

How Harmless is Harmless?
An In-Depth Look Into the Harmless Error Rule
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I. Introduction

“To err is human; to forgive, divine” – Alexander Pope. Truer words were never spoken. People make mistakes all the time. Christopher Columbus believed he could reach India and China by sailing west across the Atlantic and ended up discovering the Americas. After 177 years of construction, the Leaning Tower of Pisa was built on unstable ground and began leaning less than a decade after construction was completed.ⁱ Alexander Fleming discovered penicillin by leaving a Petri dish open accidentally.ⁱⁱ Everyone makes mistakes and most of the time we expect these mistakes to be forgiven. However, this may not be the case when someone executes a will defectively. A testator’s intent may be completely overlooked due to improper execution. Take the story of Hellen and Vasil Pavlinko, a loving husband and wife who agreed to leave everything to one another when one of them passed away.ⁱⁱⁱ They also agreed that Hellen’s brother should receive what was left of the estate after both of them passed.^{iv} Accidentally, Hellen signed her husband Vasil’s will and Vasil signed his wife Hellen’s will.^v The Wills Act requires that the will be in writing and signed by the testator.^{vi} The court held that Vasil’s will was signed by Hellen and therefore did not meet the statutory requirements of being signed by the testator.^{vii} Both Hellen’s and Vasil’s intent was to give the residue of their estate to Hellen’s brother but due to improper execution of the will, their intent was not followed. Remedies have been effectuated that will allow defective wills to be admitted to probate and follow the testator’s intent despite execution errors. This paper will first give an overview of the Wills Act and the reasons for strict compliance. Next, it will provide a description of remedies for non-conforming wills. Finally, it will focus on the harmless-error rule and the extent in which it has been applied in different jurisdictions.

II. The Wills Act and Strict Compliance

The Statute of Wills was enacted in 1540 and provided that lands were devisable by last will and testament as long as the document was in writing.^{viii} In 1677, the Statute of Frauds was enacted and allowed for the disposition of land by having a document in writing, signed by the testator, and witnessed by three witnesses.^{ix} The Wills Act of 1837 reduced the number of witnesses from three to two and that the witnesses must be present when a testator signs their will.^x Each state has adopted some form of either the Wills Act or the Statute of Frauds. The basic will formalities are that the testator's dispositions are in writing, signed by the testator, and attested by usually two witnesses.

There are four functions to the formalities of will execution. These formalities are evidentiary, cautionary, protective, and channeling.^{xi} The evidentiary function provides a document with the testator's signature and illustrates the testator's wishes. The cautionary function is used to ensure that the testator has awareness of their dispositions and understands what will happen after their passing. The ceremony of the will execution instills upon the testator the disposition that they will be making. The protective function is to ensure that the testator is free from undue influence and misdeeds of others and that the choices of the testator are of the testator's own free will.^{xii} The channeling function is meant to standardize wills so that they can be administered efficiently.^{xiii} The requirements of proper will execution help a testator realize the finality of their disposition, prevents fraud, and allows for efficient administration. Due to how important these functions are, courts often require strict compliance of these formalities.

Compliance with these formalities provides strong evidence of the testator's intent. The majority of jurisdictions follow strict compliance.^{xiv} Strict compliance requires that a will be

executed according to statutory formalities and any deviation from formalities will result in a will not being admitted to probate. Under strict compliance, a will that is defectively executed may ignore the intent of the testator. An example of this is in the West Virginia case *Stevens v. Casdorph*.^{xv} Homer Haskell Miller had no wife or children and created a will to leave the bulk of his estate to his nephew, Paul Casdorph.^{xvi} Mr. Miller, elderly and confined to a wheel chair was taken to a local bank by Mr. Casdorph to execute his will.^{xvii} Mr. Miller signed the will in front of a notary.^{xviii} Following Mr. Miller's signing, the notary brought two coworkers to Mr. Miller who signed Mr. Miller's will as witnesses.^{xix} Under West Virginia law, the witnesses must be in the testator's presence when the testator signs the will.^{xx} Due to the witnesses not actually viewing Mr. Miller place his signature on the will, the court determined under strict compliance that the will was executed improperly and would not be admitted to probate.^{xxi} Mr. Miller's estate passed by intestacy and allowed Mr. Miller's nieces to collect when they were not originally part of the will. Mr. Miller's wishes to leave the bulk of his estate to Mr. Casdorph were not followed due to the improper execution.

Although the majority of states follow the strict compliance rule illustrated by *Stevens v. Casdorph*, some jurisdictions have imposed different solutions to remedy defective execution and follow the testator's intent.

III. Remedies for Non-Conforming Wills

Two remedies have been used to correct defective will executions and follow the wishes of the testator. These remedies are substantial compliance and harmless error.

A. What is Substantial Compliance?

The substantial compliance doctrine was introduced by Professor Langbein of Yale University in 1975.^{xxii} Substantial compliance allows a will that was executed improperly to be

probated as long as the testator substantially complied with the Wills Act formalities.^{xxiii} Under substantial compliance, a judge can overlook execution errors in attestation, signature, or writing, as long as there is clear and convincing evidence that the evidentiary, cautionary, protective, and channeling functions were complied with despite the execution error.^{xxiv}

In *Matter of Will of Ranney*, the New Jersey Supreme Court allowed a will to be probated that did not have the witnesses' signatures on the will.^{xxv} Two witnesses signed affidavits swearing that they witnessed the testator execute his will; however, the witnesses failed to sign the will itself, which led to improper execution according to statutory formalities.^{xxvi} The court found that the will substantially complied with formalities and that strict compliance would not follow the intent of the testator and frustrate the purpose of the Wills Act.^{xxvii}

Substantial compliance can be implemented by a court and does not require legislative authority like the harmless error rule. Substantial compliance has been applied in approximately fifteen states without legislative authority.^{xxviii} Texas has codified its substantial compliance rule and will allow a signature on a self-proving affidavit to count as a signature on a will, if the will is not signed.^{xxix} Harmless error provides another remedy for fixing defects in will execution.

B. What is Harmless Error?

Thirteen years after writing his article urging the United States to follow substantial compliance, Professor Langbein wrote an article in 1987 favoring the use of harmless error.^{xxx} Professor Langbein studied how harmless error worked in Australia and believed that it needed to be implemented in the United States to prevent injustice.^{xxxi} Harmless error is legislation that allows a court to admit a will to probate even if it does not follow Will Act formalities. In order for a will to be admitted to probate using harmless error, there must be clear and convincing evidence that the document was intended to be the testator's will.^{xxxii}

In 1990, the Uniform Law Commission agreed with Professor Langbein and created Section 2-503, the harmless error provision in the Uniform Probate Code (UPC).^{xxxiii} Section 2-503 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:

- (1) the decedent's will,
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.^{xxxiv}

The *Restatement (Third) of Property: Wills and Other Donative Transfers*, also endorses the harmless error rule in section 3.3.^{xxxv}

The harmless error rule is similar to substantial compliance by both allowing defectively executed wills to be admitted to probate. However, substantial compliance looks at whether the testator substantially complied with statutory formalities while harmless error looks to whether the testator intended a document to serve as their will. Another difference is harmless error gives the court authority to admit defective wills through legislation while substantial compliance is not given power through legislation.

