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The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court.

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THE EFFECT OF A HARMLESS ERROR IN EXECUTING A WILL: WHY TEXAS SHOULD ADOPT SECTION 2-503 OF THE UNIFORM PROBATE COURT

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I. INTRODUCTION

In one form or another, the privilege to pass property at one's death is profoundly embedded in American society and has a deep historical foundation.[1] The law permits property owners to decide who will own

1. *See* Hodel v. Irving, 481 U.S. 704, 716 n.2 (1987) (holding that when the government restricts or limits the right to transfer property at death, compensation under the Just Compensation Clause of the Fifth Amendment is required); Irving Trust Co. v. Day, 314 U.S. 556, 562 (1943) (stating that the right to pass property at death is a privilege, not a fundamental right); *see also* 1 PAGE ON THE LAW OF WILLS § 2.18 (Anderson Publishing Co. 2003) (1901) (discussing the historical roots of wills law, and how the American law on wills is largely based on English Law); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 88 (Gryphon eds., 1994) (1698) (asserting that the right of children to inherit property upon their parents' death is a natural right); MELVILLE MADISON BIGELOW, THE LAW OF WILLS 23-31 (Little, Brown, & Co. 1898) (discussing the development of wills law from the Norman invasion through the Statute of Frauds); EUGENE M. WYPYSKI, THE LAW OF INHERITANCE IN ALL FIFTY STATES 2 (4th ed. 1984) (stating that the American law on wills is derived from Roman Civil Law, which was based on property passing through blood relationships, and English Common Law, which emphasized preference for male children over female children in succession); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L.

their property at death.[2] If the decedent dies without a will, all property, excluding nonprobate property, will pass by intestacy through the probate court.[3] Those who take property through intestacy are the decedent's heirs.[4] Whether or not a person dies with or without a will is usually obvious; there either is a will or there is not. However, there are situations where a decedent executed a will, but for whatever reason, the will is invalid. Often, the validity of a will is called into question in situations where the testator failed to execute the will in compliance with statutory formalities, but the intent to create a will was present.[5] The situation presents a problem for the probate courts: How does the court give effect to a document that clearly reflects testamentary intent, but fails to comply with statutory formalities?[6]

Several types of technical errors can occur when a will is executed. In Texas, harmless errors in the execution of a will are not excused, and the testator must comply with the statutory formalities set out in the Texas Probate Code.[7] Strict judicial adherence to statutory formalities in Texas has led to unjust results in situations where it is relatively clear that the testator intended to create a will but failed to comply with the execution requirements of the Probate Code. Historically, the most pervasive problem is where the witnesses fail to sign the actual will. In these instances,

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REV. 69, 73 (1990) (proposing an interesting, yet controversial, view on wealth transfer: that all property owned at death should be sold and the proceeds paid to the United States government; arguing that the right to dispose of one's property should end at death).

2. *See* TEX. PROB. CODE ANN. § 57 (Vernon 2003) (stating that any person of sound mind who is over the age of eighteen "shall have the right and power to make a last will and testament").

3. *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30 (2004) (stating that nonprobate transfers, such as trusts, payable-on-death accounts, life insurance policies, and property owned in joint tenancy do not pass through probate, but rather are "will-substitutes" that avoid the probate process).

4. *See* TEX. PROB. CODE ANN. § 38 (Vernon 2003) (stating that the first to take property where the decedent does not have a will is the spouse; but if there is no spouse, then the children take; if no children, then to the decedent's parents; then to the grandparents).

5. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999) (stating that it is relatively common for a testator to execute a will that is not in compliance with will formalities, but that a will that is invalidly executed may be just as reliable as a will executed in compliance with formalities); *see also* 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, 3 (1987) (discussing the array of problems that can occur when the testator executes a will).

6. *See generally* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1058 (1994) (offering the general proposition that formalities are good when they protect the testator against unwanted disposition, but they are not good when they frustrate the testator's intent).

7. *See* TEX. PROB. CODE ANN. § 59(a) (Vernon 2003) (stating that a will must be in writing, signed by the testator, and attested to by at least two credible witnesses).

Texas courts have been consistent in declaring such wills invalid.[8] Even when it appeared that the witnesses made an innocent mistake by signing the self-proving affidavit rather than the will, the court was unlikely to admit the will to probate.[9] In response to these harsh results, the Texas Legislature amended the Probate Code to allow a will that is not signed to be admitted to probate provided that the witnesses signed the self-proving affidavit.[10] However, a recent court of appeals decision from Fort Worth suggests that Texas still requires strict adherence to the formalities of the Probate Court.[11] *In re* Estate of Iversen,[12] the court reversed the probate court's decision to admit a will to probate that was not signed by two witnesses.[13] While the witnesses submitted affidavits which affirmed that they had witnessed the will, they did not subscribe their names to the will, nor did they sign a self-proving affidavit.[14] The court held that the requirements of the Texas Probate Code are "clear" and "straight-forward," and substantial compliance with execution requirements is not allowed.[15] Thus, the affidavits of the two witnesses were insufficient to satisfy the statutory requirement that the will be signed by two attesting witnesses.[16] The testator died intestate.

Another common execution error occurs where the witnesses do not sign in the presence of the testator. Most jurisdictions require that witnesses sign a will in the presence of the testator.[17] If the witnesses fail to

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8. *See* Shriners Hosps. for Crippled Children v. St. Jude's Children Research Hosp., Inc., 629 S.W.2d 767, 768 (Tex. Civ. App.—Dallas 1981, writ ref'd) (holding that a signature on a self-proving affidavit, but not the will itself was insufficient); McLeroy v. Douthit, 535 S.W.2d 771, 773 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (declaring a will invalid where the witnesses' signatures did not appear on the face of the will, but upon separate, self-proving affidavits); *In re* Estate of Pettengill, 508 S.W.2d 463, 465 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (holding that a will not witnessed on its body is invalid).

9. *See* Jones v. Jones, 630 S.W.2d 645, 648 (Tex. Civ. App.—Dallas 1980, writ ref'd) (holding that a will was not entitled to probate where the witnesses made an innocent mistake by signing only the self-proving affidavit in the belief that they had signed a valid will).

10. TEX. PROB. CODE ANN. § 59(b) (Vernon 2003).

11. *In re* Estate of Iversen, 150 S.W.3d 824, 826 (Tex. App.—Fort Worth 2004, no pet. h.).

12. 150 S.W.3d 824 (Tex. App.—Fort Worth 2004, no pet. h.).

13. *Id.* at 826.

14. *Id.* at 825.

15. *Id.* at 826.

16. *Id.*

17. *See* TEX. PROB. CODE ANN. § 59(a) (Vernon 2003) (stating that in Texas a will must be attested by two witnesses in the presence of the testator); Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (stating that presence of a witness means that the witness must be in the "conscious presence" of the testator; not that the testator actually watch the witness sign, but has the ability to see, from his position

sign the will in the conscious presence of the testator, even if the testator is in the same building, the will is invalid because the testator could not see the witnesses in the act of signing.[18] For example, if the witnesses sign a will in an attorney's office and the testator is located in the same building, but outside the conference room where the witnesses are signing the document, the will is invalid although the testator may be less than twenty feet away from the witnesses.[19] As one can see, these rules can become picky, and any mistake, no matter how harmless, is likely to invalidate the will.

The preceding cases demonstrate situations where the failure to comply with statutory formalities often produces the exact opposite of the testator's intent.[20] Formalities of will execution "serve[ ] a gatekeeping func-

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in the room, the witnesses sign their names to the will). Texas appears to modify the traditional rule that presence means that the testator actually watch, or be able to watch, the witnesses sign the will. *Nichols*, 422 S.W.2d at 24; *see also In re* Demaris' Estate, 110 P.2d 571, 582 (Or. 1941) (holding that it is unnecessary that the witnesses be within the range of the testator when they sign, but if they are within the range of any of the testator's senses, so that he knows what is going on, the presence requirement has been met); Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 318 (1977) (stating that presence is "usually framed in terms of whether the testator could have seen the witness subscribe the will and how much effort was required to enable him to bring himself into the 'line of vision'"). However, the presence test does not require "that the testator actually see the witnesses sign." *Id.* at 319; *see also* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1011 (1992) (stating that "[c]onscious presence, rather than actual presence, suffices for the [presence requirement]"); W. W. Allen, Annotation, *What Constitutes the Presence of the Testator in the Witnessing of His Will*, 75 A.L.R.2d 318, 323 (1961) (asserting that American jurisdictions have imposed a requirement of presence for the testator when the will is being attested, meaning the testator must be able to see the act of attestation). Some jurisdictions require the testator to actually watch the witness sign; however, ocular attestation is insufficient. W. W. Allen, Annotation, *What Constitutes the Presence of the Testator in the Witnessing of His Will*, 75 A.L.R.2d 318, 323 (1961).

18. *See* Morris v. West's Estate, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (holding that a will was not executed with proper formalities because the witnesses signed the will in a separate office from where the testator was at the time the will was signed, despite the fact that the testator only needed to walk fourteen feet to see the witnesses signing the will).

19. *See id.* (holding that the testator must be capable of viewing the witnesses when they sign the will). The factual scenario in *Morris* was particularly troubling. In that case, the court invalidated the will because the witnesses failed to sign in the conscious presence of the testator where the witnesses signed the document in the secretary's office while the testator was in the conference room and would have been able to see the witnesses sign the will by standing up and walking fourteen feet. *Id.*

20. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 658 (1995) (stating that the goal of a will is to identify the testator's intent and the probate court will carry out the intent if the testator complied with formalities). A dilemma arises when failure to

tion by governing the initial determination of whether people die" with or without a will.[21] Failure to comply with the statutory formalities for executing a valid will results in a total invalidation of the will, and the decedent's estate will pass by intestacy.[22] In the aforementioned cases, intestacy is probably not what the testator wanted because it seems clear that there was the intent to create a will. In Texas, if the decedent does not have a will when he or she dies, the estate will pass to the decedent's heirs at law.[23] In many ways, the notion that a harmless execution error can completely invalidate an otherwise valid will is a horror story for the testator's intended devisees, especially when one considers that a testamentary disposition is a way to ensure that the testator's wishes will be carried out after death.[24] The situations discussed above illustrate how a rule of strict compliance with statutory formalities can lead to unjust results.

