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In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron

Mark Glover*

Abstract

In Irresolute Testators, Clear and Convincing Wills Law, Professor Jane Baron draws attention to a conflict between the mechanics of the law of wills and the realities of testation. Baron observes that the law of wills is designed to be used as a tool by resolute and rationale testators to communicate their intent regarding the distribution of property upon death. However, the law's archetypical testator does not represent the many real testators who are irresolute and irrational, those possessing incoherent and only partially formed thoughts regarding the disposition of their estates.

Based upon the disconnect between the law's paradigm of resolute will-making and the irresoluteness of testation in the real world, Baron argues that reforms that have given probate courts discretion to correct mistakes in testation do not function appropriately. For instance, Baron argues that the harmless error rule, which allows courts to excuse defects in a testator's compliance with will-execution formalities when the testator's intent is established by clear and convincing evidence, does not meaningfully limit probate courts' discretion to correct mistakes. Specifically, she argues that many courts are concerned with not only the technical mistakes of resolute testators but also the more troubling mistakes of irresolute testators, and consequently, these courts overreach the boundaries of the harmless error rule.

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This essay acknowledges Baron's insight regarding the tension between the law and reality but questions whether this tension renders the harmless error rule and its clear and convincing evidence standard ineffective. More particularly, this essay argues that, despite potential overreaching by some courts, the clear and convincing evidence standard likely operates in the way that reformers intended and that the harmless error rule represents an improvement upon the conventional law of will-execution.

In her insightful new article, *Irresolute Testators, Clear and Convincing Wills Law*,¹ Professor Jane Baron sheds light on an often overlooked tension between the law of wills and the realities of testation. She suggests that the law “contemplates a coldly rational, choosing testamentary self for whom wills rules are a means for furthering self-determined ends.”² However, she observes that “many . . . testators . . . do not seem to correspond to th[is] model.”³ “These testators,” Baron explains, “cannot bring themselves to make final decisions about their property”;⁴ instead, they “have ambiguous, fluid intentions.”⁵ The law’s paradigmatic testator, who is unerring, rational, and resolute, therefore stands in stark contrast to the many real testators, who are erring, irrational, and irresolute.

To illustrate the law’s model testator, Baron focuses on the issue of will-authentication.⁶ Under the conventional

1. Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3 (2016).

2. *Id.* at 8.

3. *Id.*

4. *Id.* For a discussion of why recognition of one’s mortality might make it difficult for the testator to make estate planning decisions, see Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 434–38 (2012). For a discussion of how will-execution formalities might alleviate the emotional toll of death anxiety, see generally Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012).

5. Baron, *supra* note 1, at 29.

6. Baron also devotes attention to the issue of correction of mistaken

law's rule of strict compliance, probate courts distinguish authentic wills from inauthentic wills by relying solely upon a set of prescribed formalities.⁷ If a will is written, signed by the testator, and attested by two witnesses, the court determines that the testator intended the will to be legally effective.⁸ Conversely, if a purported will does not comply with these formalities, the court determines that the testator did not intend the will to be legally effective.⁹ Thus, the conventional law envisions a decisive testator who carefully and deliberately uses the formalities of will-execution to communicate her fully formed intent to the probate court.

The law has retained its assumption of resoluteness in reforms to the way it authenticates wills. Whereas under conventional law, probate courts conclusively presume that the testator did not intend a noncompliant will to be legally effective, the Uniform Probate Code (UPC) recognizes the harmless error rule, which grants courts discretion to overlook will-execution errors.¹⁰ In the small minority of

terms in wills. *See id.* at 14–15 (discussing one argument that “the law should be prepared to correct the error if the error is proved to a high degree of certainty”).

7. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 153 (9th ed. 2013) (discussing wills formalities).

8. *See* Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J. L. REFORM 335, 363–66 (2016) (explaining that under conventional law, compliance with the prescribed formalities is not conclusive evidence of a will's authenticity).

9. *See id.* at 343 (“When the court applies the rule of strict compliance, it invalidates a will if the testator failed to comply with any of the prescribed formalities.”).