By a jurisdiction enacting the harmless error rule, that jurisdiction is lessening the “channeling function” of the statutory requirements. Wills that do not follow statutory formalities may be looked at on a case-by-case basis to determine the testator’s intent thus reducing standardization and administrative efficiency. Even though probate efficiency may be reduced, allowing testamentary desires to be followed will reduce injustice caused by defects in will executions.

Harmless error can remedy errors in attestation, signature, and alteration. Examples of attestation errors are witnesses not being in the testator's presence when the testator was signing their will, defects in the number of witnesses attesting to the testator's signature, or witnesses not actually signing the testator's will. Harmless error can also correct signature errors, like the testator not signing in the correct place or possibly not signing their will. It also corrects alteration errors such as improper execution of codicils or improper revocation of a will in whole or in part. Despite the U.P.C. adopting the harmless error rule in 1991, only a few states have adopted U.P.C section 2-503.

IV. The Harmless Error Rule and the Extent in Which it has Been Applied in Different Jurisdictions

Currently, nine states have codified a harmless error statute.^{xxxvi} These nine states are California, Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah, and Virginia.^{xxxvii} The remainder of this paper will explain how each of these nine jurisdictions has applied the harmless error statute and the extent in which it has been applied.

A. California

California enacted California Probate Code §6110 on January 1, 2009.^{xxxviii} California's harmless error statute does not follow UPC 2-503 word for word but allows errors to be fixed if the "proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will."^{xxxix}

The first appellate case in California regarding harmless error was an attestation error in the case *In re Estate of Stoker*.^{xi} Steven Stoker created a will in 1997 that left a majority of his estate to his ex-girlfriend, Destiny Gularte.^{xii} Steven and Destiny's relationship ended poorly in 2001.^{xlii} On August 28 2005, while discussing his estate plan with his friend, Anne Marie Mejer,

Steven asked Anne to grab a piece of paper and pen and dictated his testamentary wishes to her.^{xliii} In the document, Steven revoked his trust, expressly disinherited Destiny, and left everything to his two children.^{xliv} After the dictation, Steven signed the will in front of two witnesses.^{xlv} The witness' never signed the will. Following the signing of the document, Steven urinated on the 1997 will and burned it.^{xlvi} The major issue in this case is that the 2005 will did not follow attestation rules because it was never signed by the two witnesses. It could not be considered a holographic will because it was not in Steven's handwriting. The appellate court found that Steven had intent to revoke the 1997 will and that the 2005 will was to be probated because it was intended to be Steven's will, even though it was executed incorrectly.^{xlvii} Destiny also claimed that the harmless error rule came into effect in 2009 and that the harmless error rule should not be applied retroactively to the 2005 will.^{xlviii} The appellate court found that it was the legislative intent to not invalidate wills due to improper execution and found that applying the harmless error rule would be following legislative intent.^{xlix}

Since *In re Stoker*, two cases attempted to use the harmless error rule in California. Both of these cases remain unpublished and noncitable. In the first case, *In re Estate of Richards*, Jack Richards died at the age of ninety.¹ He was survived by a daughter, three grandchildren from a predeceased son, and a brother. Jack's tenant, James Duffer, was the proponent of the purported wills for probate. There were two wills in question, the first had supposedly Jack Richards' signature but no witness signatures and the second will had two witness' signatures but not the signature of Richards. The wills left the residue of the estate to James Duffer. The family of Richards claimed that Jack's signature on the one will was fraudulent, the wills were executed improperly, and that Jack did not have capacity. After a two day trial with testimony from the witnesses who signed the will, James Duffer, and handwriting experts the court found that there

was not clear and convincing evidence that the testator intended for either of the instruments to be his will. The court looked at many different factors to determine that harmless error rule should not apply due to lack of clear and convincing evidence of Richard's intent. These factors were the age of the testator, the mistakes found in the drafting of the will, the pages not being stapled together, the witnesses not knowing who prepared the will, the expert testimony declaring that they were unable to tell who signed the will, and the improper execution. Therefore, the court did not probate the purported wills due to improper execution.

The second unpublished case is *Estate of Reese*.^{li} Norminel Reese wrote handwritten instructions to his attorney in the presence of his former girlfriend, Veronica La Shore. His instructions advised the attorney to create a will that left the residue of his estate to his daughter, Michelle, and very little to his son, Donald, because he had already provided Donald enough throughout his life. The lawyer drafted a will that followed how Norminel wanted his property disposed and sent the will to Norminel.^{lii} Norminel signed the will in front of Ms. La Shore on February 12, 2007. There was no second witness to the signing of Norminel's will. Norminel also wrote handwritten letters to Michelle with instructions on what to do with the will and reasons why he was leaving less to Donald. After Norminel's death, the probate court admitted the will to probate despite attestation errors. The court found that there was clear and convincing evidence of Norminel's intent by contacting his attorney to draft the will, signing the will in the presence of an uninterested party, contacting Michelle with instructions to make copies, and writing letters stating the reason for leaving a smaller portion of the estate to Donald. The court was able to overlook the attestation errors and allow the will into probate due to clear and convincing evidence of Norminel's intent.

California has applied the harmless error rule to two circumstances. The first when there were no signatures by the witnesses who watched the testator sign his will and second when there were not enough witnesses present for the signing of the testator's will.

B. Colorado

Colorado adopted their harmless error statute in 1994.^{liii} It expressly states that for harmless error to apply a testator's signature must be present.^{liv} It provides an exception for swapped wills of spouses.^{lv} Since the adoption of the harmless error rule, three Colorado cases have attempted to use it. The first case attempting to use the harmless error rule was *Estate of Dancer v. Barnes*.^{lvi} Sky Dancer died in 1997 the result of gunshot wounds.^{lvii} Sky's boyfriend, Lawrence Barnes tried admitting a document titled "Last Will and Testament of Sky Dancer," into probate which would leave him all her property.^{lviii} The "will" contained incomplete portions and was accompanied by an affidavit signed by Sky and two witnesses.^{lix} Sky signed the affidavit in front of the witnesses but failed to sign the "will."^{lx} Sky's mother challenged the "will" for improper execution.^{lxi} The court found that in order to apply the harmless error rule there needs to be minor deviations from statutory formalities and that was not the case in Sky's will.^{lxii} The court found that because the will was not signed by her, written by her, or represented to others that this was her will, there was not enough clear and convincing evidence of Sky's intent.^{lxiii} Another aspect not to be overlooked is that Lawrence Barnes was being investigated for the murder of Sky.