The purpose of this Comment is to propose a solution that would remedy the effects of these unjust results. This Comment explores the statutory requirements for executing a valid will, and how these requirements may frustrate testamentary intent. Part II of this Comment offers a historical perspective on the law of wills, discussing the purposes of statutory formalities. Additionally, Part II discusses the modern trend which is moving away from will formalities, such as nonprobate transfers and the doctrine of substantial compliance, and it examines the more modern harmless error/dispensation rule, how the rule operates, criticism of the rule, and finally how the rule has been applied in other jurisdictions. Part III of this Comment examines the current law in Texas. Finally, Part IV

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comply with a particular formality causes the will to fail even when testamentary intent is obvious, in which formalities become intent-defeating rather than intent-enforcing. *Id.*; *see also* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 28-29 (2004) (discussing that strict compliance with will formalities may result in defeating the testator's intent when the true purpose of these requirements is to further the testator's intent); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1061-62 (1994) (arguing that formalism has its value, but such formalism must still be reconciled with modern notions of justice and used only in furtherance of ascertaining intent, not in destroying testamentary intent).

21. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1058 (1994).

22. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490-92 (1975).

23. *See* TEX. PROB. CODE ANN. § 38(a) (Vernon 2003) (providing that the separate estate of a decedent who dies without a will shall pass to the spouse; if there is not a spouse, the property shall pass to the children; if there are no children, then to the decedent's parents; then the grandparents, etc.).

24. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493-94 (1975) (pointing out that will formalities serve a channeling function whereby the testator can be sure that his wishes will be carried out after he dies).

offers the proposition that Texas should adopt a harmless error rule. The underlying thesis of this Comment is that formalities should not be unjustly imposed to invalidate a will for noncompliance, but rather as a means to determine whether the testator intended to create a testamentary disposition.[25] A harmless error rule would allow the courts to excuse innocent execution mistakes, provided that the proponents of the will can prove by clear and convincing evidence that the testator intended the document to be a testamentary disposition.

II. BACKGROUND

A. *Historical Overview*

"To the Roman is given the credit for the creation of the true idea of wills."[26] The fundamental concept of transferring property at death, although originating in ancient times, has played a large role in modern wealth transfer. Today, under our individualistic notions of private property, an individual should have the power to determine who receives his or her property upon death.[27] The privilege of disposing of one's property at death was first recognized in England with the Statute of Wills in 1540.[28] The statute allowed those who owned land in fee simple to devise the land at death.[29] To prevent fraud that may occur in the oral transfer of property, the Statute of Frauds was later enacted to require written documentation of testamentary dispositions.[30] The modern formalities for wills originated in the Statute of Frauds of 1677, which required that a will devising land be in writing, signed by the testator, and attested by three or more credible witnesses.[31] The formalities required by the Stat-

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25. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2-3 (1941) (discussing that will formalities have lost their essential purpose when they become ends in themselves, rather than serving as means for securing the testator's intent).

26. 1 JOHN E. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 4 (Bender-Moss Co. 1917).

27. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (addressing the right to transfer property as one wishes).

28. *See* Statute of Wills, 32 Hen. VIII, c.1 (1540) (Eng.) (discussing the powers given to individuals to devise land); 1 JOHN E. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 15 (Bender-Moss Co. 1917) (exploring who was granted the right to devise land).

29. *See* 1 JOHN E. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 15 (Bender-Moss Co. 1917) (clarifying that "persons seized of land[ ] in fee simple . . . [can] by a will and testament in writing, devise to any other person two-thirds of their land[ ]").

30. MELVILLE MADISON BIGELOW, THE LAW OF WILLS 37-41 (Little, Brown, & Co. 1898).

31. Statute of Frauds, 29 Car. II, c.3 (1677) (Eng.); *see also* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975) (asserting that the Statute of Frauds had a profound impact on limiting the ability of a person to transfer

ute of Frauds served two purposes: providing proof of each testamentary disposition and protecting the testator against fraud.[32] Finally, the English Wills Act of 1837 had a profound impact on modern statutory formalities, merging the laws governing disposition of real and personal property and requiring that a will disposing of any property be in writing, signed by the testator at the end of the will, and attested by two or more witnesses.[33] Today, formalities serve essentially the same function: To ensure that the testator actually intended that the alleged will be his or her final testamentary statement.[34] American jurisdictions have enacted statutes in accordance with the English rules, establishing essentially the same execution requirements as the Wills Act of 1837.[35] The law of wills

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property at death through writing only). Some jurisdictions allow for a nuncupative will (oral will), but this type of disposition is generally limited to small estates where the testator is in his "last sickness." *Id.* at 491; *see also* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547-48 (1990) (stating that the law regarding execution formalities in each state is modeled after the Statute of Frauds of 1677); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994) (discussing that the Statute of Frauds has influenced the law on strict compliance with will formalities for over 300 years, and a change in the law had not been seen in America until 1990).

32. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 201 (1991).

33. The Wills Act, 7 Will. 4 & 1 Vict., c.26 (1837) (Eng.); *see also* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547-48 (1990) (discussing that the Wills Act of 1837 had an enormous impact on American law). The Wills Act differs from the Statute of Frauds in that the Wills Act requires the attestation of only two witnesses, and the testator's signature must be at the end of the will; the Statute of Frauds did not require the testator's signature to be at the end of the document. *Id.*; *see also* Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 467 (2002) (stating that each state has derived rules governing testamentary disposition from the Wills Act of 1837 and the Statute of Frauds).

34. *See* 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, 4 (1987) (stating that signature and attestation provide evidence that the document is genuine, and the requirement that the will be attested by disinterested witnesses is intended to protect the testator from deceptive and coercive tactics that prevent the testator from making a disposition conducive to his true intentions).

35. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975) (discussing the essential requirements in most jurisdictions that a will be in writing, signed by the testator, and attested by witnesses). Although each state differs in its approach, formalities exist in all jurisdictions and failure to comply with these formalities will render the will void. *Id.*

is controlled by the states, and each state has developed a unique set of rules that govern testamentary disposition.[36]

Will formalities serve several purposes, most of which are concerned with protecting the testator's wishes. Gulliver and Tilson[37] offer three reasons for the existence of will formalities.[38] First, compliance with will formalities serves a ritualistic function in that ceremonial requirements foreclose the possibility that the testator was not acting seriously.[39] Second, formalities serve an evidentiary function, providing a written document that the court can use as proof to ascertain the testator's wishes.[40] Third, the requirements of these statutes protect the testator against unwanted imposition by other parties at the time of the will execution.[41] John Langbein adds a fourth purpose, asserting that will formalities create a safe harbor, providing testators with some assurance that their wishes will be carried out.[42] All of these purposes reflect the simple desire of the law to protect the testator and ensure that he or she intended to execute a will.[43]

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36. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.1 cmt. c. (1992) (discussing the variations among the states regarding statutory formalities and advocating for the adoption of a uniform harmless error rule to increase consistency among states); 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, 3 (1987) (highlighting the different requirements for will execution in various American jurisdictions).

37. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941).

38. *Id.* at 5-13.

39. *See id.* at 5 (stating the requirement that will execution abide by ceremonial procedures tends to demonstrate that the testator intended the document to be a final disposition of his property, and not merely a draft or random scribbling).

40. *See id.* at 6-9 (pointing out that because of the extended lapse of time between the execution of the will and the time the will is offered for probate, a statement of testamentary intent and the probate proceedings is made by the will itself).

41. *See id.* at 9-10 (asserting that although difficult to justify under modern conditions, the original Statute of Frauds was intended to cure the problem of wills executed on a death bed, where the testator would need special protection against unwanted imposition by interested third parties).

42. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975) (pointing out that a testator can be relatively certain that if he complies with formalities of the Wills Act, his testamentary wishes will be carried out because the courts will recognize the organized nature of the disposition and not hesitate to admit the will into probate).

43. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 658 (1995) (stating that "[s]everal purposes have been identified for these formalities including purposes to protect and safeguard the testator, to provide reliable proof and evidence, to provide an event that emphasizes the finality of intent and of the act of execution . . .").

While formalities serve to protect the testator, the law should reflect the fact that the true purpose of these formalities is to guarantee that the testator intended to create a will.[44] The requirements for executing a will are noble to the extent that they protect the testator from deception, coercion, or undue influence by an interested party.[45] The danger in strict adherence to will formalities is that these formalities can become ends, rather than a means, for ascertaining the testator's intent.[46] The existence of will formalities alone is not dangerous to the concept of respecting testamentary intent, but when will formalities are used arbitrarily and automatically to make any execution mistake fatal, there is an obvious tension between compliance with will formalities and respect for intent.[47] This tension accentuates the underlying thesis of this Comment. The entire law of wills is derived from the notion that property owners should be entitled to dispose of property as they please.[48] If that is so, it logically follows that the law governing execution of testamentary documents should not create obstacles for a person wishing to dispose of property, but should encourage valid testamentary dispositions, and laws should be enacted to protect the testator's true intent.[49] It is generally conceded

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44. *See* 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, 4 (1987) (illustrating that when a testor commits a mistake "in complying with the formalities, it does not follow that the purposes of the Wills Act have been disserved").

45. *See id.* at 3 (reiterating that the Wills Act "serves evidentiary, cautionary, and protective policies").

46. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941) (noting that courts should view execution requirements as involving form rather than intent).

47. *See In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991) (stating that "[r]igid insistence on literal compliance often frustrates [the testator's intent]"); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 498 (1975) (stating "[w]hat is peculiar about the law of wills is not the prominence of the formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will"). Langbein argues that there is an obvious tension between the law of strict compliance with will formalities and testamentary intent. *Id.* at 492-93; *see also* Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 356-57 (1979) (stating that strict formalities create "tension between private ownership and restrictions upon disposition[s]").

48. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) (indicating that "[t]he first principle of the law of wills is freedom of testation").

49. *See In re* Will of Carter, 565 A.2d 933, 935 (Del. 1989) (stating that "[i]n construing a will, the intent of the testator is paramount"); 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, 4 (1987) (discussing that the Wills Act is not serving its proper function in cases where the testator has made a harmless mistake). The underlying objective of will formalities should be to promote testator intent, not to defeat it. John H.

among probate scholars that a certain level of formality in property disposition is useful because it provides evidence of what property the owner intended to devise.[50] The insistence on will formalities, however, should not be so pervasive that it heightens the tension between testamentary intent and compliance with formalities.

B. *Nonprobate Transfers*

The idea that a will may be invalid because the testator was not in the same room as the witnesses, or the witnesses signed the self-proving affidavit but not the will itself, demonstrates that the law of strict compliance with will formalities is in need of reform. There is certainly a trend moving away from strict compliance with will formalities. One of the primary reasons for this trend is the growing use of nonprobate transfers.[51] Nonprobate transfers typically require a written instrument and signature by the one transferring property, but there are usually no attestation requirements.[52] America's experience with will substitutes proves that attestation by credible witnesses is not necessary to protect the testator against fraud, duress, and undue influence.[53] Furthermore, about half of the states and the Uniform Probate Code permit holographic wills, which are wills that the testator executed in one's own handwriting without hav-

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Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 4 (1987); *see also* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059-60 (1994) (arguing that the formalistic requirements lose their substantive meaning when courts have used them not as a mechanism for ascertaining testator intent, but as a mechanism for blocking wills where the testator otherwise intends for his estate to be distributed in accordance with the technically defective will).

50. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 185 (1991) (pointing out that several scholars favor some level of formality in executing a will because it serves as proof of the testator's intent to make a will and to preserve reliable evidence of authenticity).

51. *See* 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, 5 (1987) (stating that nonprobate transfers such as life insurance policies, revocable trusts, joint accounts, and pensions have been successful ways in disposing of property without the strict compliance with formalities required by the Wills Act).

52. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 557 (1990).

53. *See id.* at 556 (arguing that if fraud, duress, and undue influence were common in will substitutes and witnessing could prevent these evils, banks and insurance companies would surely require some form of attestation in executing a life insurance policy, pension, or trust in order to protect their business interests). Lindgren argues that will execution should not require any form of attestation because the experience with will substitutes shows that a written instrument and signature adequately protect the interests of the parties involved. *Id.*

ing witnesses attest to the document.[54] Nonprobate transfers are legitimate ways of transferring property in that they serve the same purposes of will formalities, while not requiring strict adherence to statutory formalities.[55] Will substitutes, such as revocable trusts, joint accounts with right of survivorship, payable-on-death accounts, and pension plans accomplish the primary purpose of a will without having to go through the probate process.[56] The flexibility of nonprobate transfers and the prominence of such transfers in today's society makes harsh enforcement of will formalities more indefensible.[57] Many commentators today argue for the unification of probate and nonprobate transfers by harmonizing the formal requirements of probate and nonprobate transfers.[58]

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54. ALASKA STAT. § 13.12.502(b) (Michie 2004); ARIZ. REV. STAT. ANN. § 14-2503 (West 1995); ARK. CODE ANN. § 28-25-104 (Michie 2004); CAL. PROB. CODE § 6111 (West 2004); COLO. REV. STAT. § 15-11-502(2)(3) (2003); HAW. REV. STAT. § 560: 2-502(b)(c) (1999); IDAHO CODE § 15-2-503 (Michie 2001); KY. REV. STAT. ANN. § 394.040 (Michie 1999); LA. CIV. CODE ANN. art. 1575 (West 2000); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (West 1998); MICH. COMP. LAWS ANN. § 700.2502(2)(3) (West 2001); MISS. CODE ANN. § 91-5-1 (1999); MONT. CODE ANN. § 72-2-522(2)(ι) (2003); NEB. REV. STAT. § 30-2328 (1995); NEV. REV. STAT. 133.090 (2004); N.J. STAT. ANN. § 3B:3-3 (West 1982); N.C. GEN. STAT. § 31-3.4 (2004); N.D. CENT. CODE § 30.1-08-02(2)(3) (1995); OKLA. STAT. ANN. tit. 84, § 54 (West 1990); S.D. CODIFIED LAWS § 29A-2-502(a)(c) (Michie 2004); TENN. CODE ANN. § 32-1-105 (2001); TEX. PROB. CODE ANN. § 60 (Vernon 2003); UTAH CODE ANN. § 75-2-502(2)(3) (2004); VA CODE ANN. § 64.1-49 (Michie 2002); W. VA. CODE ANN. § 41-1-3 (Michie 1997); WYO. STAT. ANN. § 2-6-113 (Michie 2003); UNIF. PROBATE CODE § 2-503 (1969).

55. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 504 (1975) (arguing that writing, signature, and payment into the insurance policy, pension, or corpus of the trust serve the evidentiary and cautionary functions of the Wills Act by guaranteeing that the owner of the property is intending to make such transfers). *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (calling for a unification of the laws governing probate and nonprobate law).

56. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 180-84 (1991) (stating that will substitutes like trusts, life insurance, and pension plans can effectuate the grantor's intent without having to get approval from a probate court).

57. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 504 (1975) (asserting that the popularity and success of will substitutes makes strict compliance with will formalities "incongruous and indefensible"); Melissa Webb, Wich v. Fleming*: The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 912 (1983) (arguing that nonprobate transfers reflect society's idea that courts should be less preoccupied with formalities and more concerned with how the owner of property wants to dispose of his estate).

58. *See* UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 cmt. (Supp. 1998) (stating that the general trend is to unify the law of probate and nonprobate transfers, relaxing the formal requirements for executing a will in the same way that nonprobate transfers have relaxed formality requirements); RESTATEMENT (SECOND) OF PROP.: DON-

C. *The Doctrine of Substantial Compliance*

Another trend away from strict compliance with will formalities that has received favorable attention is the doctrine of substantial compliance.[59] The doctrine allows the proponent of a will to prove that the document was meant to be a testamentary disposition if it substantially

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ATIVE TRANSFERS § 33.1 cmt. g (1992) (stating that "an effort should be made to adopt a rule . . . that unifies the law of wills and the law of will substitutes by extending to will formalities the harmless-error principle that has long been applied to defective compliance with the formal requirements for will-substitute transfers"); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 504 (1975) (asserting that the informality associated with the execution of will substitutes should be applied to wills).

59. *See In re* Will of Ranney, 589 A.2d 1339, 1341-42 (N.J. 1991) (adopting the doctrine of substantial compliance to cure a defect where the witnesses signed a self-proving affidavit instead of the will); *In re* Will of Carter, 565 A.2d 933, 936 (Del. 1989) (applying the doctrine of substantial compliance to admit a will to probate where the testator signed the self-proving affidavit but not the will); Estate of Black, 641 P.2d 754, 756 (Cal. 1982) (holding that substantial compliance with the holographic wills statute is all that is necessary for a holographic will to be admitted to probate); *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.1 cmt. g (1992) (stating that in the absence of a legislative harmless error rule, courts should apply a rule of substantial compliance, where a will that is improperly executed will be deemed valid if the court finds that the testator substantially complied with statutory formalities); Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1160 (1993) (noting that many courts excuse noncompliance with will formalities through the doctrine of substantial compliance without statutory authorization by focusing on the purposes of will formalities rather than the specific statute); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 513 (1975) (asserting that the doctrine of substantial compliance with will formalities would lead to further inquiry as to whether or not the document purporting to be a will was valid, rather than just invalidating the document for any minor error); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism:* 43 FLA. L. REV. 167, 222 (1991) (noting that in cases involving minor violations of the statute, courts in some jurisdictions loosely interpret the statutory requirements in order to save wills that would otherwise be invalid because the testator failed to comply with will formalities); Melissa Webb, Wich v. Fleming*: The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 918 (1983) (discussing that a substantial compliance rule would allow courts to validate clearly meritorious wills even if the will did not strictly comply with statutory formalities). *But see* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1038 (1994) (stating that the doctrine of substantial compliance was rejected by several courts, which eventually lead to Langbein's alliance with the UPC's dispensing power provision for wills); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355-56 (1979) (stating that the doctrine of substantial compliance is flawed because it is ambiguous to the extent that it does not answer the question of which formalities are more important than others).

complies with will formalities.[60] The court will admit a will to probate if the proponents show "that the essential functions of the will formalities were satisfied by whatever procedure the testator employed."[61] The doctrine of substantial compliance is not a rule that allows noncompliance with formalities; rather, it merely allows a proponent to show that the testator substantially complied with formalities by excusing errors the court deems de minimus.[62] For the most part, the doctrine is nonstatutory, and has been adopted by a few courts to cure the inequities of strict compliance with will formalities.[63] The doctrine of substantial compliance is employed before any legislative action is taken. Thus, for a proponent of a will to successfully admit a will to probate, an individual may have to go through costly and time-consuming litigation.[64] While the doctrine of substantial compliance has proved to be a noble attempt to relax the strict common-law rules governing will formalities, the adoption of a harmless error rule serves the testator's intent more directly and is certainly more expedient.[65]

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60. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 513-14 (1975).

61. Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 458 (2002).

62. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 513-14 (1975).

63. *See In re Will of Ranney*, 589 A.2d at 1341-42 (adopting the doctrine of substantial compliance where the witnesses to a will did not sign the will, however, they signed the self-proving affidavit attached to the will); *see also* 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, 6 (1987) (stating that the doctrine of substantial compliance "is the only avenue open to the courts without legislative intervention").

64. *See* 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, 8 (1987) (stating that a proponent of a will may not want to go through all of the litigation inherent in jurisdictions that have adopted the substantial compliance rule, and that only a comparatively large estate is worth such a costly endeavor).

65. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 664-65 (1995) (stating that it will be difficult to predict which formalities will be given strict construction and which formalities will be given reasonable constructions under a substantial compliance rule). Thus, a statutory rule would be a more reasonable approach to addressing formalities. *Id.*; *see also* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1180-81 (1993) (discussing that the judicial substantial compliance doctrine does not provide a lot of guidance in determining what kind of defects will be excused); 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, 8 (1987) (discussing that substantial compliance is of judicial, not statutory creation); Bruce H. Mann, *Formalities and*

D. *The Harmless Error Rule*

The rule of strict compliance with will execution formalities began to erode in the latter half of the twentieth century. In 1946, the Model Probate Code was enacted as an attempt to reform probate law in America.[66] The Code preserved the traditional formalities of signature and attestation, but abrogated the traditional requirement that the will be signed at the end of the document.[67] In the 1960s, the American Bar Association sought to revise the Model Probate Code to simplify the execution requirements for the testator.[68] The Uniform Probate Code, enacted in 1969, requires that every will be in writing, signed by the testator, and attested by two witnesses.[69] The 1969 provision dismissed the following execution requirements: (1) that the testator sign the document at the

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Formalism in the Uniform Probate Code, 142 U. PA. L. REV. 1033, 1040 (1994) (stating that the dispensing power is more direct than the doctrine of substantial compliance in that it allows the court to pass on a functional analysis of substantial compliance and allows the proponent to provide clear and convincing evidence of intent); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355-56 (1979) (stating that the doctrine of substantial compliance is ambiguous because it does not really define what formalities are more important than others, but also concluding that implementation of the doctrine of substantial compliance is favored over strict compliance with will formalities).

66. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 204 (1991).

67. *See* MODEL PROBATE CODE § 47 (1946) (stating that the testator must sign a will in the presence of two or more attesting witnesses). The Model Probate Code does not specify that the testator must sign at the beginning or end of a document. *Id.*; *see also* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 205 (1991) (noting that the traditional requirements of signing the will at the end were not incorporated into the Model Probate Code).