10. *See* UNIF. PROBATE CODE § 2-503 (2010)

Although a document or writing added upon a document was not executed in compliance with [the prescribed formalities], the document is treated as if it had been executed in compliance . . . if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will

The precursor to the UPC's harmless error rule was Professor John Langbein's substantial compliance doctrine. *See generally* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (discussing the

jurisdictions that has adopted the UPC's reform,¹¹ when the testator leaves behind a will that does not comply with the prescribed formalities, the court can consider extrinsic evidence that suggests the testator's noncompliance was the product of mistake and that she truly intended the will to be legally effective.¹² Simply put, the harmless error rule transforms the conventional law's conclusive presumption into a rebuttable one.¹³

The harmless error rule maintains the law's paradigm of resoluteness, as it assumes that the testator had a fixed, fully formed intent but simply failed to communicate that intent in the way the law dictates. Although the reform acknowledges that a testator might err in the way she communicates her intent, it does not contemplate a testator whose intent was amorphous or uncertain. As Baron summarizes, the harmless error rule is designed to correct only the "technical, innocuous errors" that the law's model testator makes;¹⁴ it "do[es] not address or remedy [the] irresolution" of actual testators who do not conform to the law's archetype.¹⁵

Drawing upon this tension between the law's resolute testator and reality's irresolute testator, Baron critiques the harmless error rule and probate courts' application of it.

doctrine).

11. See DUKEMINIER & SITKOFF, *supra* note 7, at 184 (listing California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia as adoptees).

12. See Glover, *supra* note 8, at 383–84 (“[T]he UPC allows the court to excuse harmless formal defects when evidence suggests that a decedent intended a noncompliant document to constitute a legally effective will.”); see generally John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987) (discussing the harmless error rule as developed in Australian courts).

13. See Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 100–01 (2014) (suggesting that a “law reform movement” is underway that would allow probate courts to take independent evidence of testamentary intent into account).

14. Baron, *supra* note 1, at 7.

15. *Id.* at 26.

Specifically, she takes aim at the clear and convincing evidence standard that is embedded within the rule. Under the rule, the court's discretion to correct will-execution errors is limited to situations in which the testator's intent is established by clear and convincing evidence.¹⁶ Although this evidentiary standard is not clearly defined, it requires greater certainty than the fifty-one percent that is required under the preponderance of the evidence standard, which is typically used in civil litigation, but less than the near one-hundred percent certainty that is required under the criminal law's reasonable doubt standard.¹⁷ When applied in the context of the harmless error rule, the clear and convincing evidence standard directs the probate court to overlook a will-execution error only when it is fairly certain that the testator intended a noncompliant will to be legally effective.

The clear and convincing evidence standard is meant to serve as a limit on the court's discretion to excuse will-execution defects. The official comments to the UPC's harmless error rule explain: "By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence . . . , [the harmless error rule] imposes procedural standards appropriate to the seriousness of the issue."¹⁸ In essence, the procedural safeguard of the clear and convincing evidence standard restricts the cases to which the court's discretion applies to only those in which the testator's mistake is clear. Under conventional law, the probate court had no discretion to excuse will-execution defects, and therefore no limitation was needed. Once the law grants courts discretion, however, policymakers must decide how great that discretion should

16. UNIF. PROBATE CODE § 2-503 (2010).

17. Glover, *supra* note 8, at 399–400.

18. UNIF. PROBATE CODE § 2-503 cmt.

be. In this regard, the proponents of reform believed that limiting the court's discretion through the clear and convincing evidence standard would serve two important functions: (1) it would appropriately allocate the risk of incorrect determinations of a will's authenticity; and (2) it would minimize litigation regarding the authentication of wills. Baron doubts whether the clear and convincing evidence standard meaningfully serves either of these functions.

The first important function that reformers intended the clear and convincing evidence standard to serve is the allocation of risk between an erroneous finding of authenticity and an erroneous finding of inauthenticity. The harmless error rule's primary goal is to prevent the invalidity of clearly authentic wills due to technical formal defects.¹⁹ The idea is that courts can judge the authenticity of wills based upon extrinsic evidence and can thereby avoid incorrect determinations of inauthenticity. However, once courts are granted the discretion to evaluate the authenticity of wills, the possibility arises that they will exercise that discretion incorrectly.²⁰ In particular, the harmless error rule presents the risk of two types of error. First, a false-negative outcome is produced when the court fails to exercise its discretion to excuse a formal defect when, in fact, the will is authentic. Second, a false-positive outcome is produced when the court exercises its discretion to overlook a formal defect when, in fact, the will is inauthentic.²¹ Recognizing the possibility of both types of error, proponents of reform anticipated that the clear and convincing evidence standard would guide courts to excuse

19. See Glover, *supra* note 8, at 388 (“[The harmless error rule] grants probate courts the discretion to excuse will-execution errors related to the attestation requirement.”).

