his closest friends and confidants, Father Thomas Coughlin and Ron Rice, throughout the years that his cousin Diane Perry was like a sister to him. Decedent wanted Diane Perry to inherit his residuary estate, which primarily consisted of his house in Beaverton. If the court does not find a valid will and the estate passes according to the laws of intestacy, the natural object of his affection would inherit nothing from him. Instead, twenty of his other cousins, many of whom he was estranged from over the years, would inherit their statutory share of his estate. In the two wills drafted by Scott Howard in February and December of 2016, decedent only gave specific cash gifts to two of his

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

first cousins, Steve Michels and Gregory Michalski; he gave the residuary of his estate to Diane Perry. Applying the harmless error rule to this case would further the testamentary intent of the decedent. “The broad and remedial goal [of the harmless error rule]… is to give preference to the testator's intent instead of invalidating wills because of procedural deficiencies or mistakes...” *Stoker,* 193 Cal. App. 4th at 240.

DATED: July 5, 2018.

/s/ Nell Hoffman Bonaparte
Nell Hoffman Bonaparte, OSB No. 883601

SHENKER & BONAPARTE, LLP
1500 SW 1ST AVE, SUITE 765
PORTLAND, OR 97201
TELEPHONE (503) 242-0005
FACSIMILE (503) 323-7360

Petitioner:
Diane Perry
39959 Hidden Bunker Court
Antioch, IL 60002
224-754-9329

Attorneys for Petitioner:
Nell Hoffman Bonaparte, OSB No. 883601
Shenker & Bonaparte, LLP
1500 SW 1st Avenue, Suite 765
Portland, OR 97201
503-242-0005
n.bonaparte@comcast.net

Mr. John H. Draneas, OSB No. 771657
Draneas & Huglin PC
4949 Meadows Road, Suite 400
Lake Oswego, OR 97035
503-496-5500
john@draneaslaw.com

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

IN RE:

Estate of Aretha Franklin,

Decedent.

Case No. 2018-384527-DE
Hon. Jennifer S. Callaghan

Petition for Instructions on Validity and Admission of a Purported Holographic Wills and Dispositive Provisions

Craig A. Smith (MO Bar #27330)
Attorney for Edward Franklin
141 N. Meramec, Suite 201
St. Louis, MO 63105
Telephone: (314) 884-6080
Email: csmith@craigsmithlaw.net

David J. Bennett (P10690)
THAV GROSS PC
Attorneys for Personal Representative
30150 Telegraph Road, Suite 444
Bingham Farms, MI 48025
Telephone: (248) 645-1700
Facsimile: (248) 645-8205
Email: dbennett@thavgross.com

Lisa Dwyer (P47961)
LAW OFFICE OF LISA DWYER PC
Attorney for Edward Franklin
400 Monroe Street, Suite 280
Detroit, MI 48226
Telephone: (313) 962-0000
Email: dwyer1247@aol.com

Kevin M. Check (P39943)
KEVIN M. CHECK, P.C.
Co-Counsel for Personal Representative
30150 Telegraph Road, Suite 444
Bingham Farms, MI 48025
Telephone: (248) 355-3550
Email: kevinmcheckpc@aol.com

Harold R. Oseff (P18546)
LAW OFFICES OF HAROLD R. OSEFF PLLC
Attorney for Theodore Richard White, II
2000 Town Center, Suite 1500
Southfield, MI 48075
Telephone: (248) 351-3511
Email: hoseff@osefflaw.com

Jon B. Munger (P54736)
MUNGER & ASSOCIATES, PLLC
Guardian for Clarence Franklin
4545 Clawson Tank Drive, Ste. 100
Clarkston, MI 48346
Telephone: (248) 618-1200
Email: jmunger@jonmungerpllc.com

Juanita Gavin Hughes (P41141)
JUANITA GAVIN HUGHES, PLLC
Attorney for Kecalf Franklin
26300 Telegraph Road, Suite 100
Southfield, MI 48033
Telephone: (248) 809-2902
Email: juanitaghughes@yahoo.com

1

PETITION FOR INSTRUCTIONS ON VALIDITY AND ADMISSION OF A PURPORTED HOLOGRAPHIC WILLS AND DISPOSITIVE PROVISIONS

Petitioner, Sabrina Garett Owens, Personal Representative of the Estate of Aretha Franklin, a/k/a Aretha Louise Franklin, Deceased ("**Estate**"), through her attorneys Thav Gross PC and Kevin M. Check, P.C., Petition for Instructions on Validity and Admission of Purported Holographic Wills and Dispositive Provisions, and states as follows:

1. Decedent died on August 16, 2018.

2. Upon information and belief, the Decedent died intestate and after her death a diligent search of her properties was undertaken and no Will was discovered.