68. *See* LAWRENCE H. AVERILL, UNIFORM PROBATE CODE IN A NUTSHELL § 9.02 (3d ed. 1993) (stating that the purpose of the Uniform Probate Code is to keep execution requirements simple—requiring only the bare essentials in executing a will); Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 659 (1995) (stating that one of the objectives of the Uniform Probate Code is to reduce execution requirements to a minimum); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 206 (1991) (identifying that the basic philosophy of the drafters of the Uniform Probate Code was to validate a will whenever possible).

69. *See* UNIF. PROBATE CODE § 2-502 (amended 1990), 8 U.L.A. 144 (Supp. 1998) (stating that every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons, each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will).

beginning or end; (2) that the testator watch the witnesses sign the will; and (3) that the testator make a statement that he publishes the document as his or her will.[70] In 1990, in response to experience with the harmless error rule in jurisdictions outside the United States,[71] the Uniform Probate Code added the harmless error provision.[72]

The harmless error rule is a relatively new concept in probate law. The first jurisdiction to codify the harmless error rule was South Australia in 1975.[73] As stated earlier, the Uniform Probate Code did not add the harmless error rule until 1990.[74] The harmless error provision in the Uniform Probate Code states:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502, 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 (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his . . . formerly revoked will . . . .[75]

The official comment of Section 2-503 of the Code provides that the basic purpose of the rule is to place the burden on the proponent of a document to prove by clear and convincing evidence that the decedent intended the document to be his will.[76] The harmless error rule is becoming more accepted among commentators and legislatures, and enactment

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70. LAWRENCE H. AVERILL, UNIFORM PROBATE CODE IN A NUTSHELL § 9.02 (3d ed. 1993); 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, 5-6 (1987); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 209 (1991).

71. *See* UNIF. PROBATE CODE § 2-503 cmt. (amended 1997), 8 U.L.A. 146 (Supp. 1998) (stating that experiences in South Australia and other jurisdictions support the notion that the harmless error rule will be successful in implementing and ascertaining the testator's wishes). *See generally* 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) (discussing the South Australian experience with the harmless error rule, and how the rule was met with success).

72. UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 (Supp. 1998).

73. 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, 9 (1987).

74. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

75. UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 (Supp. 1998).

76. *Id.*

of the harmless error rule is an effective way to ascertain testamentary intent, without getting caught up in determining whether the testator complied with each formality.[77] To date, six jurisdictions in the United States have adopted the harmless error rule.[78]

With the advent of will substitutes, substantial compliance, and the harmless error rule, modern probate law is beginning to recognize and deal with the apparent tension between strict adherence to will formalities and respect for the testator's intent. Although the modern trend has been more accepting of reform, will formalities have been resistant to change.[79] Enforcement of will formalities is unique in American law because it is a feature of an earlier legal scene which remains relatively unchanged.[80] The purpose of such unwavering persistence in adhering to formalities is most likely the product of the long-standing notion that strict adherence to formalities will inevitably procure the desired result, which is to uphold wills that are truly valid and strike down those that are not.[81] The harmless error rule does not do violence to this purpose.[82]

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77. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999) (providing that "harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will"); *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.1, cmt. g. (1992) (stating that a harmless error rule is useful because strict compliance to will formalities has led to harsh results and a rule that dispenses with this requirement in certain situations will tend to effectuate the decedent's intent more effectively).

78. COLO. REV. STAT. ANN. § 15-11-503 (West 2003); HAW. REV. STAT. ANN. § 560:2-503 (Michie 1999); MICH. COMP. LAWS ANN. § 700.2503 (West 2004); MONT. CODE ANN. § 72-2-523 (2003); S.D. CODIFIED LAWS § 29A-2-503 (Michie 2004); UTAH CODE ANN. § 75-2-503 (2004).

79. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 177 (1991) (noting that "will acts have proved to be extraordinarily resistant to change").

80. *See In re* Hale's Will, 121 A.2d 511, 518 (N.J. 1956) (noting that statutory formalities are one of the few legislative products that courts have elected not to disturb).

81. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 177 (1991) (arguing that the unquestioned faith with will formalities is that such faith will lead to the desired result of procuring the testator's intent).

82. *See* 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, 6 (1987) (stating that "a legal system should be able to preserve relatively high levels of formality, in order to enhance the safe harbor that is created for the careful testator who complies fully, without having to invalidate every will in which the testator does not reach the harbor"). *See generally* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994) (asserting that will formalities are useful to the extent that formalities protect the testator from fraud and unwanted imposition from third parties).

When long-standing judicial notions of fairness and justice conflict with the ultimate goal of protecting the testator who desires to create a will, the time has come to re-evaluate these notions in an attempt to realign them more with contemporary problems.[83]

In many ways, determining the efficacy of a testamentary disposition at the testator's death depends not on whether the testator intended to create a will, but rather how carefully the testator complied with statutory formalities.[84] This approach is misguided given the central purpose of will formalities, which is to foster the testator's intent. By requiring a proponent of a defectively executed will to prove by clear and convincing evidence that the testator intended to create a will, the harmless error rule reaches the supposed purpose of will formalities in a more effective way.[85] This Comment does not propose that wills should be executed without formalities.[86] The problem, however, with the strict compliance rule is that failure to comply with will formalities precludes any further discussion about whether the will was valid, while a harmless error rule would allow the proponent to show testamentary intent.[87] With this background in mind, a brief examination of how a harmless error rule works on a pragmatic level will remove any lingering doubt that the rule would dispense with all formalities and result in probate chaos.

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83. *See* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059 (1994) (asserting that adherence to statutory formality has lost its substantive meaning if it is no longer a vehicle for ascertaining testator intent, but rather a means for destroying wills).

84. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 179 (1991) (stating that the threshold, without a harmless error rule, is not necessarily the testator's intent but rather whether the requisite formalities were met).

85. *See generally* 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) (discussing generally how a clear and convincing evidence standard is a more efficient and reliable way of ascertaining the intent of the testator).

86. *But see* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 570-73 (1990) (emphasizing that a written document and a signature should be all that is required to probate a will, and that the attestation requirement should not be required to execute a valid will). Lindgren's article discusses how attestation can frustrate testamentary intent. *Id.*

87. Melissa Webb, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 917 (1983).

III. ANALYSIS

A. *Basics of the Harmless Error Rule*

How does the harmless error rule work in a practical setting? If we recall the situations described in the introduction, a harmless error rule would probably bring about the right results. If the harmless error rule is applied to the cases above, the proponents will succeed in having the will admitted to probate if each proponent can prove, by clear and convincing evidence, that the testator intended the document to be a will, although there was some minor execution mistake. When the court is presented with a defective will, the harmless error rule allows the court to ask the right question, which is whether the document embodies the decedent's unequivocal testamentary intent.[88] The question is accurate because the purpose of will formalities is to determine whether the decedent executed the document as his will. It is not hard to conceptualize, indeed it should be obvious, that formalities should not serve as ends, but as a means of determining whether the decedent intended to create a will.[89]

The harmless error rule is relatively innocuous in that it does not threaten our traditional notions that wills should be executed with certain formalities. A harmless error rule would not completely abrogate any need for the testator to comply with will formalities.[90] Indeed, the larger the departure from traditional will formalities, the harder it would be for a court to excuse such an error as harmless.[91] A harmless error rule would not abrogate the need for a written instrument because the requirement that a will be in writing is basic to the validity of a will and

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88. 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, 34 (1987).

89. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a. (1999) (discussing that formalities are employed to facilitate the intent of the decedent; they are "not to be ends in themselves"); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 394 (2001) (stating that execution formalities are merely a means to attaining the end of determining whether or not the document was intended to be a will); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355 (1979) (stating "[t]here is something inherently fair about an approach which says that formalities are important, but they are a tool and not a sword").

90. *See* 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, 6 (1987) (asserting that statutory formalities should not be abolished entirely, but that a harmless error rule would allow courts to have strict requirements without having to invalidate every will that fails to comply with execution requirements).

91. *See id.* at 23-39, 52 (discussing a variety of cases from various jurisdictions in which the court did, or did not, excuse the error in the will as harmless).

cannot be excused as harmless.[92] The lack of a signature on the document ranks next in importance, and a court will not excuse such an error as harmless, save for a limited range of situations where the decedent's intent is clear and unmistakable.[93] The dispensation rule of the Restatement[94] and the Uniform Probate Code[95] "purports to strike a balance between formalism and case-by-case evaluation of testamentary intent by tempering judicial power to disregard certain will execution formalities with a requirement of clear and convincing evidence."[96]

The harmless error rule does not work against will formalities. Rather, such a rule supplements the law of statutory compliance with will formalities and provides relief to effectuate the intent of the careless testator who makes a harmless error in executing a will.[97] Fundamentally, the harmless error rule serves the same purposes as will formalities in that it protects the testator who intends to create a testamentary disposition, but

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92. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999) (discussing that not all defects are harmless and the failure to have a written documentation of testamentary intent is fundamental to the purpose of execution and thus cannot be excused as harmless).

93. *See id.* (stating that while the lack of a signature by the decedent would be the hardest error to excuse, it is possible to excuse a lack of signature when the decedent accidentally signs his or her spouse's will); *see also* 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, 23-24 (1987) (discussing that it would be hard to excuse the signature requirement as harmless because signature requirements distinguish drafts from actual wills). There are situations where signature requirements may be dispensed with, for example, when a decedent and his or her spouse execute joint wills and by mistake, the decedent signs the spouse's will. *Id.* at 24; *see also* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 653 (1991) (stating that one must overcome the presumption that an unsigned will is a draft by demonstrating compelling circumstances similar to switched-wills cases). *But see In re* Estate of Pavlinko, 148 A.2d 528, 531 (Pa. 1959) (refusing to admit a will to probate where the decedent signed his wife's will, stating that it is not the duty of the judiciary to make exceptions to the plain meaning of the Wills Act).

94. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

95. UNIF. PROBATE CODE § 2-503 (1990).

96. Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 460 (2002).