20. See *id.* at 384 (“[P]robate courts will not always correctly judge the authenticity of a noncompliant will.”).

21. See DUKEMINIER & SITKOFF, *supra* note 7, at 153 (describing false-negatives); Glover, *supra* note 8, at 338 (defining false-positives).

will-execution errors in the most obvious cases of mistake and to avoid exercising their discretion in more difficult cases.²² In this way, the clear and convincing evidence standard allocates risk of error between false-positive outcomes and false-negative outcomes.

Although Baron acknowledges that the clear and convincing evidence standard might play a role in sorting harmless errors from more problematic errors,²³ she questions whether considerations other than clear and convincing evidence are driving the decisions in some cases. Specifically, Baron suggests that “[i]t seems possible that the testators’ conformity to the will-making paradigm is more important . . . than the evidentiary standard.”²⁴ She notes that the cases in which courts seem most willing to excuse will-execution defects involve testators who had a clearly formed intent regarding the disposition of property after death and who largely complied with the formalities of will-execution.²⁵ Thus, the more similar a testator is to the law’s unerring, rational, and resolute archetype, the more likely the court is to excuse a will-execution defect.²⁶ Based upon this correlation, Baron observes, “[I]f these facts are determinative, it’s hard to see what work the clear and convincing standard is doing.”²⁷

Baron correctly perceives the connection between the

22. See Glover, *supra* note 8, at 400 (“[T]he higher standards of proof could encourage courts to use their best efforts to correctly decide the issue of a will’s authenticity . . .”).

23. See Baron, *supra* note 1, at 33 (contrasting two cases and suggesting that “the clear and convincing evidence standard does seem to be doing some important work in both cases”).

24. *Id.* at 55.

25. See *id.* at 54–55 (stating that many cases “ultimately turn on whether the evidence of the decedent’s intent with respect to the document in question is clear and convincing”).

26. See *id.* at 55 (“Paradoxically, the closer the testator conforms to the paradigm, the less careful the courts seem to be about openly confronting evidentiary weaknesses.”).

27. *Id.*

law's paradigmatic testator and the harmless error rule, but she incorrectly concludes that conformity to the paradigm is altogether unrelated to the harmless error calculus and the clear and convincing evidence standard. In particular, the level of formality that the testator's defective will displays is integral to the operation of the harmless error rule. Instead of courts wholly ignoring the testator's attempted will-execution when applying the harmless error rule, reformers anticipated that the degree to which the testator complied with the prescribed formalities would itself serve as evidence of the testator's intent.²⁸ Therefore, the level of formality of the testator's attempted will-execution is inversely related to the amount of extrinsic evidence that probate courts need to excuse a will-execution defect. More drastic deviations from the prescribed will-execution process necessitate greater extrinsic evidence of intent, and lesser deviations require less extrinsic evidence. The UPC expressly acknowledges this connection, when it suggests that "[t]he larger the departure from [the prescribed] formality, the harder it will be to satisfy the Court that the instrument reflects the testator's intent."²⁹ Thus, the correlation between a testator's conformance with the law's will-execution paradigm and a probate court's willingness to excuse a will-execution defect is entirely consistent with how reformers envisioned the harmless error rule and its clear and convincing evidence standard would operate.

The second important function that reformers intended the clear and convincing evidence standard to serve is the suppression of litigation. Once probate courts are granted discretion to overlook formal defects, the concern arises that proponents of noncompliant wills will flood the courts with

28. See Langbein, *supra* note 12, at 52 ("The larger the departure from the purposes of Wills Act formality, the harder it is to excuse a defective instrument.").

29. UNIF. PROBATE CODE § 2-503 cmt. (2010).

harmless error litigation.³⁰ In turn, the cost of overburdening the probate system could outweigh whatever benefits the harmless error rule might produce. The proponents of reform envisioned that the clear and convincing evidence standard would limit the court's discretion to such an extent that litigation rates would remain low. In particular, by placing a relatively high burden on the proponent of a defective will, reformers intended the clear and convincing evidence standard to weed out frivolous litigation involving little chance of success.³¹

Like her critique of the allocation of risk function, Baron's take on the clear and convincing evidence standard's role in suppressing litigation is more skeptical than critical. Baron points out: "There is no way to ascertain whether the [reported] cases are typical of disputes arising around wills generally or mistaken wills particularly. It is possible that the reforms are working as their proponents expected, deterring litigation in all but the most contested cases."³² Implicit in this statement is that it is also possible that the clear and convincing evidence standard is not deterring litigation. Baron's point is that whatever the reported cases suggest about the rates of harmless error litigation, we do not know what impact the harmless error rule has had on the probate system in general.

