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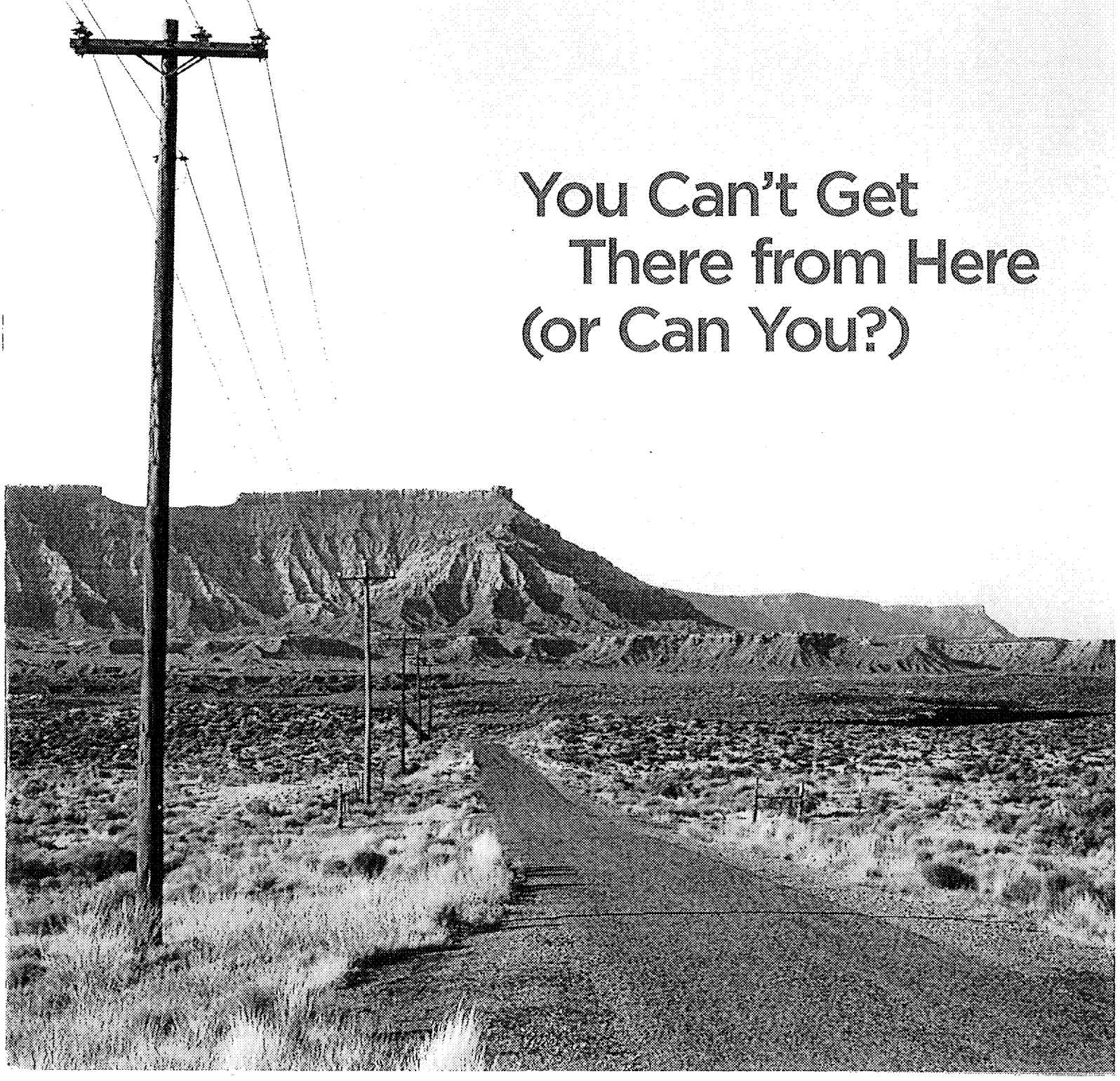
You Can't Get There from Here (or Can You?)

