

“de facto” Wills and the Harmless Error Rule - Part 2

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Virginia maintains a signature requirement even for “de facto” wills

With its added signature requirement, Virginia’s version of the Harmless Error Rule differs materially from the proposed uniform version of the Rule. The first part of the Virginia statute, [Section 64.2-404\(A\)](#), expressly permits writings not executed in compliance with the statutory attestation requirements [i.e., without all the whistles and bells] to be admitted to probate under the relevant circumstances. It was and remains the primary purpose of the Harmless Error Rule’s adoption and continued application.

Virginia’s version of the Rule adds the language of [Section 64.2-404\(B\)](#), which (except in two very discreet situations) refuses to protect as harmless error “compliance with any requirement for a testator’s signature” and, in this respect, differs materially from the uniform code provision. The uniform code’s version of the Harmless Error Rule would overlook as “harmless” in appropriate circumstances not only the attestation requirements but also the signature requirement itself. Virginia legislators were collectively unwilling to be nearly as forgiving in this regard. With the addition of Section 64.2-404(B) and its signature requirement, the General Assembly clearly circumscribed the list of potentially “harmless errors” capable of being overlooked to allow an otherwise non-compliant will document to be accepted for probate.

In one of several litigated matters relating to the Estate of Marvin Sacks, an Arlington circuit judge had occasion to address multiple facets of the statute, including not only alterations to an existing will but also to the Section 64.2-404(B) signature requirement itself. At the threshold, the respondent in Sacks sought to prevent the probate of a “de facto will” by challenging the testator’s failure to execute the document in compliance with all the attestation whistles and bells. As the Arlington court recognized, however, although Section 64.2-404 specifically references a “testator’s signature” requirement, it would be self-defeating for the statute to require “execution” of the writing in question by the testator as would otherwise be mandated by Section 64.2-403 (i.e., the whistles and bells section). Had the General Assembly intended the “testator’s signature” reference in Section 64.2-404(B) to mean a document “executed in compliance with § 64.2-403,” they would have thereby negated the purpose of the Harmless Error Rule itself.

Failure to satisfy the attestation whistles and bells can only be corrected if a judicial ruling is sought within one year from the testator’s death.

The right afforded under the Harmless Error Rule statute to have a court intervene to deem a non-compliant will legally enforceable has a limited lifespan. The protections otherwise afforded under Section 64.2-404(B) only survive the testator by one year. There is no exception. With the addition of subpart B to the Harmless Error Rule statute, the General Assembly saw fit to impose a time limit, what is known as a statute of limitation, by which time a proponent of a non-compliant will could otherwise seek the help of the court in having such a will declared legally enforceable is limited to the first anniversary of the testator’s death. In other words, an attestation error, otherwise deemed harmless and correctable under the Rule, ceases to be harmless one year after death.

What constitutes clear and convincing evidence in this context?

Prior to the 2007 adoption of the Harmless Error Rule in Virginia, all wills and changes to wills had to meet all the statutory attestation whistles and bells to be legally enforceable. Section 64.2-404 opens the door to allowing potentially harmless errors from preventing enforceability but affords such allowances only if the proponent of a will without all the requisite whistles and bells meets an elevated burden of proof regarding the testator’s intentions reflected therein and the signature appearing thereon.

So what evidence is needed to meet the elevated clear and convincing standard? I include here a non-exhaustive list of factors to consider when evaluating whether a document without all the attestation whistles and bells might nevertheless be upheld as a “de facto” will.

One should consider evidence of the following factors along with any other evidence tending to support or refute whether the document in question truly reflects the decedent’s testamentary intentions (and not merely draft considerations) at the time the document was made: (i) the preparation and signing of the document itself (how, where, and under what circumstances did the document come into being and/or come to be signed); (ii) witnesses to the de facto will (did they formally “witness” (i.e., sign)

or were they mere coincidental observers); (iii) the temporal proximity of the de facto will to the onset of testator's terminal condition or death; (iv) questions or concerns regarding capacity of the testator (including age of the testator and possible undue influence); (v) motivation(s) and/or (dis-)incentive(s) for the de facto will proponent to lie; (vi) the level of independence of the source of information to be considered; and (vii) the status of the documentation of testator's most recent prior known testamentary disposition(s).

Additionally, evidence of consistencies and/or inconsistencies with the following are all potentially relevant considerations as well: (i) the de facto will provision(s) compared to the testator's previously articulated intentions; (ii) the manner of document creation compared to prior testamentary dispositions (e.g., typed or holographic; physical or mental impairments impacting writing); (iii) the manner of document creation compared to current changed circumstances (e.g., typed or holographic; physical or mental impairments impacting writing); and/or (iv) the manner of maintaining/storing the de facto will be compared to prior known testamentary disposition documentation (e.g., nightstand v. bank safe deposit box).

10 “clear and convincing” evidentiary factors:

- Testator Capacity/Undue Influence
- Testator Age/Health
- Signature Circumstances
- Witnessing Formalities
- Temporal Proximity – Will/Death
- Proponent's Self-interestedness
- Source(s)' Independence
- Prior Will(s)
- (In)consistencies – time, place, manner, and intent
- Finality

When setting forth one's intentions regarding the disposition of one's property when one dies, certain formalities are expected to be followed, and with good reason. At least two witnesses together in the same place at the same time to observe the signing of a will is not an unreasonable expectation when the resulting document is intended to affect the disposition of property only upon the death of the person willing it to be so. It is, after all, for the testator's own protection that we generally require all the whistles and bells, all the pomp and circumstance, associated with a formal will signing because the testator will not be around to answer questions about their intentions after they are dead – the only time the language of the will actually has any legal impact. When such formalities have all been adhered to, we can be sufficiently certain that the resulting document validly reflects with sufficient certainty the final wishes of the testator. The Harmless Error Rule, as set forth in Virginia Code Section 64.2-404, is there as a safety net for when things don't always go exactly as planned or for circumstances when, despite the best of intentions, people make changes to a will without understanding or appreciating that any such edits might serve to nullify the formalities they had previously paid to achieve.

This work is intended for the non-lawyer wondering whether to involve a lawyer in the preparation of one's will or a change to one previously made (you absolutely should!) and for family members or friends of departed loved ones who discover a document which you think might or could have been an attempt by the dearly departed to express their testamentary wishes in a form and manner that may or may not be legally sufficient to be accepted as the final will of the decedent. If you happened upon this article while conducting online legal research on the subject, I commend you to the prior publication. The earlier piece was intended for legal practitioners, complete with case and statutory citations and cross-references to scholarly sources upon which I relied at the time. Since publishing the original work, I have continued to be involved in cases with ever-evolving fact patterns of situations where proponents and opponents legally battle over the legal enforceability of documents which may or may not have been intended as testamentary dispositions, i.e., will documents seeking to dispose of one's

property at death.