

Minnesota Enacts “Harmless Error” Rule Relaxing Formalities That Govern the Execution of Wills

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On April 15, 2020, Minnesota became the latest state to enact the "Harmless Error" rule into law.[1] The new law relaxes traditional formalities that govern the execution of wills and other will modifications created between March 13, 2020 and February 15, 2021. The law effectively recognizes that social distancing during the COVID-19 pandemic could make it difficult to satisfy traditional execution formalities, and it empowers courts to recognize wills and will modifications as valid if there is "clear and convincing evidence" the testator intended the document to be controlling. While the new law is a well-intentioned response to the COVID-19 crisis, it is not difficult to imagine future disputes over wills and will modifications executed without traditional formalities during these uncertain times.

Traditional Will Signing Formalities

In order to be valid under Minnesota law before the Harmless Error rule was adopted, a will or will modification had to be: 1) in writing; 2) signed by the testator or another individual at the testator's direction; and 3) signed by two witnesses who could verify they witnessed the testator's signature. These formalities had several purposes, including to prevent fraud and abuse, and to ensure the testator understood the importance and finality of the document. For obvious reasons, social distancing during the COVID-19 pandemic will make it difficult for testators to meet all of these requirements, and particularly the requirement that two witnesses sign and verify they witnessed the testator's signature.

The Harmless Error Rule

Under the new Harmless Error rule, Minnesota courts are empowered to recognize a will or will modification as valid as long as there is "clear and convincing" evidence the testator intended the document to be controlling, even if it fails to meet one of the traditional requirements. The law is immediately effective and applies to wills and will modifications executed between March 13, 2020 and February 15, 2021.

How Will the Harmless Error Rule Be Applied in Practice?

It remains to be seen how Minnesota courts will apply the Harmless Error rule in practice, particularly as to documents created during a time when government officials encouraged people to practice social



distancing. At this stage, however, a few notable trends have emerged in other states that have adopted the rule, which allow us to make a few predictions:

1. A document that does not adhere to traditional formalities is more likely to be challenged by a beneficiary who is disinherited or unhappy with the document. The burden of proof will be on the proponent of the document to demonstrate, by clear and convincing evidence, that the testator intended the document to be controlling.
2. The clear and convincing evidence standard is a high bar for anyone seeking to validate a document that does not adhere to traditional formalities. Accordingly, testators should adhere to traditional formalities whenever possible.
3. When adhering to the traditional formalities is not possible, a testator or the proponents of a document should develop as much evidence as they can to demonstrate the testator intended the document to be controlling. Although not required, best practice might include documenting the reason why traditional formalities could not be followed and, perhaps, why the testator had to create the document at that time.
4. Courts are more likely to invoke the Harmless Error rule to validate a document when deviations from traditional execution formalities are minor — e.g., one witness signature instead of two; no witness signatures, but two individuals who testify they watched the testator sign the document in their presence). The more deviation there is, the more challenging it will be for proponents of the document.

As noted above, the Harmless Error rule is a well-intentioned response to the COVID-19 pandemic, but wills and will modifications promoted under the rule are likely to be the subject of disputes down the road. In order to avoid these disputes, individuals seeking to execute new wills or will modifications who cannot adhere to traditional execution formalities should proceed with caution and are strongly encouraged to consult with an attorney to ensure their testamentary intentions will be carried out.

If you or a client plans to execute a will or will modification, please consult with Brian Dillon; Amy Erickson; Litigation and Dispute Resolution Practice Group Chair Matt Jacober; Trust, Estate and Legacy Planning Practice Group Chair Courtney Conrad; or your regular Lathrop GPM contact so that we can help ensure the document will be accepted by the courts.

[1] Other states that have adopted the Harmless Error rule include: California, Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah and Virginia.