Baron is right to point out that the reported cases do not give us a clear picture of the numerous unreported cases that flow through the probate system each year.

30. See Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 631 (2014) ("[B]y channeling all valid wills into substantially the same form, the strict compliance requirement minimizes the court's discretion in evaluating the genuineness of wills and consequently increases certainty regarding which wills are valid and which are not. The increased certainty suppresses litigation involving formal wills . . .").

31. See Baron, *supra* note 1, at 22–23 (noting that a higher standard of proof deters potential plaintiffs from bringing suits based on insufficient evidence).

32. *Id.* at 28.

Nonetheless, it is possible to dive into unreported records that are located in probate courts across the country. And although there is certainly more empirical probate research to be done,³³ the initial results are promising for harmless error advocates. For instance, in a recent empirical study of probate records from Alameda County, California, Professor David Horton examined 571 cases of decedents who died in 2007.³⁴ California enacted its harmless error rule during the time period covered by Horton's research, and consequently, harmless error litigation rates could not be measured using the entirety of Horton's sample.³⁵ The portion of the sampled cases that overlapped the enactment of the harmless error rule, however, produced no instances of harmless error litigation. Horton explains, "I did not uncover a single litigant who attempted to invoke the rule—a finding that might belie doomsday claims about harmless error overburdening courts."³⁶ As Baron correctly points out, even if the rates of harmless error litigation are low, we do not know for certain that the clear and convincing evidence standard is the mechanism that is deterring litigation.³⁷

33. See generally Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343 (2016).

34. See David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1120–22 (2015) (finding that low harmless error litigation rates comports with the experience of other jurisdictions); UNIF. PROBATE CODE § 2-503 (2010) cmt. ("Experience in Israel and South Australia strongly supports the view that a dispensing power like [the harmless error rule] will not breed litigation.").

35. See Horton, *supra* note 34, at 1139

California lawmakers approved the bill that authorized harmless error on July 1, 2008. At that time, 138 (24 percent) of the estate in my spreadsheet had closed. By January 1, 2009, when the statute became effective, that number had grown to 293 (51 percent). Thus, my date provide a partial glimpse of the relevant period.

36. *Id.*

37. See Baron, *supra* note 1, at 28–29 n.115

The reformer claim that the clear and convincing evidence standard would deter trivial litigation assumes that potential contestants, familiar with the newly-reformed law, will decide whether or not to litigate based on a rational assessment of their chances of prevailing. [However,] [t]here is little empirical evidence to support the claim

Nevertheless, it is also true that we do not know that the clear and convincing evidence standard is not the driving force behind low litigation rates. Thus, at the very least, Horton's research suggests that it is possible that the clear and convincing evidence standard is serving its intended purpose.³⁸

Whatever skepticism Baron might have regarding the effectiveness of the clear and convincing evidence standard in limiting the exercise of discretion by courts that are committed to applying the harmless error rule as reformers intended, her primary criticism of the standard involves the application of the rule by courts that are concerned about both technical will-execution errors and non-technical mistakes. In particular, Baron argues that the clear and convincing evidence standard does not serve its restrictive purpose because the harmless error rule does not account for the irresoluteness of everyday testators. She observes that, "[t]he clear and convincing evidence standard addresses only the technical errors of the self-reliant choosing testamentary self. But at least some courts care also about the more complicated errors of the vulnerable, irresolute testamentary self. These courts push against the reforms' boundaries."³⁹ Put differently, Baron argues that probate courts sometimes exercise discretion that falls outside the bounds of the harmless error rule because they want to correct the inattentiveness and indecisiveness of irresolute testators in addition to the technical errors of the resolute. Based upon this overreaching, Baron concludes that "the clear and convincing evidence standard has not,

that decisions of prevailing at trial, as opposed to intensity of feelings based on family circumstances.

38. See Simmons, *supra* note 33, at 362 ("Functionalists predicted that allowing imperfectly executed wills when a heightened burden of proof was met would result in a flood of litigation. Professor Horton's sampling overlaps California's adoption of the harmless error rule, but he found no contests involving the harmless error rule. So much for . . . a flood.")