The second case attempting to use the harmless error rule was the *In re Estate of Wiltfong* case.^{lxiv} In this case, Ronald Wiltfong gave his domestic partner Randal Rex a birthday card which contained a typed letter signed by Ronald.^{lxv} The letter said that if anything happened to him he wanted everything to go to Randal and that "everyone else is dead to [him]."^{lxvi} The

letter was witnessed by friends and Ronald said that these were his wishes. The trial court found that the letter did not meet the formalities of a formal will because it was not signed by two witnesses who witnessed Ronald sign or Ronald's acknowledgement of his signature.^{lxvii} The letter was not a holographic will because it was not handwritten.^{lxviii} The trial court also found that in order to determine whether the letter was intended to be a will, the letter would need to be signed *and* (emphasis added) acknowledged as his will and the decedent must state, "this is my will."^{lxix} On appeal, the appellate court found that the trial court misinterpreted the statute and that the testator only needs to sign *or* (emphasis added) acknowledge a document to be their will and that they do not need to state, "this is my will." The appellate court remanded the case to determine if there was clear and convincing evidence that the letter was intended to be Ronald's will.^{lxx} They advised on remand that the trial court focus on the language of the letter, determine if the letter disposes of the testator's property, and leaves a beneficiary.^{lxxi} It also suggests that extrinsic evidence should be taken into account as to whether Ronald made statements to others about the letter being his testamentary dispositions.

The last case that poorly attempts to use the harmless error rule is *In re Estate of Schumacher*.^{lxxii} In this case, a holographic will is created by the testator and the testator crosses out who will receive his stock.^{lxxiii} The testator goes to an attorney to have him prepare a will. He told the attorney that the people that were crossed out no longer should be in the will because he no longer felt close with them.^{lxxiv} The attorney created the will with the testator's wishes but the testator failed to execute the will before his death.^{lxxv} The holographic will was placed into probate.^{lxxvi} The probate court found that the cross outs would be given effect. The court looked into the intent of the cross outs and used extrinsic evidence.^{lxxvii} The petitioners argued that because the cross outs did not have signatures, the court cannot find that the will was partially

revoked. The appellate court found that partial revocation was done correctly and the harmless error rule only applies to the testator's signature of their will and not for revocation.^{lxxviii}

The application of harmless error in Colorado has been very limited. Colorado will apply harmless error when there are minor execution errors.

C. Hawaii

Hawaii enacted Hawaii Revised Statute § 560:2-503 in 1996 as their harmless error statute.^{lxxix} They have yet to apply the harmless error rule to a case.

D. Michigan

Michigan enacted its version of the U.P.C. on April 1, 2000.^{lxxx} Michigan has eight cases that reference the harmless error statute however only one published case. The published case is *In re Estate of Smith*.^{lxxxii} In this case, Ms. Smith one day after executing her will met with her minister.^{lxxxii} She created a document which said "I want to donate \$150,000 to God in order to build a church. 1999/04/20 Lee, Kilyon (deacon)."^{lxxxiii} Following Ms. Smith's death, the church claimed this document was a codicil to her original will, while Ms. Smith's family said that the document expressed her present intent to give the church money.^{lxxxiv} The probate court granted summary judgment to Ms. Smith's heirs and did not allow extrinsic evidence to be presented for testamentary intent.^{lxxxv} The appellate court reversed and found that extrinsic evidence needs to be used to establish the testator's intent.^{lxxxvi}

The next seven cases were not published in Michigan, but give interesting insights to the application of the harmless error rule. *In re Bruce D. Cameron Trust*, the court concluded that harmless error would not apply to trusts.^{lxxxvii} *In re Estate of Berg*, deals with attestation of a will in the presence of the testator.^{lxxxviii} Michigan law says that a will must be signed by two witnesses "each of whom signed within a reasonable time after he or she witnessed either the

signing of the will ... or the testator's acknowledgment of that signature or acknowledgment of the will.^{xxix} Ms. Spears and Mr. Shulte acted as witnesses for Ms. Berg. Ms. Spears did not remember if she signed before or after Ms. Berg and was unclear if she witnessed Ms. Berg's signature. Mr. Shulte did not see Ms. Berg sign her will or acknowledge that it was her will. He signed the will in a separate location after Ms. Berg signed and never met or saw Ms. Berg. The court used the harmless error rule to conclude that there was clear and convincing evidence that Ms. Berg's document was intended to be her will. The court focused on her conversations with her attorney, Mr. Gracely, to determine that the document was intended to be her will even though it was executed incorrectly.

The case *In re Estate of Smoke* deals with a testator who created an original will in 1977 that left only \$1,000 to his son and the rest to his brother and sister.^{xc} Mr. Smoke also owned a partial ownership in a 152 acres farm. He sent a letter to his son saying that if he should leave the property to his son that he should be smart with it and signed it Dad. He sent a second letter to his sister and his son that stated "I am getting older and I want to avoid any problems of being able to devise my share of the 152 acres to my son, Tim Smoke, if I should expire unexpectedly."^{xc} The second letter did not have a signature. The probate court found that the letters were neither a holographic will nor a codicil.^{xcii} They also found that harmless error could not be applied in this situation due to the lack of signatures on the documents by the testator. The trial court found that the harmless error rule could not fix an error as fatal as a lack of a signature. They also found that the letters contained a variety of subjects including the testator seeing a bear and that the letters lacked testamentary intent.

In re Estate of Windham, Esther created a will in 2003 and named her son as the primary beneficiary.^{xciii} Esther made handwritten changes on her will, crossed out her son's name, and

placed her daughter, Carr's name in its place. Esther wrote a letter to Carr stating the desire to give all her property to her at her death.^{xciv} After Esther's death, Carr argued the original will was revoked and the handwriting on the will should have testamentary effect.^{xcv} The court found that Carr did not establish through clear and convincing evidence that the cross outs were revocation and that the handwriting had testamentary intent.^{xcvi} The court focused on the fact that there were comments on the will besides the cross outs and that it was intended to be a draft. They also used extrinsic evidence to prove that Esther would go to her attorney when she wanted to make changes to her will with a marked up copy of her will and would give it to the attorney to make the changes. The court said that Esther also knew that her attorney kept the original will, so Esther would be able to make changes on the copy. In this case, Carr failed to establish the high standard of clear and convincing evidence.