97. *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills the Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 29-31 (2004) (providing that the essential execution formalities such as writing and signature are non-excusable for the most part, but that attestation errors may be excused if the proponent of the will furnishes clear and convincing evidence of testamentary intent).

fails in this endeavor by not complying with all the strict formalities.[98] The burden of proof provides further assurance that the document executed was intended to be a will. In a probate proceeding, the burden of showing that a will was duly executed falls on the party who submits the will for probate. Likewise, under a harmless error rule, the proponent of a will that was not duly executed must furnish proof of testamentary intent.[99] The harmless error rule cuts right to intent, the dispositive issue.[100]

B. *Criticism of the Harmless Error Rule*

Much of the criticism lodged against the harmless error rule is based on the fear of an influx of unwarranted litigation.[101] The conclusion that the harmless error rule would increase litigation is facile and severely misses the point. First, the harmless error rule is useful because it requires courts to re-evaluate the continued importance of will formalities in today's society,[102] and the benefits of the harmless error rule exceed the drawbacks of a possible increase in litigation.[103]

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98. *See* 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, 2-3, 6 (1987) (recalling the original purposes of will formalities and stating that a harmless error rule can create a safe-harbor for the testator who does not comply with formalities but clearly intended to create a testamentary disposition).

99. *See* Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 460-61 (2002) (stating that by placing the burden on the proponent to prove by clear and convincing evidence that the decedent intended to create a will places procedural standards that insure testamentary intent).

100. *See In re* Estate of Brooks, 927 P.2d 1024, 1027 (Mont. 1996) (stating that intent "implies that the mind is directed to some definite accomplishment or end").

101. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1181-83 (1993) (stating that a dispensing power provision may increase litigation by encouraging parties to argue the validity of technically defective wills, but concluding that the benefits of the harmless error rule far exceed the possibility of increased litigation); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 706-07 (1991) (stating that the adoption of a harmless error rule would have an impact on probate practice, but concluding that litigation levels will not necessarily increase). *See generally* Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893 (1996) (discussing the potential for an increasing quantity of probate litigation based on undue influence as a result of the adoption of the harmless error rule).

102. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059 (1994).

103. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1190

Second, high litigation levels are not integral to the harmless error rule.[104] It is obvious that a decrease in the number of technical requirements could result in an eventual decrease in litigation levels because the opponents of the will would be hesitant to contest the will if the probate court will excuse a harmless error.[105] Finally, the rule has proved to be successful in jurisdictions outside the United States.[106] In South Australia, the harmless error rule has met with success as formalities still play a large role in probate law; courts still require a written instrument in all cases and the testator's signature in most instances.[107] The history in South Australia demonstrates that the harmless error rule does not breed an increased amount of litigation, but rather tempers litigation because it limits the disputes by excusing merely technical lapses in the will execution process.[108] The harmless error rule has also gained popularity outside South Australia. In 1983, Manitoba became the first North American jurisdiction to enact a harmless error rule.[109] It should be noted, however, that South Australia and Manitoba are far less populated

(1993) (arguing that the potential problems of increased litigation that may come with the harmless error rule do not exceed the benefit of being able to ascertain the true intent of the testator).

104. 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, 16, 37-38 (1987); *see also* MONT. CODE ANN. § 72-2-523 (2004) (stating that the experience in jurisdictions outside the United States strongly suggests that the dispensing power provision will not breed unwanted litigation).

105. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1182-83 (1993) (pointing out that when courts do not have the power to excuse harmless error, the probate court becomes a fruitful ground for contesting any defect in a will, thereby increasing litigation levels).

106. *See generally* 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) (stating that South Australia, Canada, and Israel have enacted harmless error rules that have proven to be very successful in validating wills where the decedent has made a minor error).

107. 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, 23-27 (1987).

108. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 705-06 (1991).

109. 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, 47 (1987).

than Texas,[110] which may suggest that litigation levels would increase to a larger extent in Texas than in smaller jurisdictions.[111]

In the context of litigation, an argument could be made that the harmless error rule may foster an increase in litigation levels, since less than strict compliance with will formalities may encourage individuals to execute homemade wills.[112] Homemade wills are notorious for breeding an intense amount of litigation because the probate court is not always sure whether the decedent executed a will.[113] The possibility that a harmless error rule would lead to individuals creating homemade wills is indeed frightening because homemade wills are generally not favored by the legal community.[114] Another problem with homemade wills is that it may be difficult to ascertain whether or not the testator intended the document to be a will, whereas, when the testator has an attorney draft a will, testamentary intent is usually clear.[115] However, the Texas Probate Code

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110. *See* Australian Bureau of Statistics (2001), *available at* www.abs.gov.au/ausstats (stating that the population in South Australia was at 1.47 million in 2001); Census of Canada (2001), *available at* www.12.statcan.ca/english/census01/products/standard/popdwell/Table-PR.cfm (stating that the population in Manitoba, Canada is just over 1.1 million).

111. *See* 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, 9 (1987) (pointing out that in South Australia, the harmless error rule has been applied to only forty-one cases). The harmless error rule took effect in South Australia in 1975; Langbein's research covers 12 years. *Id.* Although the article does not indicate whether an increase in litigation would be more apparent in more populated jurisdictions, it may logically follow that there would be an increase in litigation.

112. *See* Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 787 n.94 (1993) (stating that homemade wills increased litigation levels because family disputes are more common when the testator chooses to make up a will); Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence*, 94 DICK. L. REV. 231, 242-43 (1990) (pointing out that homemade wills are "litigation-producing").

113. Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 n.12 (1988) (stating "[l]itigation [levels] arise[ ] due to the fact that, unlike the case of a formal will, a court cannot be certain that the decedent actually executed the will").

114. *See* Gail B. Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 632 (1981) (stating that there is a rise in individuals helping themselves instead of consulting attorneys, and that it is "easier to make a will than to buy a house in California"); Jeffrey S. Kinsler, *Politically Incorrect*, 48 SMU L. REV. 411, 417-18 (1995) (observing that homemade wills have been referred to as "trailer-park wills"). *See generally* John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297 (1934) (discussing homemade wills and citing examples).

115. *See* Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 WASH. L. REV. 799, 801 n.12 (1999) (stating, "Showing that the testator had testamentary intent is rarely a problem when a lawyer has drafted the will, but it may become an issue when a will is homemade").

recognizes the validity of holographic wills,[116] which are wills that are written in the testator's handwriting and do not require a date or attestation.[117] Essentially, the legislature's approval of holographic wills may invite the testator to execute a homemade will since holographic wills are usually homemade wills. Thus, the harmless error rule should be promoted as part of a general scheme by the legislature to encourage testamentary intent.[118] If the legislature recognizes the validity of holographic wills, the argument that a harmless error rule will invite testators to execute homemade wills is undermined by a lack of evidence that holographic wills have diminished the attorney's involvement in estate planning.

Another criticism of the harmless error rule is that it weakens the standards set in the wills acts of various states.[119] This argument rests on the assumption that a legislative harmless error rule would allow the testator to intentionally disregard will formalities.[120] Professor Langbein, however, points out that the incentive for due execution of a will would remain because attorneys will do their best to comply with will formalities to avoid expensive litigation.[121] The argument that the harmless error rule would result in disregard for formalities presupposes that attorneys will place unfettered reliance on the harmless error rule to save a defective will.[122] The South Australian experience with the harmless error rule proves that the rule has not caused such an effect, and that those involved

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116. *See* TEX. PROB. CODE ANN. § 60 (Vernon 2003) (stating that "[w]here the will is written wholly in the handwriting of the testator, the attestation of the subscribing witnesses may be dispensed with").

117. *See* Kramer v. Crout, 279 S.W.2d 932, 935 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.) (holding that in Texas, a will that is in the testator's handwriting does not need to be witnessed or dated).

118. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1180 (1993) (discussing that since Virginia recognizes the validity of holographic wills, which are generally homemade wills, "Virginia should be especially sensitive to promoting the expressed intent of testators who do not seek legal advice in preparing wills").

119. C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 707 (1991).

120. *See id.* (asserting the possibility that by permitting courts to validate defective wills, courts may eventually begin to undercut the purposes of the Wills Act).

121. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 524 (1975).

122. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 707 (1991) (stating that anyone who knows about the probate process understands that the harmless error rule should not be relied upon, but rather the testator and his or her attorney should strive to comply with formalities).

in estate planning are particularly cognizant that formalities should be respected and taken seriously in order to avoid litigation over whether the defect in the will was harmless.[123]

C. *Why the Harmless Error Rule Works*

Litigation levels and respect for formalities will not be affected to a large extent by the harmless error rule. Given that fact, it is important to make sure we ask the right question. The question should not be whether the testator complied with formalities; rather, the question should be whether the testator intended to create a will.[124] This question gets to the point more effectively than asking whether the testator complied with will formalities because it allows the court to look directly at intent.[125] The proponents must prove the testator's intent with clear and convincing evidence.[126] Therefore, the harmless error rule imposes a heavy burden on the proponent of the will to demonstrate to the court that the error

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123. *See* 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, 23 (1987) (asserting that "[n]oncompliance is hardly an enticing option, even for the stubborn, since [noncompliance] throws one's estate into litigation").

124. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b. (1999) (asserting that examining each formality in isolation to see whether or not the testator complied with these formalities could result in an inquiry that has no purpose because it never really answers the question of intent, while a harmless error rule answers the question directly); 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, 34 (1987) (arguing that the harmless error rule "ask[s] the right question, which is whether the document embodies the unequivocal testamentary intent of the decedent").

125. *See* 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, 34 (1987) (stating that the question of whether the decedent intended to create a will is more effective than having to ask whether the decedent complied with will formalities); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1040 (1994) (asserting that the dispensing power provision allows the proponents of a will to go directly to the question of whether the decedent intended to create a will).

126. *See* UNIF. PROBATE CODE § 2-503 cmt. (amended 1990), 8 U.L.A. 144 (Supp. 1998) (providing the standard of clear and convincing evidence of intent to save wills that are technically invalid); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b. (1999) (stating that the "proponent [must show] by clear and convincing evidence that the decedent['s conduct showed an intent to] adopt[ ] the document as his or her will"); 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, 34-36 (1987) (stating that a clear and convincing evidence standard of intent, as opposed to a reasonable doubt standard would be an adequate standard because the clear and convincing evidence standard is prominent in other areas of gratuitous transfers, such as deeds, trusts, and insurance contracts).

should be ignored, highlighting the importance of procedural safeguards for the testator.[127] A harmless error rule would also provide consistency in probate law by applying a standard of clear and convincing evidence of the testator's intent in all cases.[128]

The harmless error rule has spread to American jurisdictions. Section 2-503 of the Uniform Probate Code has been adopted in Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah.[129] Experience with the harmless error rule in the United States has demonstrated that the rule works. Applying the harmless error rule, a Colorado Court of Appeals held that the rule should not be used to excuse defects where the decedent did not sign the document or represent the document to be his will.[130] In *In re Estate of Sky Dancer v. Barnes*,[131] the Colorado Court of Appeals did not extend the harmless error rule to cases in which the testator failed to sign the will completely. The court held that the larger the departure from formal execution, the more difficult it will be on the proponent of a will to establish by clear and convincing evidence that the testator intended the document to be a will.[132]

American jurisdictions have emphasized that the proponent must provide clear and convincing evidence of intent to create a will when the document is not in compliance with statutory formalities.[133] The focus on clear and convincing evidence of intent is what makes the harmless error

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127. *See* UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 (Supp. 1998) (stating that a clear and convincing evidence standard provides adequate procedural safeguards); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 460 (2002) (arguing that "[b]y placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to [show] clear and convincing evidence . . . [of the testator's intent, the harmless error rule] imposes procedural standards appropriate to the seriousness of the issue").