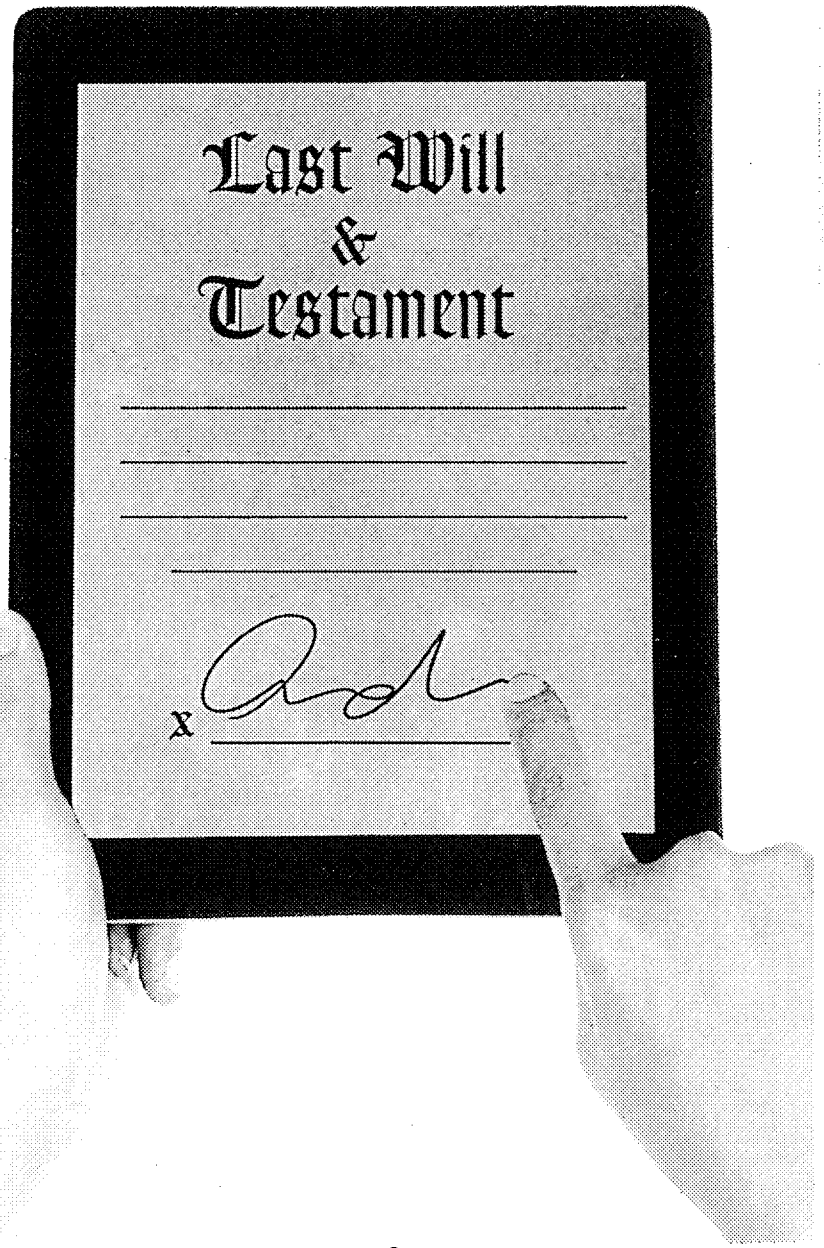


What's in a Name?

What's in a name? That which we
call a rose
By any other name would
smell as sweet.
Romeo & Juliet
(Act II, sc. 2, ll. 43–44)

Writings Intended as Wills

By Anthony R. La Ratta and Melissa B. Osorio



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What is a will, but the sum of its formalities? By some other name, would it be so valid? In recent years, the definition of the term "will" has changed dramatically. The type of writing necessary to create a valid will is evolving, and courts are moving away from adherence to strict compliance. Probate courts across the country, faced with everything from DVDs to post-it notes, are admitting to probate these nontraditional "documents" as writings intended as wills.