The case *In re Sam Gentile Trust* is a broad interpretation of the harmless error statute.^{xcvii} Sam created a revocable trust in 1994. In 2007, he created an amendment to the trust to make John Carlesimo the primary beneficiary and successor trustee.^{xcviii} On January 1, 2008, Sam executed a second amendment that removed Carlesimo as the beneficiary and trustee and named John Graybill as the only beneficiary. Sam's will left the residue of his estate to Carlesimo. Graybill petitioned the court to revoke the portion leaving the residue of the will to Carlesimo. The probate court found that the second amendment to the trust provided clear and convincing evidence that the document was intended to partially revoke Sam's will to the extent that anything was to be left to Carlesimo.^{xcix} The appellate court found that even though the amendment applied only to the trust, Sam believed it applied to all his property whether in trust or not. The court found that Sam might have been unaware that he had a will or did not understand the difference between his will and trust. The court also focused on Sam's

conversations with his attorney, which stated that he wanted to leave all his property to Graybill, and that Carlesimo did not receive anything.^c This case stretches the harmless error rule. The court applied a revocation to a document that the testator might not have even had knowledge of and did not reference specifically. However, the court found that the testator's intent was to disinherit Carlesimo and allowed for the revocation of Carlesimo from the testator's will.

In re Estate of Southworth, is another interesting case expanding the harmless error rule in Michigan.^{ci} In this case, Ms. Southworth had a will and was good friends with Charles Russell. Mrs. Southworth went to an attorney and informed her that she had a will and wanted to make one change to the will by giving her home to Russell when she died, but wanted to retain a life estate. The attorney drew up a quitclaim deed, the decedent signed it, and the attorney witnessed it. Ms. Southworth took the deed when she left the attorney office but never recorded the deed or presented it to Russell. The deed was found in the decedent's safe with her will when she passed. The court found that the undelivered deed was intended to be an addition or alteration to her will and that Russell had established this through clear and convincing evidence.^{cii} The court used the affidavit of the attorney to find that the decedent intended to give the property to Russell at her death.

In re Leach, Maria Leach executed two documents on her death bed which conveyed property in Illinois to Keith Storm.^{ciii} The documents lacked testamentary formalities like witnesses but the probate court granted summary disposition because the documents had testamentary intent.^{civ} The appellate court found the trial court erred by not applying the clear and convincing standard. The appellate court found that there were no witnesses, the decedent was suffering heart failure, the documents were drafted by Mr. Storm, and there were no

witnesses besides Mr. Storm that saw Ms. Leach sign the documents.^{cv} The court remanded for further proceedings to determine Maria Leach's intent when the documents were executed.

In general, it seems that Michigan has a broad view of harmless error. They have allowed a deed to act as a codicil and allowed a revocation to a will through an amendment to a trust. They still will not allow harmless error if a document was not signed by the testator. Michigan seems to go beyond minor errors in formalities and looks more toward the testator's intent.

E. Montana

Montana's harmless error statute was enacted in 1993 and follows U.P.C. 2-503.^{cvi} . There have been three cases testing the harmless error statute in Montana. *Matter of Estate of Brooks* involves the testamentary capacity of the testator.^{cvi} Kay Brooks, the testator, had two children Bruce and Jean.^{cvi} Bruce created a will and had Kay execute it in front of Bruce and his friend, but only Bruce's friend signed the will.^{cix} Bruce then took the will to a notary who signed the will.^{cx} Montana law says that you need two witnesses in the presence of the testator signature in order for a will to be valid.^{cx} Due to Bruce's friend being the only witness to the will, the will was nonconforming.^{cxii} Bruce argued harmless error and the court found that to apply harmless error the testator must have intended the document to be their will.^{cxiii} The court found that in order to have intent the testator needs to be of sound mind and that Kay Brooks was not of sound mind.^{cxiv}

In re Estate of Hall provides an example of harmless error remedying an attestation error.^{cxv} In this case, a married couple, Jim and Betty visited an attorney to draft a joint will. ^{cxvi} After some discussion, the couple agreed on the terms of the joint will and the couple said they would execute the joint will when the attorney sent them their final copy.^{cxvii} Jim asked the

attorney if the draft will would be valid until the final document was executed.^{cxxviii} The attorney incorrectly told Jim that the draft would be valid if Jim and Betty executed it and the attorney notarized it.^{cxxix} There were no witnesses to the execution of the will. When Jim and Betty got home from the attorney's office Jim told Betty to tear up their old will.^{cxx} Jim died before executing the final version of the joint will.^{cxxi} The court admitted the draft will to probate despite the attestation error.^{cxxii} The court found that there was clear and convincing evidence that Jim intended the draft to serve as his will until the final will could be executed.^{cxxiii} The court put emphasis on the fact that the joint will revoked all previous wills and that Jim told Betty to destroy the original will.^{cxxiv} Betty established through clear and convincing evidence Jim's intent for the draft joint will to serve as his will.^{cxxv}

In re Estate of Kuralt used harmless error to remedy a nonconforming codicil and alter an original will.^{cxxvi} Kuralt had an extramarital affair with Elizabeth Shannon.^{cxxvii} Kuralt supported Shannon and Shannon's children and in 1985 Kuralt bought 20 acres of property in Montana and built a cabin on it.^{cxxviii} Two years later, he bought two adjoining parcels that had approximately 90 acres of land.^{cxxix} Kuralt deeded the Montana cabin and 20 acres to Shannon in the form of a sale but provided Shannon the money for the "purchase."^{cxxx} Kuralt asked Shannon to provide him a blank buy sell agreement so that he could convey the remainder of the Montana property to Shannon.^{cxxxi} Kuralt also had a formal will that provided for his wife and children but never mentioned Shannon or the Montana property in that will.^{cxxxii} Kuralt became suddenly ill and wrote a letter to Shannon that said, "I'll have the lawyer visit the hospital to be sure you inherit the rest of the place in MT. if it comes to that."^{cxxxiii} Kuralt died two weeks later and Shannon sought to probate the letter as a holographic codicil to the original will.^{cxxxiv} The estate claimed that the letter only represented future intent to create a will. The court found that the letter

represented a valid holographic codicil.^{cxxxv} The court focused on Kuralt’s testamentary intent and made specific reference to the word “inherit” in his letter and that he was very close to death when he wrote the letter.^{cxxxvi} The court upheld Kuralt’s testamentary wishes by looking at his intent.

Montana will uphold a nonconforming wills if there is clear and convincing evidence of testamentary intent. This will be applied to both attestation errors as was the case in *Hall* and alterations to wills as was the case in *Kuralt*. Montana will not allow harmless error to be applied if the testator lacked capacity.