128. *See* Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 356 (1979) (stating that requiring fewer formalities and looking at testamentary intent provides for predictability in deciding whether or not the document is a will).

129. COLO. REV. STAT. ANN. § 15-11-503 (West 2003); HAW. REV. STAT. ANN. § 560:2-503 (Michie 1999); MICH. COMP. LAWS § 700.2503 (2001); MONT. CODE ANN. § 72-2-523 (2003); S.D. CODIFIED LAWS § 29A-2-503 (Michie 2004); UTAH CODE ANN. § 75-2-503 (2004).

130. *In re* Estate of Sky Dancer v. Barnes, 13 P.3d 1231, 1234 (Colo. Ct. App. 2000).

131. *Id.*

132. *Id.*

133. *See In re* Estate of Brooks, 927 P.2d 1024, 1027 (Mont. 1996) (holding that a will that was not duly executed was not valid under the harmless error rule where the proponent of the will could not prove clear and convincing evidence of intent). The court seemed persuaded by the fact that the decedent was not of sound mind, and thus the proponent could not prove by clear and convincing evidence that the decedent intended the defectively executed will to be a testamentary disposition. *Id.* at 1028.

rule effective; at the same time, this emphasis protects the testator from unwanted imposition from third parties.[134] The jurisdictions that have applied the rule require that a will be duly executed by the testator.[135] While due execution is mandatory, and signature ranks next in importance, the requirement that the will be attested by credible witnesses should not prevent a will from being admitted to probate if the proponents of the will establish proof that the testator clearly intended the document to be a will.[136] When the testator misunderstands attestation requirements, it seems only reasonable that the law should not allow such a blunder to invalidate completely an otherwise valid will, if the proponents present clear and convincing evidence of testamentary intent.[137] State legislatures that adopted the harmless error rule wanted to prevent a will from being admitted to probate unless clear and convincing evidence of intent is found, thus ensuring that the basic purposes of statutory formalities remain secure.[138] Even though a few states have adopted a legislative harmless error rule, at least one jurisdiction adopted what appears to be a similar, albeit very limited, approach through the judiciary.[139]

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134. *See* 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, 35 (1987) (stating that the requirement of clear and convincing evidence of testamentary intent serves the same function of will formalities in terms of protecting the testator against unwanted disposition).

135. *See In re Estate of Sky Dancer*, 13 P.3d at 1235 (stating that the failure to execute a will precludes the application of the harmless error rule); *In re Estate of Brooks*, 927 P.2d at 1026 (holding that due execution is a prerequisite to probate).

136. *See In re* Estate of Hall, 51 P.3d 1134, 1136 (Mont. 2002) (holding that although the testator failed to have his will witnessed at the time of execution, the proponents of the will established by clear and convincing evidence that the testator intended that the document be his will).

137. *See* UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 146 (Supp. 1998) (stating that one of the most common execution mistakes is where the testator fails to have two witnesses attest to the document, however, the harmless error rule would allow the proponents of the will to show that the defect was innocuous); 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, 16-23 (1987) (discussing that the most common execution mistakes in South Australia occur where the testator does not understand attestation requirements). Langbein points out that there are several cases where the testator did not sign the will in the presence of two witnesses, had an incomplete number of witnesses, or the testator's will was only partially attested. *Id.* at 18.

138. *See* MONT. CODE ANN. § 72-2-523 (2003) (discussing the procedural safeguards attached to a clear and convincing evidence standard).

139. *See In re* Snide, 418 N.E.2d 656, 657 (N.Y. 1981) (holding that a will could be admitted to probate where the testator accidentally signed his wife's will when they were executing mutual wills). *But see In re* Estate of Pavlinko, 148 A.2d 528, 531 (Pa. 1959)

D. *The Requirement for a Valid Will in Texas*

In Texas, a will must be in writing, "signed by the testator in person or by another person for him by his direction and in his presence . . . [and] attested by two or more credible witnesses above the age of fourteen years [who sign] in the presence of the testator."[140] The Texas Supreme Court made it abundantly clear that Texas does not recognize the doctrine of substantial compliance or the harmless error rule, and the execution of a valid will is a condition precedent to the will's admissibility to probate.[141] In *Boren* and *Wich*, the Texas Supreme Court held that the witnesses' signatures on a self-proving affidavit, but not on the will itself, were not in compliance with the statutory execution requirements and the will in each case was not available for probate.[142] In Texas, the efficacy of a self-proving affidavit is predicated upon the execution of a valid will, however, the attached self-proving affidavit is not a part of the will.[143] Several commentators have criticized the principle established in *Boren* and *Wich*, arguing that the decisions lead to inequitable results because it was clear that the testator in each case intended to create a will, but that a technical mistake in execution rendered this intent irrele-

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(holding that it is not the duty of the judiciary to rewrite or make exceptions to clear and unmistakable provisions of the Wills Act).

140. TEX. PROB. CODE ANN. § 59(a) (Vernon 2003).

141. *See* Orrell v. Cochran, 695 S.W.2d 552, 552 (Tex. 1985) (holding that a self-proving affidavit is not part of the will, but is only concerned with proof of attestation only; execution of a will is a condition precedent to the usefulness of a self-proving affidavit); Wich v. Fleming, 652 S.W.2d 353, 355 (Tex. 1983) (stating that the will was not admissible to probate where the signatures of the witnesses did not appear on the will itself, but on an attached self-proving affidavit); Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966) (holding that "[t]he execution of a valid will is a condition . . . to the use[ ] of the self-proving [affidavit]"); Shriners Hosps. for Crippled Children v. St. Jude's Children Research Hosp., Inc., 629 S.W.2d 767, 769 (Tex. Civ. App.—Dallas 1981, writ ref'd) (holding that a signature on a self-proving affidavit was insufficient); McLeroy v. Douthit, 535 S.W.2d 771, 774 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (holding a will invalid where the witnesses' signatures did not appear on the face of the will, but upon separate, self-proving affidavits); *In re* Estate of Pettengill, 508 S.W.2d 463, 465 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (holding that a will not witnessed on its body is not valid).

142. *Orrell*, 695 S.W.2d at 552.

143. Hopkins v. Hopkins, 708 S.W.2d 31, 33 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

vant.[144] As discussed below, such criticisms may have contributed to the 1991 legislation overruling *Boren* and *Wich.*[145]

The rule for revoking a will in Texas is also quite strict. While the Uniform Probate Code allows a mistake in revoking a will to be excused if the testator clearly intended to revoke the will,[146] the Texas rule states that a will may not be revoked unless a subsequent will is executed or the will is destroyed.[147] If the testator attempts to destroy or revoke a will without the required formalities, Texas law basically ignores the intent of the testator and holds that the will has not been revoked.[148] This approach is misguided, and these rules demonstrate that compliance with will formalities has in many ways worked against the testator's probable intent, rather than fulfilling the testator's intent.[149] The United States jurisdictions that have adopted the harmless error rule have applied the

144. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1158 n.103 (1993) (discussing that *Boren* is perhaps "the most notorious strict compliance decision"); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1045 (1994) (stating that the decisions in *Wich* and *Boren* proved to be a "sorry example" of how courts can use the concept of strict formalities to defeat the testator's intent); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 227-28 (1991) (stating that the decisions in *Wich* and *Boren* are disturbing because the documents purporting to be a will in these cases were actually signed by the testator and witnesses, but the problem was harmless in that the documents signed were the self-proving affidavits and not the will itself); *see also* Melissa Webb, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 907 (1983) (discussing the general rule in Texas regarding strict compliance and criticizing the rule from *Wich* and *Boren* as leading to unjust results).

145. TEX. PROB. CODE ANN. § 59(b) (Vernon 1991).

146. UNIF. PROBATE CODE § 2-503(ii) (amended 1997), 8 U.L.A. 146 (Supp. 1998).

147. TEX. PROB. CODE ANN. § 63 (Vernon 2003).

148. *See* Morris v. Morris, 642 S.W.2d 448, 450 (Tex. 1982) (stating that "[t]he intent of a testator to destroy a will, standing alone and absent a later written express or implied revocation, cannot abrogate the clear wording of the statute").

149. *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 28-29 (2004) (pointing out that strict adherence to will formalities has defeated intent in many cases, while these requirements were meant to be intent-serving); 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, 4 (1987) (recalling that the simple purpose of will formalities is to further testator intent, not to defeat it); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059 (1994) (stating that formalistic requirements such are only useful insofar as they promote intent, but that courts have applied the doctrine in such a way that formalism has lost its substantive meaning).

rule to harmless revocation errors.[150] Applying the harmless error rule to revocation mistakes would serve the testator's intent more completely.

E. *Hint of Substantial Compliance in Texas?*

Section 59(b) of the Texas Probate Code, in relevant part, provides:

> Substantial compliance with the form of [a self-proving] affidavit shall suffice to cause the will to be self-proved. . . . A signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witnesses, or both, but in that case, the will may not be considered a self-proved will.[151]

This provision of the Texas Probate Code was added in 1991, and according to *In re Estate of Livingston v. Nacim*,[152] *Boren* is no longer good law because a signature on a self-proving affidavit is sufficient to admit the will to probate.[153] This opinion, however, is very narrow, and neither the addition to the Texas Probate Code nor case law has adopted the harmless error rule or the doctrine of substantial compliance. At best, *Livingston* stands for the narrow proposition that an effectively executed self-proving affidavit will save a will that was not signed.[154] This does not account for all the other possible execution mistakes. Additionally, other Texas cases have held that a self-proved will serves as prima facie evidence that the will has been properly executed, and the contestant must go forward with evidence to overcome the prima facie case.[155] Thus, ac-

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150. *See* COLO. REV. STAT. ANN. § 15-11-503 (1)(b) (West 2003) (applying the harmless error rule to revocation of the will); MONT. CODE ANN. § 72-2-523(2) (2003) (stating that the harmless error rule applies "a partial or complete revocation of the will").

151. TEX. PROB. CODE ANN. § 59(b) (Vernon 1991).

152. 999 S.W.2d 874 (Tex. App.—El Paso 1999, no pet.).

