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# The Harmless Error Doctrine: What to Know and When to Say “Oh No”

6/15/2023 -- Kiralyn Locke, Chris Siebenaler

Under Minnesota law, a will is valid if it is: (1) in writing, (2) signed by the testator or another person authorized to sign on behalf of the testator, and (3) signed by two witnesses. Minn. Stat. § 524.2-502. However, recent changes in the world – notably, the COVID-19 pandemic – prompted an update to these rigid requirements.

On April 15, 2020, Minnesota enacted the "Harmless Error" rule. This rule allows a court to overlook certain deviations from the legal formalities required for the execution of a will. If a will executed on or after March 13, 2020 does not meet the specific requirements for a valid execution, the Harmless Error rule can potentially save the will from being invalidated in probate court.

## The Rule

2022 Minnesota Statutes
524.2-503 HARMLESS ERROR.

(a) If a document or writing added upon a document was not executed in compliance with section 524.2-502, the document or writing is treated as if it had been executed in compliance with section 524.2-502 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 the decedent's formerly revoked will or of a formerly revoked portion of the will.

(b) This section applies to documents and writings executed on or after March 13, 2020.

## Application of the Harmless Error Rule

First, it is important to understand what types of errors may constitute “harmless” errors. The statute makes clear that the error must relate to the execution of the document. These types of errors are likely to be procedural. A potential “harmless”

## Categories

error may include a witness failing to sign the document. An error that is *not* likely to be "harmless" would relate to the substance of the document, such as an ambiguous provision.

Next, the statute explains that the Harmless Error rule applies to more than just the initial execution of a will. This rule also applies to revocations, modifications, or revivals of wills.

Finally, and arguably most importantly, this rule does not erase the formal requirements for executing a will. Instead, it merely provides a potential safety net for documents that fail to meet the formal requirements for execution.

Wills must still be (1) in writing, (2) signed by the testator or another person authorized to sign on behalf of the testator, and (3) signed by two witnesses. However, if the document fails to comply with these requirements, it can still be treated as if it had been executed properly. In order for this to occur, the Harmless Error rule requires the proponent of the document to establish by clear and convincing evidence that the testator intended the document to constitute their final wishes for their property or assets.

The clear and convincing evidence standard is a high burden of proof. In fact, it is the second highest level of proof, trailing shortly behind the "beyond a reasonable doubt" standard. To establish that evidence is clear and convincing, it must be highly and substantially more likely to be true than not. This standard ensures that the court is adequately convinced that the document reflects the true intentions of the testator.

The Harmless Error rule provides an opportunity for an improperly executed will to be valid. However, it does not erase the requirements for executing a will and it does not erase the potential for someone to contest a will. The importance of proper and thorough estate planning remains imperative to meet the clear and convincing statutory standard.

## Challenging a Will

An individual must have legal standing to contest a will. Standing is generally accomplished when the individual challenging the will is an heir or beneficiary who stands to inherit from the decedent's estate. This can also include a person designated as a beneficiary in the current or previous versions of the will or someone specifically mentioned in the will as being disinherited.

The process for challenging a will in Minnesota includes filing a petition in probate court. The petition must be filed with the probate court in the county where the testator lived at the time of their death. The petition must state the grounds for the challenge and must be filed within one year of the testator's death.

In Minnesota, there are several grounds on which a will can be challenged. These include:

1. Lack of capacity: The testator did not have the mental capacity to understand the nature and extent of their property, the natural objects of their bounty, and the disposition they were making of their property.
2. Undue influence: Someone exerted undue influence over the testator, causing them to make a will that does not reflect their true wishes.
3. Fraud or duress: The testator was induced to make a will based on fraudulent misrepresentations or threats.
4. Improper execution: The will was not executed in accordance with Minnesota law.

Once the petition is filed and identifies the grounds for the challenge, the court will schedule a hearing to determine the validity of the will. If the court finds that the will is invalid, it will be set aside, and the testator's property will be distributed according to Minnesota's laws of intestacy.

The Harmless Error rule applies if a will is challenged based on improper execution. The proponent of the will must show by clear and convincing evidence that that the decedent intended the document to constitute their final wishes for their property or assets. If this can be established, the will can be honored.

Minnesota courts have not yet ruled on will contests related to the newly adopted Harmless Error rule. However, other jurisdictions with similar rules provide guidance. California, Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah, and Virginia all have Harmless Error rules. In these jurisdictions, individuals challenging wills based on “harmless” errors have not been successful.

## Attorney-Client Privilege and the Duty of Confidentiality

If you have been contacted by a beneficiary of a will to testify about the validity of a will, it is crucial that you take the necessary steps to protect yourself and your practice. Two important things to consider are (1) the attorney-client privilege, and (2) the ethical duty of confidentiality.

In general, communications between a client and their attorney are protected by the attorney-client privilege. This privilege continues even after legal representation ends and even after a client has died. However, under the testamentary exception to attorney-client privilege, there are situations in which attorneys may disclose such privileged communications.

The testamentary exception to the attorney-client privilege arises when a client has died and the client’s estate is in probate or litigation. This exception allows an attorney to testify about discussions with their client in order to establish the client’s wishes, their client’s capacity, or to refute allegations of undue influence or fraud.

In addition to obligations surrounding the attorney-client privilege, attorneys must also consider their ethical duty of confidentiality. Under Rule 1.6 of the Minnesota Rules of Professional Conduct, a lawyer may not reveal confidential client information without client permission. Much like the attorney-client privilege, this duty of confidentiality continues even after legal representation ends and even after a client has died.

The ethical rules do not carve out a testamentary exception, but the American College of Trusts and Estate Counsel (ACTEC) has provided guidance on this issue. ACTEC suggests confidential information may be disclosed after a client’s death if the client’s personal representative gives consent, or if the decedent had "expressly or impliedly authorized the disclosure." Implied authority may exist if disclosure of confidential information would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention.

Testifying about a will can be a delicate matter, as it involves providing information that may impact the validity of the document. It is important to seek advice when information related to the representation of an estate planning client is sought. This includes a request for file materials, a subpoena or a request for your testimony, irrespective of how that request is made. If you err in disclosing client information, it can result in serious consequences. Therefore, it is essential to ensure that you have proper legal representation and guidance throughout the process.

If you find yourself in this situation, we highly recommend contacting your carrier.  Minnesota Lawyers Mutual does not sublimit subpoena coverage. Malpractice insurance can provide coverage for defense costs, settlements, and judgments in the event of a claim, which can help protect your business and your reputation.

## A Safety Net is Not a Hammock

The Harmless Error rule does not erase the formal requirements for executing a will. While it does provide some flexibility in the execution of a will, it is crucial to ensure that the will fully complies with the necessary legal formalities. If there are any questions or challenges related to a will you have drafted, it is best to consult with an experienced attorney who can help you navigate the process.

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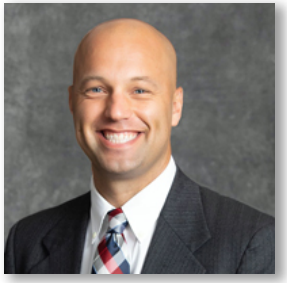

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