This trend away from strict formalities has developed in large part by the adoption of section 2-503 of the Uniform Probate Code in 1990. The UPC was originally promulgated in 1969 (last amended and revised in 2010). See Unif. Probate Code, Prefatory Note at 24 (amended 2010). Historically, the execution of a valid will required strict compliance with certain statutory formalities. With the adoption of UPC § 2-503, however, there is now a statutorily created exception for writings that contain harmless execution errors or mistaken terms. Roger W. Andersen, *Understanding Trusts & Estates* 56–57 (LexisNexis, 4th ed. 2009). This doctrine is known by various names, including, but not limited to, "dispensing power," "excused non-compliance," and most commonly, "harmless error." Id. The adoption of the harmless error doctrine is changing the landscape of estate litigation and bringing new meaning to the term "last will and testament."

The Formalities

Traditionally, courts required literal compliance with Wills Act formalities and automatically invalidated defectively-executed wills. See *Allen v. Dalk*, 826 So. 2d 245, 248 (Fla. 2002) (holding that, although decedent signed numerous duplicate originals of her living will and her durable power of attorney, her will nonetheless was invalid because she failed to sign it); *Coyne Will*, 37 A.2d 509, 510 (Pa. 1944) (finding that Wills Act, 20 Pa. Cons. Stat. Ann. § 191, required testator's signature at end of will and not at top); *Fann v. Fann*, 208 S.W.2d 542, 544

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(Tenn. 1948) (declaring will invalid because attesting witnesses, though they signed will in front of testator, failed to sign in front of each other); *Orrell v. Cochran*, 695 S.W.2d 552, 552 (Tex. 1985) (denying will to probate because witness signed where testator should have and testator signed only self-proving affidavit attached to will).

The Wills Act, which has been adopted in some form in all 50 states, generally requires three main formalities for attested wills: (1) written terms, (2) the testator's signature, and (3) attestation by two witnesses. See Restatement (Second) of Property: Donative Transfers § 33.1 (1992) (citing each state's variation of Wills Act). In the past, these formalities have served several purposes. For instance, formalities protect the testator from mistake, fraud, and undue influence. The ceremonial aspect of execution also serves a ritual value, impressing on testators the seriousness and importance of making a testamentary disposition. Finally, these formalities provide courts with reliable evidence that the purported will is genuine. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 7–13 (1941) (discussing purposes of Wills Act formalities). Together, these formalities work to preserve the testator's intentions and to give effect to his or her will after the testator has died.

The UPC, similar to the Wills Act, delineates the basic formal requirements for a will. UPC § 2-502 states in relevant part that a will must be:

> (1) in writing;
>
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
>
> (3) either:
>
> > (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgement of the will; or
> >
> > (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.

UPC § 2-502 (amended 2010).

Liberalization of Formalities

Even before the emergence of the harmless error doctrine, there has been a gradual liberalization of strict formalities. The doctrine of substantial compliance, unlike the harmless error doctrine, does not completely abandon formalities. See generally John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 513–14 (1975). Under the doctrine of substantial compliance, so long as the document reflects the testator's intent, a technical defect in the formal execution of the document will not invalidate it. Although in most states, this doctrine is nonstatutory, for years courts have invoked it in certain circumstances when not all formalities have been met.

In New Jersey, the case of *In re Ranney*, 589 A.2d 1339 (N.J. 1991), held that a nonholographic will might be admissible to probate even though the witnesses did not sign an attestation clause. In discussing the differences between self-proving affidavits and attestation clauses, the New Jersey Supreme Court noted that the legislature envisioned a will, including the attestation clause, as being independent from a self-proving affidavit. Id. at 1343. Thus, signatures of the witnesses on the self-proving affidavit, but not on an attestation clause, do not literally comply with the requirements of N.J. Stat. Ann. § 3B:3-2.