153. *See In re* Estate of Livingston v. Nacim, 999 S.W.2d 874, 876-77 (Tex. App.—El Paso 1999, no pet.) (holding that the legislature overruled *Boren* and a signature on a self-proving affidavit is considered a signature on a will); *see also* Gerry W. Beyer & Jerry Frank Jones, *Annual Survey of Texas Law Article: Probate and Trusts Case Law Update Statutory Update*, 53 SMU L. REV. 1229, 1236 (2000) (stating that while strict compliance with will formalities is the general rule in Texas, the legislature has carved out an exception and "a signature on a self-proving affidavit [is now] considered as being on the will itself").

154. Gerry W. Beyer & Jerry Frank Jones, *Annual Survey of Texas Law Article: Probate and Trusts Case Law Update Statutory Update*, 53 SMU L. REV. 1229, 1236 (2000) (stating the general rule of strict compliance is subject only to this statutory exemption).

155. *See* Bracewell v. Bracewell, 20 S.W.3d 14, 26 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that a self-proved will is prima facie evidence of proper execution); Guthrie v. Suiter, 934 S.W.2d 820, 829 (Tex. App.—Houston [1st Dist.] 1996, no writ) (stating that the court must find that the will was valid before it is admitted into probate, and a proponent has established prima facie evidence of due execution with a self-proved will, and the contestant can bring forth "evidence to overcome the prima facie case"); James v. Haupt, 573 S.W.2d 285, 288 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (holding that

cording to some Texas case law, a signature on a self-proving affidavit alone will not cause an invalidly executed will to be valid. While some Texas cases have displayed a hint of substantial compliance, the applicability of these cases is marginal at best, especially since the Texas Supreme Court has yet to rule on this issue. A legislative harmless error rule could clearly define the law in Texas and provide consistency in probate court decisions.

F. *The Need for a Harmless Error Rule in Texas*

While the harsh results from *Boren*[156] and *Wich*[157] may have been tempered by the additions to the Probate Code,[158] the law in Texas still requires that the testator exhibit strict adherence to execution formalities.[159] There is an array of other problems, other than the witnesses accidentally signing a self-proving affidavit, that can occur in the execution of a will which are not covered by the Texas Probate Code or case law.[160] For example, consider the case of a person who is dying and has asked an attorney to draft a will. The attorney presents the will to the dying individual, who begins to sign in the presence of two witnesses, but dies before the signature is complete.[161] Under current Texas law, the probate court will turn its head away from the fact that the decedent intended the document to be a will, and invalidate the will for failure to comply with execution formalities. Another problem that might occur is

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once a self-proved will has been admitted, the proponent has made out a prima facie case that the will was properly executed, and the contestants must bring forth evidence to rebut this presumption of due execution).

156. Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).

157. Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983).

158. TEX. PROB. CODE ANN. § 59(b) (Vernon 1991); *see also In re* Estate of Livingston v. Nacim, 999 S.W.2d 874, 876-77 (Tex. App.—El Paso 1999, no pet.) (stating that Section 59(b) overrules *Boren* and *Wich*).

159. *See* Gerry W. Beyer & Jerry Frank Jones, *Annual Survey of Texas Law Article: Probate and Trusts Case Law Update Statutory Update*, 53 SMU L. REV. 1229, 1236 (2000) (stating that strict compliance with will formalities is normally required in Texas, save for the limited number of cases where the witnesses have signed on a self-proving affidavit rather than the will itself).

160. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999) (stating that there are many errors that would be considered harmless, like improper number of witnesses, signing the spouses will, or signing outside of the presence of witnesses).

161. *See id.* (stating that a person who fails to complete a signature on his death bed has committed a harmless error that should be cured by the courts). In the Restatement example, the failure to complete the signature should be excused because under these circumstances a partial signature by the testator constitutes clear and convincing evidence that the testator intended to adopt the document as his will. *Id.*

that the testator might accidentally sign his spouse's will.[162] At least one other jurisdiction does not allow such a mistake to be excused, no matter how innocuous the mistake was and without an inquiry into the decedent's intent.[163] Finally, like the situations discussed in the introduction, Texas law would not allow a will to be probated if the will is not attested by witnesses in the testator's presence.[164] A legislative harmless error rule would resolve the questions that have been left unanswered by the

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162. *See id.* (stating that while a lack of a signature by the testator is very difficult to excuse, a particularly attractive case for excusing such a defect is when the signature signs another person's will by mistake, typically when the wife signs her husband's will or the husband signs his wife's will); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L .REV. 387, 408-10 (2001) (pointing out that relief should be available where the testator accidentally signs his spouse's will); 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, 24 (1987) (stating the general rule that a harmless error rule will not excuse the lack of a signature except for the limited cases in which it would be highly appropriate to do so, like when the decedent accidentally signs his spouse's will).

163. *See In re* Pavlinko's Estate, 148 A.2d 528, 530-31 (Pa. 1959) (refusing to excuse an error where the husband unwittingly signed his wife's will, stating that it is not the role of the court to excuse harmless errors where the legislature has not seen fit to do so). *But see* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 658 (1995) (citing *Pavlinko* as an example of when compliance with will formalities actually becomes intent-defeating rather than intent-serving); 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, 24 (1987) (criticizing the result in *Pavlinko* as "wretched" because the court completely ignored intent and held that there was no will in the first place because there was no signature); *see also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 562-63 (1982) (calling the reasoning in *Pavlinko* a "lame argument"); Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 473 (2002) (stating that *Pavlinko* demonstrates how the requirement of strict compliance with will formalities can lead to harsh results).

164. *See* Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (invalidating a will where the witnesses signed the will in the same office building as the testator, but while the testator was outside of the office). *But see* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b, illus. 4 (1999) (stating that a testator who was dying on his death bed and was unable to procure two witnesses has committed a harmless error and the will should be admitted into probate notwithstanding that the will was not signed in the presence of two witnesses); 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, 22-23 (1987) (stating that a harmless error rule would cure errors where the testator only had one witness sign the document, so long as the proponents of the will can furnish clear and convincing evidence of intent).

Texas courts. Therefore, the Texas Legislature should make the following addition to Section 59 of the Texas Probate Code:

> Texas Probate Code Section 59(d): Harmless Error Rule
>
> Failure to comply with the execution requirements of Section 59(a) shall not result in automatic invalidation of the will. If the court finds that the execution error was harmless, the will may be admitted for probate, notwithstanding the failure to comply with statutory formalities.
>
> For an error to be excused as harmless, the burden is on the proponent of the will to prove by clear and convincing evidence that the testator intended the document to be his or her last will and testament, and the error must not be so substantial that it suggests a lack of testamentary intent.
>
> Certain errors are clearly more difficult to excuse than other errors. For the purposes of this harmless error rule, the court may not excuse the testator's failure to write a will, nor may the court excuse the requirement that the testator sign the document, unless the court finds a compelling reason to do so.
>
> The harmless error rule is applicable to complete or partial revocation of the will, provided the proponent brings forth clear and convincing evidence of the testator's intent.[165]
>
> Nothing in this section is intended to abrogate the validity of Nuncupative Wills.[166]

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165. *See* TEX. PROB. CODE ANN. § 63 (Vernon 2003) (revising this section, which states, "[n]o will in writing, and no clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or canceling the same, or causing it to be done in his presence"). The comment proposal would allow the court to excuse harmless errors in revoking the will, provided the proponents furnish clear and convincing evidence that the testator intended to partially or completely revoke the will.

166. The purpose of this statute is to embody the experiences that other jurisdictions have had with the harmless error rule. In part three of the statute, the comment advocates that the legislature formally adopt a hierarchy of errors in which the court would be unable to cure a will that is not in writing, and signature requirements should only be excused in a limited range of instances. This provision should be added to caution those who seek to probate a will that is not in writing or signed by the testator from litigating that such an error is harmless.

IV. CONCLUSION

Statutory formalities for the execution of a will are useful insofar as they promote the essential purposes of facilitating the testator's intent.[167] The danger that these formalities impose is when they actually begin working against the testator's intent.[168] By adopting a harmless error rule similar to the rule adopted in several other jurisdictions,[169] Texas probate courts will be able to address the issue of intent more directly,

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167. *See* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 918 (1992) (asserting that formalities should be employed in a least restrictive manner, and should serve as evidentiary proof and reliability of intent); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1049-50 (1994) (stating that a broad and flexible application of will formalities is a sound way of determining intent because it allows the probate court to consider evidence of intent while applying formalities strictly has the effect of ignoring what the testator actually intended, thus becoming simply a "mechanical application" and not a meaningful tool for ascertaining intent); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 357 (1979) (asserting that formalities are useful "[t]o the extent that formalities can be perceived or approached from a perspective of achieving the testator's goals or assisting the implementation of the testator's choices"); Christopher J. Caldwell, Comment, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 486 (2002) (stating that will formalities are useful to the extent that they further the intent of the testator, but such formalities are problematic to the extent they serve as an end rather than a means to attaining the end of testamentary intent).

168. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 658 (1995) (stating that "[t]he dilemma created by legal formalities is that if a formality is not obeyed . . . the failure to satisfy the formality may cause the instrument to fail and thus cause an intent-denying rather than intent-enforcing result"); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941) (pointing out that the statutory requirements for executing a will are justifiable only as a means for determining the testator's intent, and that such requirements should not be revered as ends); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 28-29 (2004) (asserting that when some harmless blunder in executing a will renders the will void for failure to comply with formalities, compliance with such formalities has become intent-defeating rather than intent-serving); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV 235, 240 (1996) (stating that "courts must be freed from the constraints of a formalistic approach to Wills Act formalities, so that the goal of effectuating testamentary intent may be attained"); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355 (1979) (arguing that formalities should not be used as a "sword").

169. COLO. REV. STAT. ANN. § 15-11-503 (West 2003); HAW. REV. STAT. ANN. § 560:2-503 (Michie 1999); MICH. COMP. LAWS ANN. § 700.2503 (West 2001); MONT. CODE ANN. § 72-2-523 (2003); S.D. CODIFIED LAWS § 29A-2-503 (Michie 2004); UTAH CODE ANN. § 75-2-503 (2004); *see also* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 261 (6th ed. 2000) (stating that the harmless error rule has been adopted in Montana, South Dakota, Colorado, Hawaii, Michigan, and Utah).

rather than being bound by the incomplete provisions of the Probate Code.[170] The law on wills should be about results; and the end result should be to probate wills when there is clear and convincing evidence that the testator intended to create a will. The clear and convincing evidence standard serves essentially the same function as statutory execution requirements.[171] By requiring the proponent of a will to provide clear and convincing evidence of testamentary intent, the testator is protected against unwanted imposition and fraud from interested third parties.[172] The harmless error rule does not abrogate the rule on statutory formalities. Rather, statutory formalities have increased importance under a dispensing power provision: The larger the departure from certain statutory formalities, the more difficult it will be for the proponents of the will to

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170. *See* TEX. PROB. CODE ANN. § 59(b) (Vernon 2003) (providing that a will is admissible to probate if the witnesses sign the self-proving affidavit but not the will itself). This statement is incomplete because it does not account for several other execution mistakes; *see also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV 235, 242 (1996) (stating that a dispensing power provision would allow probate courts to validate wills that are technically defective, so long as they embody the decedent's intent). "Thus, 'the cruelty of the old law' will disappear and testamentary freedom will presumably reign supreme." *Id.* at 242-43; *see also* Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 460 (2002) (asserting that the harmless error rule attempts to strike a balance between strict formalism and case-by-case evaluation of testamentary intent by imposing a clear and convincing evidence of intent standard).