F. New Jersey

New Jersey may be infamous to the public for its reality television show, *Jersey Shore*, but may be even more infamous to estate planning attorneys for their interpretation of the harmless error rule. New Jersey’s harmless error statute, N.J. Stat. Ann. § 3B:3-3, became effective February 27, 2005.^{cxxxvii} New Jersey was one of the first states in establishing that a testator’s intent should be followed despite execution error. They illustrated this by applying substantial compliance in the case *In re Ranney* before they enacted their harmless error statute. This section will focus on the two published opinions by the New Jersey courts.

The first case published since the passage of the harmless error statute was *In re Probate of Will and Codicil of Macool*.^{cxxxviii} Louise and Elmer Macool were married for forty years and this was both of their second marriages.^{cxxxix} Louise did not have any biological children but raised Elmer’s seven children from his previous marriage.^{cxl} On September 13, 1995, Louise and Elmer went to attorney Kenneth Calloway and executed a will for Louise that named Elmer as her sole beneficiary and named Louise’s seven stepchildren, her step-granddaughter, and her step-great-grandson as contingent beneficiaries.^{cxli} Elmer passed away and Louise went to

Calloway to make changes to her will by adding her Niece, Mary and her niece's godchild, LeNora.^{cxliii} She gave Calloway a handwritten note that read,

“get the same as the family Macool gets Niece Mary Rescigno. . . If anything happen[s] to Mary Rescigno [,] her share goes to he[r] daughter Angela Rescigno. If anything happen[s] to he[r] it goes to her 2 children. 1. Nikos Stylon 2. Jade Stylon Niece + Godchild LeNora Distasio [indicating address] if anything happe[ns] to [her it goes back in the pot I [would] like to have the house to be left in the family Macool. I [would] like to have 1. Mike Macool... 2. Merle Caroffi...3. Bill Macool...Take.”^{cxliii}

Calloway used the note as guidance and “dictated the entire will while she was there.”^{cxliv}

Calloway's secretary drafted the will, adding Mary and Lenora as residuary beneficiaries but failed to include Angela's children as contingent beneficiaries. The draft will also added that the house should be kept in the family Macool and that Mike, Merle, and Bill were responsible for trying to keep the house in the family as long as possible.^{cxlv} Louise left Calloway's office but passed away approximately one hour after leaving and never got to view the draft will.^{cxlvi}

Louise's niece, Mary, attempted to admit the draft will to probate despite there being no signature or witnesses.^{cxlvii} She relied on the harmless error rule and argued that Louise intended for the draft will to be her will. The trial court found that Louise's draft will did not meet statutory formalities, Louise intended for Mary and Lenora to be included in Louise's testamentary plan, however, Louise did not intend the draft will to be her will and therefore the will could not be probated due to the harmless error rule.^{cxlviii} The trial court also held that a signature by the testator is necessary for the harmless error rule to apply.^{cxlix}

The appellate court agreed with the trial court that Louise never intended the draft to be her will.^{cl} They focused on the facts that Louise never met with her attorney to possibly make changes like adding Angela's children as contingent beneficiaries as she mentioned in her notes.^{cli} They also mentioned that her intention in her handwritten note was unclear on what to

do with her house and that revisions may have been necessary to the draft will.^{clii} The court was unsure if the document would have met Louise's approval and therefore found that there was not clear and convincing evidence, that Louise would have intended the draft will to be her will.^{cliii} The appellate court ruled that for harmless error to be applied to a will, the proponent must prove by "clear and convincing evidence that (1) the decedent actually reviewed the document in question and (2) thereafter gave his or her final assent on it."^{cliv} Clearly, in this case Louise failed to do both.

The second item the appellate court focused on was the trial court's ruling that in order for harmless error to apply there needed to be a signature by the testator. The appellate court focused on the plain language of the harmless error statute, that a document is "not *executed* in compliance with N.J.S.A. 3B:3-2, the document is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will." (Emphasis added.)^{clv} The appellate court looked at what is needed to execute a will and found that a formality to execute a will is the testator's signature.^{clvi} They found that the harmless error statute is to fix execution errors and that an execution error in signature should not prevent the harmless error rule from applying.^{clvii} Therefore, the appellate court found that a will could be admitted to probate without the testator's signature through the harmless error rule as long as there is clear and convincing evidence of the testator's intent.^{clviii}

The appellate court established precedent that the harmless error rule would be applied broadly. The court in this case expressly stated that they would admit wills without a testator's signature to probate under the right circumstances. Also to note is that New Jersey accepts valid holographic codicils.^{clix} An interesting point is that the handwritten notes without a signature

that were given to the attorney were not scrutinized under the harmless error rule as a holographic codicil. It seems that this argument was either not brought up at the trial court level or not brought up on appeal. The formalities of a holographic codicil are that the testator intends the document to be a will, the testator writes the material portions of the document in their handwriting, and the testator signs the document. The appellate court notes that Louise's note to Calloway does not pass muster as a holographic will because Louise failed to sign her notes. In the same opinion, the appellate court notes that a signature is not needed for harmless error to be applied. Had harmless error been applied to Louise's notes, Louise's intent of giving to Mary and LeNora could have been followed. The question would have been if there was "clear and convincing evidence the decedent intended the document or writing to constitute: . . .(3) an addition or an alteration of the will." The court could have looked to guidance from the Montana court in the case *In re Estate of Kuralt*. As mentioned earlier in this paper, in *Kuralt* the decedent sent a letter from his deathbed saying that he wanted his mistress to inherit his Montana property. The court looked at the decedent's intent and followed the decedent's wishes even though the document itself did not appear to be intended as a codicil to his will. The court already concluded that there was clear and convincing evidence that it was Louise's testamentary intent to give to Mary and Lenora. They could have concluded the notes, although not signed, were intended to be an alteration to the will and that through harmless error, the notes could have been probated as a holographic codicil. It could have also been argued that the notes themselves were not intended to constitute an alteration to Louise's will and that she went to Calloway to actually alter her will through formal execution. This author believes that if Louise's notes were offered as a holographic codicil through harmless error to the New Jersey courts, the New Jersey

courts would have applied the harmless error rule broadly and followed Louise's intent and admitted to probate Louise's notes as an alteration to her will.