The New Jersey Supreme Court found, however, that a will may be admitted to probate under circumstances in which it does not literally comply with the statutory attestation requirements if there was substantial compliance. Id. at 1341–43. The court reasoned that "courts and scholars have determined that substantial compliance better serves the goals of statutory formalities by permitting probate of formally-defective wills that nevertheless represent the intent of the testator." Id. at 1343–44.

The record in *Ranney* suggested "that the proffered instrument was the will of Russell Ranney, that he signed it voluntarily, that [the witnesses] signed the self-proving affidavit at Russell's request, and that they witnessed his signature." Id. at 1346. The court remanded the case for a plenary hearing because the party objecting to the probate of the will questioned whether Russell "actually signed" the document. The court held, however, that, if the trial judge conducted a hearing and was satisfied by clear and convincing evidence that the execution of the will substantially complied with the statutory requirements, the will could be admitted to probate.

Harmless Error

Unlike substantial compliance, which proposes that a document meets some, but not all, statutory elements and is therefore *close enough* to pass as a valid will, the doctrine of harmless error ignores the traditional statutory elements and focuses entirely on whether the testator intended the document to be effective as his or her last will and testament. UPC § 2-503, adopted in several states, treats a noncomplying will

> as if it had been executed in compliance with [UPC § 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 his [or her] formerly revoked will or of a formerly revoked portion of the will.

UPC § 2-503 (amended 2010).

The majority of states have rejected the UPC § 2-503 harmless error doctrine in favor of strict compliance with the statutory requirements to create a valid will. At least six states, however, have adopted the UPC's harmless error doctrine in full. These states include Hawaii, Michigan, Montana, New Jersey, South Dakota, and Utah.

Four other states have adopted a variation of the harmless error doctrine. These states are California, Colorado, Ohio, and Virginia.

As the harmless error doctrine is still a relatively new concept, there is scant case law to illustrate the doctrine or to provide extensive guidance for its application. The following are a few significant cases that have interpreted the harmless error doctrine.

In Michigan, a testator executed a valid will but later decided to alter the disposition of her property by giving her residence and 160 acres of property to a family friend, Charles Russell. *In re Estate of Southworth*, No. 297460, 2011 Mich. App. LEXIS 1245, at *2 (Mich. Ct. App. 2011). The testator consulted an attorney for estate planning advice and told her attorney that she already had a will but that she wished to slightly change the disposition of her property, that is, she wanted Russell to receive her residence and 160 acres of land after she died. Id. Her attorney created a quitclaim deed in accordance with the testator's wishes and witnessed her sign the deed. Id. at *2–*3. The testator stored both the deed and the will in her safe. Id. at *7.

Although the deed was an invalid amendment to her preexisting will because it was never delivered or executed, the Michigan Court of Appeals upheld the deed as an amendment under its own statutory version of the harmless error doctrine. Id. at *8. Under this standard, the court found clear and convincing evidence of the testator's intent to grant Russell

States That Adopted the UPC § 2-503 Harmless Error Doctrine in Full	
Hawaii	Haw. Rev. Stat. Ann. § 560:2-503
Michigan	Mich. Comp. Laws Serv. § 700.2503
Montana	Mont. Code Ann. § 72-2-523
New Jersey	N.J. Stat. Ann. § 3B:3-3
South Dakota	S.D. Codified Laws § 29A-2-503
Utah	Utah Code Ann. § 75-2-503

States That Adopted a Variation of the UPC § 2-503 Harmless Error Doctrine		
California	Cal. Prob. Code § 6110(c)(2)	Deviates from the UPC by omitting UPC § 2-503(2), (3), and (4), meaning that California's harmless error doctrine will not cure defective revocations, alterations, or revivals.
Colorado	Colo. Rev. Stat. § 15-11-503	Adopts the language of UPC § 2-503 but adds that this remedy "shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse."
Ohio	Ohio Rev. Code Ann. § 2107.24	Deviates from the UPC by altering the language so that a defective will can only be cured if a probate court, after holding a hearing, finds clear and convincing evidence of all three of the following: (1) The decedent prepared the document or caused the document to be prepared; (2) The decedent signed the document and intended the document to constitute the decedent's will; and (3) The decedent signed the document in the conscious presence of two or more witnesses.
Virginia	Va. Code Ann. § 64.2-404	Adopts the language of UPC § 2-503 but adds that this remedy "may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and [also adds that this remedy] is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties."