171. *See* 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, 4 (1987) (pointing out that a harmless error rule carries with it a requirement of clear and convincing evidence of the testator's intent, thus further assuring that the document is intended to be his or her will, not the unwanted disposition of a third party); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355 (1979) (stating that a statute would ease the tension between formalities and intent while furthering the goals of determining how the testator intended to devise his estate).

172. *See* Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 404 (2001) (stating that the rationale of a clear and convincing evidence of an intent standard is such that a standard of proof will guard against fraud); *In the Matter of: Walter Stechly, Deceased (Validation of an Improperly Executed Holographic Will Under Harmless Error Analysis)*, 17 QUINNIPIAC PROB. L.J. 271, 276 (2004) (stating that "[b]y placing the burden of proof upon the proponent of a defective instrument, and by requiring . . . clear and convincing evidence . . . Section 2-503 imposes procedural standards appropriate to the seriousness of the issue"); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30 (2004) (asserting that the formal requirements of will formalities can be served by allowing the proponent of a defectively executed will to provide clear and convincing evidence of intent); 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, 4-5 (1987) (discussing the purposes of will formalities, and how these purposes are not disrupted by a clear and convincing evidence rule).

establish clear and convincing evidence that the decedent intended the document to be his or her final testamentary statement.[173] Indeed, this is the guiding principle for jurisdictions which have adopted the harmless error rule.[174] As discussed, a written instrument is the most difficult to excuse under a "harmless error" analysis, followed by the issue of a testator's signature.[175]

Reluctance in reforming the law of strict compliance with statutory formalities is understandable—the execution requirements of a valid will are

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173. *See* MONT. CODE ANN. § 72-2-523 (2003) (adopting the Uniform Probate Code's "clear and convincing evidence" standard as to whether a departure from statutory formalities should be allowed); UNIF. PROBATE CODE § 2-503 cmt. (amended 1997), 8 U.L.A. 146 (Supp. 1998) (stating that "[t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent"); *In the Matter of: Walter Stechly, Deceased (Validation of an Improperly Executed Holographic Will Under Harmless Error Analysis)*, 17 QUINNIPIAC PROB. L.J. 271, 276 (2004) (asserting that the larger the departure from will formalities, the harder it will be for the proponent to show that the document reflects the testator's intent); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30-31 (2004) (noting that the harmless error rule has never been applied "to excuse compliance with the writing requirement, [and] it is also virtually never applied to excuse compliance with the signature requirement"); 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, 52 (1987) (stating that the large departures from traditional formalities will be harder to excuse); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 633-81 (1991) (discussing the hierarchy that has developed in South Australia, and stating that the larger the departure from will formalities, the more difficult it will be for the proponent to furnish clear and convincing evidence of intent).

174. *See In re* Estate of Sky Dancer v. Barnes, 13 P.3d 1231, 1234 (Colo. Ct. App. 2000) (refusing to admit a will into probate where the testator failed to execute a written will, affirming that the larger the deviation from statutory requirements, the more difficult it will be for the proponents of the document to prove of testamentary intent); *In re* Estate of Brooks, 927 P.2d 1024, 1026 (Mont. 1996) (finding that due execution of a will is a prerequisite to the document's validity, and will only be excused in limited situations); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism: Part Two*, 43 FLA. L. REV. 599, 713 (1991) (discussing that the legislature needs to set threshold requirements for validly executed wills).

175. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999) (asserting that "[a]mong the defects in execution that can be excused, the lack of a signature is the hardest [defect] to excuse"); 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, 23-24 (1987) (stating that a signature is one of the distinguishing features between a draft and a will, and should only be excused in a limited number of circumstances).

centuries old.[176] The reluctance, however, should not deter courts from considering the relevance of will formalities, and how they operate under modern problems.[177] With the advent of nonprobate transfers and the judicial doctrine of substantial compliance, the notion that the law of wills should not adapt to modern times is misguided and unrealistic.[178] The harmless error rule does not threaten the traditional precept that will formalities still serve a vital function; rather, the rule supports the underlying rationale of will formalities, which is to determine the intent of the testator.[179] In fact, it is not will formalities per se, but misplaced judicial insistence on will formalities which disrupts testamentary intent.[180]

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176. *See* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994) (pointing out that "[f]or over [300] years, wills have been defined by their formal qualities"); *see also* Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 332-37 (1979) (discussing the development of the law on wills from Roman times through the Statute of Frauds of 1677, and how the formalities from the Statute of Frauds have played a large role in the modern development of execution formalities).

177. *See* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059 (1994) (asserting that strict adherence to formalistic requirements have the effect of precluding courts from considering the use of formalities under modern law).

178. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 504 (1975) (pointing out that the advent of nonprobate transfers makes compliance with will formalities indefensible); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 718-19 (1991) (calling for the unification of probate and nonprobate transfers); Melissa Webb, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904, 912 (1983) (stating that nonprobate transfers reflect society's modern notion of becoming more flexible and less preoccupied with formal ceremony); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (noting the inconsistency between the law of wills and the laws governing nonprobate transfers, and that because both probate and nonprobate transfers are testamentary, both should be embodied in one unified law).

179. *See* 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, 34 (1987) (noting that the harmless error rule focuses on the relevant issue, which is whether the decedent intended the document to be his or her will); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1016 (1992) (asserting that litigation in probate court will now focus on testamentary intent, rather than asking whether the testator complied with strict will formalities); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1049-50 (1994) (stating that formalities should exist in a broad sense as formal applications of rules in a way that does not blind the court from considering the testator's intent).

180. *See* 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, 3 (1987) (stating that "[t]he puzzle about [will] formalities is not why we have them, but why we enforce them so stringently"); John H. Langbein, *Substantial Compliance with the Wills*

The suggestion that a harmless error rule will encourage litigation is also a dubious proposition.[181] South Australia's experience with the harmless error rule militates against the idea that the harmless error rule fosters frivolous litigation.[182] Furthermore, American jurisdictions tend to narrowly construe the rule, which would discourage frivolous claims.[183]

Given the unwarranted fear that the harmless error rule will burden probate courts with frivolous litigation, adoption of the harmless error rule makes sense. But assuming, arguendo, that the harmless error rule will substantially increase probate claims, the Texas Legislature should still adopt the rule because the benefits of the harmless error rule clearly outweigh the risk of increased litigation.

Act, 88 HARV. L. REV. 489, 498 (1975) (noting "[w]hat is peculiar about the law of wills is not the prominence of the formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will"); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1061 (1994) (asserting that formalities are neither good or bad, but they can be dangerous when the commitment to will formalities overlooks the reason we have such formalities in the first place).

181. *See* Kelly A. Hardin, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. LEE L. REV. 1145, 1190 (1993) (asserting that careful legislative drafting could prevent useless litigation); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30 (2004) (noting that the harmless error rule actually prevents increased litigation because it eliminates disputes about technical errors and just asks whether or not the decedent intended to create a will); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1016 (1992) (asserting that litigation levels about formalities will decrease with the adoption of a harmless error rule); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 709 (1991) (pointing out that in the long term, a strict-formality approach would increase litigation by allowing opponents of a will to "seize upon some technical defect" and argue that the will is void).

182. *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30 (2004) (pointing out that experience in South Australia shows that litigation levels will not increase); 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, 51-52 (1987) (concluding that while a slight increase in litigation is initially expected, litigation levels have been surprisingly low in South Australia since the enactment of the rule).

183. *See, e.g., In re* Estate of Sky Dancer v. Barnes, 13 P.3d 1231, 1234 (Colo. Ct. App. 2000) (refusing to apply the harmless error rule in a case where the decedent failed to validly execute a will, and the proponents brought forth no evidence of testamentary intent); *In re* Estate of Hall, 51 P.3d 1134, 1135-36 (Mont. 2002) (holding that a will was admissible to probate, despite the failure to comply with attestation requirements of the statute, where the proponents of the will furnished clear and convincing evidence of testamentary intent); *In re* Estate of Brooks, 927 P.2d 1024, 1026 (Mont. 1996) (affirming the general rule that due execution of a will is a prerequisite to the application of the harmless error rule).

A standard that allows the proponent of a will to demonstrate the decedent's testamentary intent by clear and convincing evidence is an efficient way to ascertain testamentary intent. Statutory formalities remain necessary in order to protect against unwanted alteration of testamentary intent.[184] However, courts should be prevented from imposing statutory formalities and invalidating otherwise valid wills where the testator merely makes a clerical error; the harmless error rule ensures the proper application of statutory formalities, which is to determine whether the testator intended to create a will.[185] A harmless error rule eases the tension between a court's responsibilities to observe strict compliance with will formalities, while acknowledging clear and convincing evidence of a testator's intent.

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184. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975) (acknowledging that "formalities are designed to perform functions which will assure that [the testator's] estate really is distributed according to his intention"); 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, 3 (1987) (stating that statutory formalities such as signature and attestation provide "evidence of the genuineness of the instrument, and they caution the testator about the seriousness and finality of his act"). *See generally* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941) (discussing the ritualistic, evidentiary, and cautionary functions that will formalities are intended to serve).

185. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L. REV. 631, 658 (1995) (stating that a will is an "intent-enforcing document" and that statutory formalities should be designed as a means of determining testamentary intent and not as an end). "[F]ormalities ought to be designed to provide safeguards, but not to strike down documents obviously intended to have legal effect." *Id.*; *see also* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941) (discussing why formalities are useful only insofar as they are used as a means for determining testamentary intent, not imposed solely to defeat a will where the testator has failed to comply with statutory formalities); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1059 (1994) (arguing that strict compliance with statutory formalities actually prevents courts from examining testamentary intent); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 355 (1979) (proposing that statutory formalities should function as a tool, not a sword).