The second and most surprising published case regarding harmless error is *In re Estate of Ehrlich*.^{clx} This case seems to be the broadest reading of the harmless error statute. In this case Richard Ehrlich, a trust and estates attorney with fifty years experience, passed away on September 21, 2009.^{clxi} His only next of kin were his deceased brother's children: Todd, Jonathan, and Pamela.^{clxii} Prior to his death Richard did not have a relationship with Todd or Pamela and had not seen either of them in over twenty years.^{clxiii} Richard did keep a relationship with Jonathan and told his closest friends that if he became ill or passed away to contact Jonathan.^{clxiv} He also told friends that he was leaving his estate to Jonathan.^{clxv} Two months after Richard's death, Jonathan searched Richard's house and found a "purported Will in a drawer near the rear entrance of decedent's home, which like his office, was full of clutter and a mess."^{clxvi} No other will was ever found for Richard.^{clxvii} The purported will was fourteen pages long and had no signatures by the decedent or any witnesses.^{clxviii} On the cover page Richard handwrote "Original mailed to H.W. Van Sciver, 5/20/2000[.]"^{clxix} The purported will leaves \$50,000 to Pamela, \$50,000 to Todd, 25% of his residue to go into trust for his friend, Kathryn Harris, and 75% of his residue to pass to Jonathan.^{clxx} The purported will named Sciver as the executor and trustee and named Jonathan as contingent executor and contingent trustee.^{clxxi} Sciver predeceased Richard and the original document was never returned.^{clxxii} Richard created this will nine years before his passing. He mentioned to others that he had a will and mentioned deleting Kathryn from his will.^{clxxiii} However, no other will was ever found. The trial court found that Richard created the will and although it was not executed correctly his writing on the first page demonstrated clear and convincing evidence that it was "final assent" that the

document was his will.^{clxxiv} The trial court admitted the unexecuted, unsigned document to probate using the harmless error rule.^{clxxv}

The appellate court upheld the ruling of the trial court.^{clxxvi} The court looked into the fact that Jonathan was the only relative Richard had a relationship with and that the will was prepared in a professional manner.^{clxxvii} They looked into the final assent of the unexecuted will, and found that Richard telling others that he made a will that would leave the majority of his estate to Jonathan was clear and convincing evidence of his final assent.^{clxxviii} They also looked into the fact that the document was titled last will and testament and that Richard executed both a power of attorney and health care directive on the same day.^{clxxix} The court overlooked the fact that the document was a copy, unsigned by the testator and witnesses, and looked to the intent of the testator and admitted the document into probate. The dissenting judge looked at case law from South Australia and Israel, where harmless error first was adopted and found that both these countries were apprehensive to excuse noncompliance with a signature.^{clxxx} He also looked at the restatement and found that lack of signature was the hardest execution error to overcome.^{clxxxi} He focused on the fact that the decedent was a trust and estates attorney and knew the copy was executed incorrectly and most likely did not intend “the [unexecuted copy of the document] to constitute [his] will.”^{clxxxii} The dissent believes the document should be looked at as a “lost will” instead of under the harmless error statute.^{clxxxiii} The New Jersey Supreme Court denied certification of this case on January 30, 2013.^{clxxxiv}

Ehrlich expands the harmless error doctrine immensely. The only formal requirement fulfilled in Richard’s will was that the document was in writing. The New Jersey courts overlooked the facts that the testator did not sign the document, there were no witnesses to the will, and there were no witness signatures. In this author’s opinion, it seems as if the court has

gone too far when probating Richard's will. The proponent need to show "by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will." Clear and convincing evidence is a very high standard to overcome. The dissent stated correctly that Ehrlich as an estate planning attorney knew how to execute wills correctly and would not leave a will unsigned and unattested if he intended the document to be his will. Another major problem with admitting this document as his will is suggesting that Ehrlich gave "final assent" to this document. The document was found stuffed in a drawer in a messy office. If Ehrlich intended that document to be his will he would have kept it in a safe place away from his other client's documents. In addition, Richard stated to others that he was going to take Kathryn out of his will. The will still had Kathryn receiving 25% of Richard's residue. As an estate-planning attorney, there is a high likelihood that he made changes to his will to exclude Kathryn from taking. It is also troubling that the copy of the will itself was not executed. As an attorney, Ehrlich should have known the common law practice in New Jersey of admitting executed copies of a will to probate if the original will could not be found. It does not seem that Jonathan proved by clear and convincing evidence that the unsigned will was intended to be Richard's final assent to the will. The name of the statute is harmless error but to this author it seems the errors in the execution of Richard's will were more than harmless.

In general, the New Jersey courts will overlook many execution errors to fulfill what they believe is the testator's intent. New Jersey will overlook a missing signature by the testator, missing signatures by witnesses, the wrong number of witnesses to a will, and admit a document that is a copy to probate. New Jersey has applied the harmless error statute most liberally.

G. South Dakota

South Dakota enacted S.D. Codified Laws § 29A-2-503 as their harmless error statute.^{clxxxv} The only case has that tested South Dakota's harmless error statute was *In re Estate of Palmer*.^{clxxxvi} Connie and Larry were married in the 1980's and later divorced.^{clxxxvii} On March 21, 2000, Connie executed a will, which left everything to her sister Linda.^{clxxxviii} Larry and Connie remarried in 2005 and Connie passed away from cancer in 2006.^{clxxxix} Connie did not create a will after she remarried Larry. Under South Dakota intestacy law, Larry would receive the entire estate because the original will Connie executed in 2000 would be ineffective due to her remarriage to Larry. Linda offered to the court a typewritten instrument dated January 23, 2006, which Linda claims to be a codicil to the 2000 will.^{cxo} The instrument states, "IF I AM DECEASED AS THE LAST WILL AND TESTAMENT STATES EVERYTHING IS ABSOLUTELY MY SISTERS [.]"^{cxci} Linda claimed that Connie signed the instrument in front of her and that she was the only witness.^{cxcii} Linda also submitted for evidence a typewritten document entitled "Instructions in the Event of My Death," which was not signed by Connie and stated to leave all Connie's money to Linda.^{cxciiii} The circuit court found that the alleged codicil was not executed properly due to lack of witnesses and that Linda did not meet the burden of clear and convincing evidence that the codicil was Connie's testamentary intent.^{cxciiv} They found it significant that Linda was the only witness to the alleged codicil and that while Connie and Larry were married they went to an attorney to draft a power of attorney, but did not seek his services to draft a will.^{cxci v} The Supreme Court of South Dakota agreed with the circuit court that Linda did not offer clear and convincing evidence that the alleged codicil was intended by Connie to be a will or an amendment to a will.^{cxci vi}

South Dakota's harmless error statute was not really tested in *In re Estate of Palmer*. The court found that Linda was not credible and she could not prove that the documents she proffered as a Connie's codicil were Connie's testamentary intent.

H. Utah

Utah's harmless error statute was put into effect July 1, 1998.^{cxcvii} The harmless error statute has yet to be tested in Utah.

I. Virginia

Virginia harmless error statute, VA Code Ann. § 64.2-404, became effective October 1, 2012.^{cxcviii} The statute specifically references that the signature of the testator is needed but will be excused in the case of switched wills. The harmless error statute has yet to be tested in Virginia.