her home and acres of land on her death notwithstanding her failure to execute a valid amendment: the testator had consulted her attorney for estate planning advice; she informed the attorney that she had a will but wished to give Russell some of her property in a quitclaim deed; she signed the deed in front of her attorney; and she stored the deed with the will in her safe. Id. at *7–*8. In addition, she never altered or destroyed either document despite offers by another attorney to help in estate planning. Id. at *8–*9. Based on this evidence, the appellate court upheld the will and affirmed judgment in favor of Russell. Id. at *9.

In California, a testator attempted to create a new will to replace his previous one. *Estate of Stoker*, 122 Cal. Rptr. 3d 529 (Ct. App. 2011), review denied, No. 5192197, 2011 Cal. LEXIS 5337 (May 18, 2011). The testator lacked the requisite two witnesses' signatures, and therefore, the new will was deemed defective. Id. at 531. The California Court of Appeals nevertheless upheld the new will under California's harmless error doctrine and affirmed the trial court's finding that there was clear and convincing evidence that the testator intended the document to be his will. Id. Though he lacked two witnesses' signatures, two witnesses were present when he executed his will. Id. at 533. Both witnesses saw him sign the will and verified that the will was genuine. Id. One of the witnesses testified that at the time the decedent was discussing his estate plan, he asked her to get pen and paper so he could dictate the terms of his new will. Id. at 532. She wrote the document "word for word" from his dictation. He then looked at it, signed it in front of both witnesses, and stated that this was his last will and testament. The two witnesses also saw him urinate on his previous will and then burn it. Id. Both the appellate and trial courts found that these facts established clear and convincing evidence that the testator intended the document to be his last will despite his failure to obtain two witnesses' signatures. Id. at 534. In addition, the court rejected the appellants' argument that the harmless error doctrine does not apply to handwritten nonholographic wills because there was no statutory language that justified such a limitation. Id.

Recently, an Ohio court had to address a case of first impression concerning the creation of an electronic will, specifically a will written on a Samsung Galaxy tablet computer because no paper or writing instrument was available. *In re Estate of Javier Castro, Deceased*, Slip Op., No. 3871, Journal 331 (Ohio Ct. Com. Pl. (Probate Division, Lorain County) June 19, 2013). In *Castro*, the testator was informed that he needed a blood transfusion but declined for religious reasons. He discussed preparing a will with two of his brothers. Because they did not have any paper or writing instrument, one of his brothers suggested that the will be written on his Samsung Galaxy tablet. The other brother wrote on the tablet what the testator wanted in the will, and each section was read back to the testator. The testator was later transported to the hospital and signed the will on the tablet later that day in front of his two brothers. A third witness, a cousin, arrived shortly thereafter, at which time the testator acknowledged in the cousin's presence that the testator had signed the will on the tablet.

The Ohio court found that the document prepared on the tablet constituted a "writing" and that it was "signed" as defined by Ohio law. Specifically, the court found that all three requirements of Ohio Rev. Code Ann. § 2107.24 were proven by clear and convincing evidence: the decedent signed the will; he intended the document to be his last will and testament; and he signed the will in the presence of two or more witnesses. The court admitted the electronic will to probate.

Ehrlich

Perhaps the most liberal application of the harmless error doctrine to date has been invoked by the New Jersey Appellate Division in *In re Estate of Ehrlich*, 47 A.3d 12 (N.J. Super. Ct. App. Div. 2012), appeal dismissed, 64 A.3d 556 (N.J. 2013). (Although the *Ehrlich* decision was appealed to the New Jersey Supreme Court as of right based on the dissent, it was dismissed by stipulation of the parties on April 26, 2013.) The Appellate Division upheld the probate of a copy of an unsigned document as a valid writing intended as a will.