39. Baron, *supra* note 1, at 8.

and will not, function as a serious limit on mistake correction.”⁴⁰

Baron’s point is well taken. It is true that courts have not applied the harmless error rule consistently and within the bounds that reformers intended.⁴¹ But what is not as clear is how problematic this inconsistency and overreaching is. First, Baron acknowledges that the corpus of harmless error case law is limited due to the rule’s infancy.⁴² Therefore, it is entirely possible that, as courts gain greater familiarity with the harmless error rule and experience with its application, judicial restraint and decisional consistency will develop. Even if it continues, however, the overreaching about which Baron is concerned does not necessarily indicate that the harmless error rule’s clear and convincing evidence standard is failing to constrain courts in the exercise of discretion. Indeed, without the clear and convincing evidence standard, probate courts might step outside the bounds of the harmless error rule even farther than they do now.

But regardless of whether the clear and convincing evidence standard is in some way serving its restrictive purpose, the most important question is whether the overreaching that is occurring is tolerable. More particularly, the issue is whether a harmless error rule with nebulous bounds is preferable to the conventional law’s rule of strict compliance. Because the overarching goal of the law in this area is to fulfill the testator’s intent,⁴³ this question

40. *Id.*

41. See Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 603–11 (2016) (providing examples of the inconsistent application of the harmless error rule).

42. See Baron, *supra* note 1, at 28 (“The universe of case law is not particularly large.”).

43. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L.J. 643, 644 (2014) (“[T]he American law of succession facilitates, rather than regulates, the carrying out of the decedent’s intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent’s

should be answered by evaluating which method of will-authentication fulfills the intent of testators to the greatest extent at an acceptable rate of litigation. In this regard, proponents of reform have persuasively argued that the harmless error rule is better than the rule of strict compliance in fulfilling the testator's intent,⁴⁴ and, as explained previously, the initial research suggests that the reform does not increase litigation rates.⁴⁵ To be clear, this does not suggest that the harmless error rule as applied by overreaching courts is the best mechanism for fulfilling the intent of both resolute and irresolute testators.⁴⁶ Instead, it simply means that the reform is preferable to the conventional law.

It is also worth noting that the type of overreaching about which Baron is concerned should not be surprising. As explained previously, under the conventional law, courts are directed to authenticate wills based solely on formal compliance.⁴⁷ The court's stated task is purely to evaluate formal compliance, not to independently assess the will's authenticity. However, recognizing that some testators make mistakes that can undermine the fulfillment of their intent, courts sometimes overstep the conventional law's bounds, deeming wills to be in compliance with the prescribed formalities even when formal defects are clear.⁴⁸

probable intent.”).

44. See generally, e.g., Langbein, *supra* note 10 (explaining why it is beneficial to allow for some errors in execution if decedent's intent is clear); Langbein, *supra* note 12 (same). For an overview of the reform movement's arguments, see generally Glover, *supra* note 8.

45. See *supra* notes 34–38 and accompanying text (showing how litigation has not seemed to increase when applying the harmless error rule).

46. Elsewhere, I have argued that courts should apply the harmless error rule more consistently and predictably. For a fuller discussion of these arguments, see generally Glover, *supra* note 41.

47. See *supra* notes 7–9 and accompanying text (discussing the importance of formalities in conventional wills law and the rule of strict compliance).

48. See DUKEMINIER & SITKOFF, *supra* note 7, at 171 (“To avoid . . . harsh result[s], some courts have occasionally excused or corrected one or another innocuous defect in execution.”).

The overreaching of courts within the context of the harmless error rule is therefore an extension of this previous overreaching. Now that some courts are authorized to fulfill the testator's intent through the harmless error rule, they have simply found a new frontier through which to push the limits of the law. Thus, it is both tolerable and expected that the clear and convincing evidence standard does not establish a well-defined and impermeable boundary for the exercise of judicial discretion.

In sum, Baron's article draws much needed attention to the tension between the law's paradigmatic testator, who is resolute and rational, and the many actual testators, who are irresolute and irrational. In particular, she persuasively argues that greater attention should be devoted to how the law accounts for irresolute testators. As explained above, however, the harmless error rule's clear and convincing evidence standard is not necessarily an appropriate target for criticism in this regard. Indeed, whatever problems the clear and convincing evidence standard might have, the harmless error rule and its clear and convincing evidence standard are preferable to the conventional law's rule of strict compliance.