V. Conclusion

Harmless error is a very useful tool in correcting execution errors. It is meant to follow the testator's intent and not negate their intent due to noncompliance with formalities. Each state that has adopted the harmless error rule has interpreted it differently. The spectrum for the application of harmless error is very large. Colorado has stated that they will only apply the harmless error statute if there are minor mistakes in the execution of a will. New Jersey on the other side of the spectrum has allowed a will to be probated without the testator's signature or witnesses. The only thing that is consistent across all jurisdictions is that for harmless error to apply the will must be in writing. Extrinsic evidence will also be used in all jurisdictions to determine the intent of the testator.

Most states are willing to overcome attestation errors if there is clear and convincing evidence of the testator's intent. California applied harmless error when a will was witnessed but

not signed by the witnesses. Michigan applied harmless error when witnesses were not in the presence of the testator when the testator signed their document. California, Montana, and New Jersey applied harmless error when there were not enough witnesses to a testamentary document. South Dakota has had one case regarding lack of witnesses to an attestation of a codicil but found there was not clear and convincing evidence that the testator intended the document to be her codicil. In general, states that have adopted the harmless error rule seem to be willing to admit wills to probate that have attestation errors as long as there is clear and convincing evidence of the testator's intent.

Michigan allowed for a partial revocation of a will when the revocation was done incorrectly in a trust and not in a will. This applied the harmless error statute broadly to follow the testator's intent of disinheriting a beneficiary.

Almost all states that have adopted the harmless error rule are unwilling to probate a document without the testator's signature. The only exception to this is when wills between spouses are accidentally swapped. California, Colorado, Michigan, Virginia will not admit a will to probate if it lacks a testator's signature. New Jersey is the only exception and is willing to admit a will to probate without a signature as long as there is clear and convincing evidence the testator intended the document to be their will. The lack of a signature by the testator is the hardest error to overcome when applying the harmless error rule.

Hawaii, Utah, and Virginia, have yet to apply their harmless error statute to a case. When a case arises, these states will look to other states for guidance on how to apply harmless error.

In general, states have been weary to adopt a harmless error statute. Mistakes happen and the testator's intent should be followed. When a person spends their life amassing wealth and wants to give it to their loved ones when they pass, they should not be denied this right because

of a forgotten witness signature. More states should adopt the harmless error statute so that decedent's testamentary wishes can be followed even if an execution error has been made.

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- ⁱ The Telegraph, <http://www.telegraph.co.uk/expat/expatpicturegalleries/7079567/Historys-great-mistakes.html?image=1> (last visited April 5, 2013).
- ⁱⁱ The Telegraph, <http://www.telegraph.co.uk/expat/expatpicturegalleries/7079567/Historys-great-mistakes.html?image=12> (last visited April 5, 2013).
- ⁱⁱⁱ *In re Pavlinko's Estate*, 394 Pa. 564, 565, 148 A.2d 528 (1959).
- ^{iv} *Id.* at 566.
- ^v *Id.*
- ^{vi} *Id.*
- ^{vii} *Id.* at 569.
- ^{viii} Statute of Wills 32 Henry VIII (1540), reprinted in HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS at 188-90 (1928).
- ^{ix} *Changing the Estate Planning Malpractice Landscape: Applying the Constructive Trust to Cure Testamentary Mistake*, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=victoria_haneman (last visited April 5, 2013).
- ^x *Id.*
- ^{xi} Leigh A. Shipp, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 Tul. L. Rev. 723, 725 (2005).
- ^{xii} *Id.*
- ^{xiii} *Id.*
- ^{xiv} *Id.*
- ^{xv} 203 W. Va. 450, 508 S.E.2d 610 (1998).
- ^{xvi} *Id.* at 611.
- ^{xvii} *Id.*
- ^{xviii} *Id.*
- ^{xix} *Id.*
- ^{xx} *Id.* at 612.
- ^{xxi} *Id.* at 613.
- ^{xxii} Shipp, *supra* at 726.
- ^{xxiii} *Id.*
- ^{xxiv} *Id.*
- ^{xxv} 124 N.J. 1, 589 A.2d 1339 (1991).
- ^{xxvi} *Id.* at 6.
- ^{xxvii} *Id.* at 10.
- ^{xxviii} Arkansas (*Faith v. Singleton*, 692 S.W.2d 239 (Ark. 1985)); Georgia (*Hickox v. Wilson*, 496 S.E.2d 711 (Ga. 1998)); Idaho (*Parkinson v. Artley*, 455 P.2d 310 (Idaho 1969)); Illinois (*In re Lum*, 699 N.E.2d 1049 (Ill. App. Ct. 1998)); Kansas (*In re Bond*, 153 P.2d 912 (Kan. 1944)); Kentucky (*Scott v. Gastright*, 204 S.W.2d 367 (Ky. Ct. App. 1947)); Louisiana (*In re Brown*, 458 So.2d 140 (La. Ct. App. 1984)); Mississippi (*Swanzy v. Kolb*, 46 So. 549 (Miss. 1908)); New York (*Snide v. Johnson*, 418 N.E.2d 656 (N.Y. 1981)); North Carolina (*In re Durham*, 698 S.E.2d 112 (N.C. Ct. App. 2010)); North Dakota (*Montague v. Street*, 231 N.W. 728 (N.D. 1930)); Ohio (*In re Weilert*, No. 98AP-390, 1999 WL 41073, (Ohio Ct. App. Dec. 3, 1998)); Oklahoma (*In re Cutsinger's Estate*, 445 P.2d 778 (Okla. 1968)); Oregon (*Walker v. Walker*, 929 P.2d 316 (Or. Ct. App. 1996)); Pennsylvania (*In re Kajut*, 22 Pa. D. & C.3d 123 (Pa.Com.Pl. 1981)).

^{xxx} Tex. Prob. Code Ann. § 59 (West 2013).

^{xxx} 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).

^{xxxi} *Id.* at 9.

^{xxxii} § 2-503. Harmless Error., Unif.Probate Code § 2-503.

^{xxxiii} *Id.*

^{xxxiv} *Id.*

^{xxxv} Restatement (Third) of Property (Wills & Don. Trans.) § 3.3 (1999).

^{xxxvi} *Changing the Estate Planning Malpractice Landscape: Applying the Constructive Trust to Cure Testamentary Mistake*,

http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=victoria_haneman (last visited April 5,2013).

^{xxxvii} *Id.*

^{xxxviii} Cal. Prob. Code § 6110 (West 2013).

^{xxxix} *Id.*

^{xl} 193 Cal. App. 4th 236, 122 Cal. Rptr. 3d 529, 531 (2011), review denied (May 18, 2011), as modified on denial of reh'g (Apr. 4, 2011).