Decedent Richard Ehrlich was a trust and estate attorney who practiced in New Jersey for over 50 years. At his death, his only heirs or next of kin were his deceased brother's three adult children—Todd and Jonathan Ehrlich and Pamela Venuto.

The material facts were undisputed. The decedent had not seen or had any contact with Todd or Pamela in over 20 years, but he did maintain a relationship with Jonathan. In fact, the decedent told his closest friends that Jonathan was the person to contact if he became ill or died and that Jonathan was the person to whom the decedent would leave his estate.

Jonathan learned of his uncle's death nearly two months after his passing. Jonathan then located a copy of a purported will in a drawer near the rear entrance of the decedent's home. He filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, objected.

The document proffered by Jonathan was described by the Appellate Division as follows:

> [It] is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, however, include, in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H. W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as

contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.

Id. at 14.

The purported will provided $50,000 to Pamela, $75,000 to Todd, 25% of the residue to a trust for the benefit of a friend, Kathryn Harris, and 75% of the residue to Jonathan.

It was "undisputed that the document was prepared by the decedent and just before he was to undergo life-threatening surgery." Id. On the same date as the proffered will—May 20, 2000—the decedent also executed a power of attorney and living will, which were both witnessed by the same individual. As with the purported will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. Id. at 15.

The evidence established that, years after drafting these documents, the decedent acknowledged to others that he had a will and wished to delete the bequest to his former friend, Kathryn Harris. Nevertheless, no later will was ever found.

After discovery, the parties cross-moved for summary judgment. The trial court granted Jonathan's motion and admitted the document to probate. The court reasoned:

> First, since Mr. [Richard] Ehrlich prepared the document, there can be no doubt that he viewed it. Secondly, while he did not formally execute the copy, his hand written notations at the top of the first page, effectively demonstrating that the original was mailed to his executor on the same day that he executed his power of attorney and his health directive is clear and convincing evidence of his "final assent" that he intended the original document to constitute his last will and testament as required both by *N.J.S.A.* 3B:3-3 and [*In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 310, 3 A.3d 1258 (App. Div. 2010)].

Id. at 15.

On appeal, the Appellate Division articulated the issue as "whether the unexecuted copy of a purportedly executed original document sufficiently represent[ed] decedent's final testamentary intent to be admitted into probate." Id. at 15.

Citing to the legislative history of N.J. Stat. Ann. § 3B:3-3 and *Macool*, 3 A.3d 1258, the Appellate Division continued:

> Thus, *N.J.S.A.* 3B:3-3, in addressing a form of testamentary document not executed in compliance with *N.J.S.A.* 3B:3-2, represents a relaxation of the rules regarding formal execution of Wills so as to effectuate the intent of the testator. This legislative leeway happens to be consonant with "a court's duty in probate matters . . . 'to ascertain and give effect to the probable intention of the testator.'" As such, Section 3 dispenses with the requirement that the proposed document be executed or otherwise signed in some fashion by the testator.

Id. at 17 (citations omitted).

The court explained that N.J. Stat. Ann. § 3B:3-3 "places on the proponent of the defective instrument the burden of proving by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent, and was thereafter assented to by the testator." Id. at 18.

The Appellate Division then noted that the decedent undeniably prepared and reviewed the challenged document. In disposing of his entire estate and making specific bequests, the purported will contained both a level of formality and expressed sufficient testamentary intent. As the motion judge noted, in its form, the document "[was] clearly a professionally prepared will and complete in every respect except for a date and its execution." Moreover, as the only living relative with whom the decedent had any meaningful relationship, Jonathan, who was to receive the bulk of his uncle's estate under the purported will, was the natural object of the decedent's bounty. Id. at 15.