3. Upon Application to the Court, Sabrina Garrett Owens was appointed Personal Representative of the Estate on August 31, 2018

4. Since the date of her appointment, the Personal Representative has been marshalling the Estate assets, paying its expenses and negotiating various contracts and agreements for the purpose of increasing the Estate's value, paying its debts, and advancing the legacy of the Decedent.

5. In preparation of Decedent's residence for a personal property appraisal and to protect her personal property, the Personal Representative has been inspecting the home and its contents.

6. On May 3, 2019, the Personal Representative, while continuing her examination of the home, discovered a key to a locked cabinet that she had been previously unable to gain access and open.

5/20/2019

7. Inside the cabinet the Personal Representative found two purported Holographic Wills of the Decedent dated on or about June 21, 2010 and October 20, 2010, copies of which are attached hereto as **Exhibit "A"** and **Exhibit "B"**.

8. On the same date, the Personal Representative searched underneath the cushions of the coach in the living room and discovered (inside a spiral notebook) another purported Holographic Will dated on or about March 31, 2014, a copy of which is attached hereto as **Exhibit "C"**.

9. Shortly thereafter, the Personal Representative circulated the purported Holographic Wills to the all the attorneys of record for the heirs and held a meeting to discuss the same on Thursday May 9, 2019.

10. The heirs, through their counsel, have been unable to reach a resolution with each other as to the admission, validity, and dispositive provisions of the purported Holographic Wills.

11. Counsel for the Personal Representative has reviewed the purported Holographic Wills and is unsure as to whether or not these documents meet the legal requirements to constitute a valid Holographic Will pursuant to MCL 700.2502 nor are they able to sufficiently determine the dispositive terms of those instruments.

12. The Personal Representative, on a daily basis, is actively involved in many continuing projects for the benefit of the Estate, including, but not limited to, various television and movie proposals, as well as dealing with various creditor claims and resulting litigation. (**Exhibit "D"**).

13. Although no formal testacy proceeding has been filed with the Court, Petitioner seeks instructions *confirming that other than suspending future distributions to the heirs, her*

3

powers and duties as the previously appointed personal representative continue pursuant to MCL 700.3401(4), or until further Order of this Honorable Court.

14. The names and addresses of the Interested Persons are attached hereto as **Exhibit "E"**.

WHEREFORE, the Personal Representative respectfully requests this Honorable Court for instructions as to the validity and admissibility of the purported Holographic Wills, their dispositive provisions and her authority to continue to carry on her powers and duties as Personal Representative and/or any other Orders the Court may deem fair and just.

WE DECLARE UNDER PENALTIES OF PERJURY THAT THIS PETITION HAS BEEN EXAMINED BY US AND THAT ITS CONTENTS ARE TRUE AND ACCURATE TO THE BEST OF OUR KNOWLEDGE, INFORMATION AND BELIEF.

Respectfully submitted,

THAV GROSS PC

By:____________________
David J. Bennett (P10690)
Attorney for the Personal Representative
30150 Telegraph Road, Ste. 444
Bingham Farms, MI 48025
Telephone: (248) 645-1700
Facsimile: (248) 645-8205
Email: dbennett@thavgross.com

KEVIN M. CHECK, P.C.

By:____________________
Kevin M. Check (P39943)
Co-Counsel for Personal Representative
30150 Telegraph Road, Suite 444
Bingham Farms, MI 48025
Telephone: (248) 355-3550
Email: kevinmcheckpc@aol.com

Dated: May 20, 2019

This complete document including the attachments is available for download from https://s3-us-west-2.amazonaws.com/oregonstatebar/Seminars/2019/AEP19-4/AEP19-4A-5.pdf.

5/20/2019

4