^{xli} *Id.* at 239

^{xlii} *Id.*

^{xliii} *Id.* at 240

^{xliv} *Id.*

^{xlv} *Id.*

^{xlvi} *Id.*

^{xlvii} *Id.* at 242

^{xlviii} *Id.* at 243

^{xliv} *Id.*

^l B226261, 2011 WL 6062018 (Cal. Ct. App. Dec. 7, 2011), review denied (Mar. 14, 2012), as modified (Dec. 21, 2011), reh'g denied (Jan. 3, 2012), unpublished/noncitable (Dec. 7, 2011).

^{li} D060749, 2013 WL 64379 (Cal. Ct. App. Jan. 7, 2013), unpublished/noncitable (Jan. 7, 2013), reh'g denied (Jan. 28, 2013).

^{lii} *Id.*

^{liii} Colo. Rev. Stat. Ann. § 15-11-503 (West 2013).

^{liv} *Id.*

^{lv} *Id.*

^{lvi} 13 P.3d 1231, 1232 (Colo. Ct. App. 2000).

^{lvii} *Id.*

^{lviii} *Id.*

^{lix} *Id.*

^{lx} *Id.*

^{lxi} *Id.* at 1233.

^{lxii} *Id.* at 1234.

^{lxiii} *Id.*

^{lxiv} 148 P.3d 465 (Colo. Ct. App. 2006).

^{lxv} *Id.* at 466.

^{lxvi} *Id.*

lxvii *Id.* at 467.
lxviii *Id.*
lxix *Id.* at 468.
lxx *Id.* at 469.
lxxi *Id.*
lxxii 253 P.3d 1280 (Colo. Ct. App. 2011).
lxxiii *Id.* at 1281.
lxxiv *Id.*
lxxv *Id.*
lxxvi *Id.* at 1282.
lxxvii *Id.* at 1283
lxxviii *Id.* at 1287.
lxxix Haw. Rev. Stat. § 560:2-503 (West 2013).
lxxx Mich. Comp. Laws Ann. § 700.2503 (West 2013).
lxxx1 252 Mich. App. 120, 651 N.W.2d 153 (2002).
lxxxii *Id.* at 121.
lxxxiii *Id.*
lxxxiv *Id.*
lxxxv *Id.* at 125-126.
lxxxvi *Id.* at 126.
lxxxvii 257306, 2005 WL 3190621 (Mich. Ct. App. Nov. 29, 2005).
lxxxviii 268584, 2006 WL 2482895 (Mich. Ct. App. Aug. 29, 2006).
lxxxix *Id.*
xc In re Estate of Smoke, 273114, 2007 WL 4415499 (Mich. Ct. App. Dec. 18, 2007).
xci *Id.*
xcii *Id.* at 2.
xciii 287937, 2010 WL 293064 (Mich. Ct. App. Jan. 26, 2010).
xciv *Id.*
xcv *Id.*
xcvi *Id.* at 2.
xcvii 288690, 2010 WL 4137450 (Mich. Ct. App. Oct. 21, 2010).
xcviii *Id.*
xcix *Id.* at 7.
c *Id.*
ci 297460, 2011 WL 2623381 (Mich. Ct. App. July 5, 2011).
cii *Id.* at 3.
ciii 304688, 2012 WL 4900516 (Mich. Ct. App. Oct. 16, 2012).
civ *Id.*
cv *Id.* at 2.
cvi Mont. Code Ann. § 72-2-523.
cvii 279 Mont. 516, 927 P.2d 1024 (1996).
cviii *Id.* at 518
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cx *Id.* at 520.
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cxii *Id.*
cxiii *Id.*
cxiv *Id.* at 522.
cxv 2002 MT 171, 310 Mont. 486, 51 P.3d 1134.
cxvi *Id.* at 487.
cxvii *Id.*
cxviii *Id.*
cxix *Id.*
cxx *Id.* at 488.
cxxi *Id.*
cxxii *Id.* at 489.
cxxiii *Id.*
cxxiv *Id.*
cxxv *Id.* at 490.
cxxvi 2000 MT 359, 303 Mont. 335, 15 P.3d 931.
cxxvii *Id.* at 337.
cxxviii *Id.*
cxxix *Id.*
cxxx *Id.*
cxxxi *Id.* at 338.
cxxxii *Id.*
cxxxiii *Id.*
cxxxiv *Id.*
cxxxv *Id.* at 340.
cxxxvi *Id.*
cxxxvii N.J. Stat. Ann. § 3B:3-3 (West 2013).
cxxxviii 416 N.J. Super. 298, 3 A.3d 1258 (App. Div. 2010).
cxxxix *Id.*
cxl *Id.*
cxli *Id.* at 303-304.
cxlii *Id.*
cxliii *Id.*
cxliv *Id.*
cxlv *Id.* at 305.
cxlvi *Id.*
cxlvii *Id.* at 306.
cxlviii *Id.*
cxlix *Id.* at 307.
cl *Id.* at 309.
cli *Id.*
clii *Id.*
cliii *Id.*
cliv *Id.* at 310.
clv *Id.*
clvi *Id.* at 311.

clvii *Id.*
clviii *Id.*
clix 94 C.J.S. Wills § 207 at 1048-1049 (1956)
clx 427 N.J. Super. 64, 47 A.3d 12 (App. Div. 2012).
clxi *Id.* at 67.
clxii *Id.*
clxiii *Id.*
clxiv *Id.*
clxv *Id.*
clxvi *Id.* at 68.
clxvii *Id.*
clxviii *Id.*
clxix *Id.*
clxx *Id.*
clxxi *Id.*
clxxii *Id.*
clxxiii *Id.* at 69.
clxxiv *Id.*
clxxv *Id.*
clxxvi *Id.* at 74.
clxxvii *Id.*
clxxviii *Id.*
clxxix *Id.*
clxxx *Id.* at 79.
clxxxi *Id.* at 80.
clxxxii *Id.* at 82.
clxxxiii *Id.* at 83.
clxxxiv In re Estate of Ehrlich, 213 N.J. 46, 59 A.3d 602 (2013).
clxxxv S.D. Codified Laws § 29A-2-503.
clxxxvi In re Estate of Palmer, 2007 S.D. 133, 744 N.W.2d 550.
clxxxvii *Id.*
clxxxviii *Id.* at 551.
clxxxix *Id.*
cx c *Id.*
cxci *Id.*
cxcii *Id.*
cxci *Id.* at 552.
cxci *Id.*
cxv *Id.* at 554.
cxvi *Id.*
cxvii Utah Code Ann. § 75-2-503 (West 2013).
cxviii VA Code Ann. § 64.2-404 (West 2013).