The court then turned to whether the decedent "gave his final assent" to the document:

> Clearly, decedent's handwritten notation on its cover page evidencing that the original was

> sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates—the "Last Will and Testament" of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, "[e]ven if the original for some reason was not signed by him, through some oversight or negligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament."

Id.

The appellate court also noted that, as late as 2008, the decedent "repeatedly orally acknowledged and confirmed the dispositionary contents therein to those closest to him in life." Id.

The court further concluded that the fact that the document was only a copy of the original sent to the decedent's executor was not dispositive, because N.J. Stat. Ann. § 3B:3-3 does not require that the document be an original. The court determined that the evidence was compelling on the testamentary sufficiency of the document, so as to rebut any presumption of revocation or destruction because of the absence of the original. Id. at 19.

One of the most intriguing aspects of the *Ehrlich* decision is the dissent by the Hon. Stephen Skillman, J.A.D. (retired and temporarily assigned on recall). He concluded, "I do not believe that N.J. Stat. Ann. § 3B:3-3 can be reasonably construed to authorize the admission to probate of an unexecuted will." Id. at 20. In other words, Judge Skillman found that the statute authorized the admission to probate of a defective yet executed will, but not an *unexecuted* will. Interestingly, Judge Skillman also was on the three-judge panel that decided the appeal in *Macool*—and reached a different conclusion in dictum.

In *Ehrlich*, Judge Skillman relied on the legislative history of N.J. Stat. Ann. § 3B:3-3 and the national standards under the UPC. He explained:

> Although I was on the panel that decided *Macool*, upon further reflection I have concluded that that opinion gives too expansive an interpretation to N.J.S.A. § 3B:3-3; specifically, I disagree with the dictum that seems to indicate a draft will that has not been either signed by the decedent or attested to by any witnesses can be admitted to probate, provided the putative testator gave his or her "final assent" to the proposed will.

Id. at 23.

Judge Skillman stated that the proper standards for the case at bar were those dealing with lost wills and that he would have remanded the matter for proceedings under those standards. Id. at 24.

Meanwhile, the majority opinion addressed Judge Skillman's dissent as follows:

> Our dissenting colleague, who participated in *Macool*, retreats from its holding and now discerns a specific requirement in Section 3 that the document be signed and acknowledged before a court may even move to the next step and decide whether there is clear and convincing evidence that the decedent intended the document to be his Will, and therefore excuse any deficiencies therein. We find no basis for such a constrictive construction in the plain language of the provision, which in clear contrast to Section 2, expressly contemplates an unexecuted Will within its scope. Otherwise what is the point of the exception?

Id. at 17.

What Is a Will?

The holding in *Ehrlich* demonstrates that the erosion of the requirements of testamentary formalities continues, and even *unsigned* wills may be probated. Although only a handful of states have adopted UPC § 2-503, the shift in American courts toward the harmless error doctrine seems inevitable.

This doctrine has even been endorsed in the Restatement (Third) of Property: "A 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." Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3. In adopting the doctrine, the Restatement explains that there is a growing acceptance of the principle that mistake, whether in execution or in expression, should not be allowed to defeat intention or give rise to unjust enrichment. Id. § 3.3 cmt. b.

But are these exceptions to formalities subsuming the rule? Although the substantial compliance doctrine allowed for mistakes in the execution or expression of a will, harmless error allows for the probate of a document that complies with none of the statutory requirements. The statutory formalities were adopted originally to ensure that the decedent adopted the document as his or her will. Courts enforced those formalities because they presumably preserved testamentary intent—speaking for the testator who can no longer speak for himself or herself. In this new landscape, and with the erosion of these formalities, there is an argument that the testator's intent is in danger of fraud, misinterpretation, and undue influence.

The concept of writings intended as wills can be expected to continue to evolve—and provide fertile ground for estate litigation—in those cases involving nontraditional testamentary "documents." Undoubtedly, states and courts will continue to grapple with the question: What is a will? ■