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MATTER OF WILL OF RATCLIFF AND THE NOT-SO-HARMLESS ERROR: A CALL TO CHANGE MISSISSIPPI'S APPROACH TO WILL FORMALITIES

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INTRODUCTION

Death is not the end . . . There remains litigation over the estate.[1]

A will provides a mechanism to dispose of property at death. But costly litigation—or worse, a will's invalidation—often thwart this purpose. The law of probate is state-specific, which leaves jurisdictions with the burden of ensuring that their laws promote rather than defeat the purpose of probate—to honor the testator's intent. Mississippi attempts to recognize this purpose by requiring strict compliance with the statutory requirements for creating a will. This "better safe than sorry" approach errs on the side of invalidity with the hope that denying a non-compliant instrument for probate will prevent fraud and other wrongdoing.

Despite its intention, Mississippi's approach does not conform to the traditional idea of strict compliance; instead, the approach falls somewhere between strict compliance and the Uniform Probate Code's ("UPC") harmless error rule.[2] Courts evaluate each situation on a case-by-case basis which has left attorneys and individuals across the state uncertain as to what the probate process requires. This Article calls for Mississippi to formally adopt the UPC's harmless error rule and change Mississippi's approach to will formalities from the current state of uncertainty to a more uniform standard.

To support this Article's call for change, Part I discusses the background of *Matter of Will of Ratcliff*.[3] This case illustrates probate courts' complex issues and how the current lack of standardization incites confusing, costly, and time-consuming litigation. Part II provides a detailed description of the history of Mississippi probate and its relevance to the court's approach to will formalities. Part III illustrates the analytic maze the Mississippi Supreme Court used in determining the outcome of *Matter of Will of Ratcliff*,[4] and how such an approach hinders—rather than promotes—the probate process. Part IV, the core component of this Article, describes how Mississippi court jurisprudence gravitates toward the harmless error rule and how the state will benefit from formally adopting the UPC approach.

1. John McCrank, *Wealth manager-estate-planning can benefit client and adviser*, REUTERS (July 6, 2010), https://www.reuters.com/article/wealthmanager-estateplanning/wealth-manager-estate-planning-can-benefit-client-and-adviser-idUSN309704020100706.

2. UNIF. PROB. CODE § 2-503 (amended 2019).

3. *In re* of Will of Ratcliff, 315 So. 3d 1025, 1025 (Miss. 2021).

4. *Id.*

I. THE CASE OF MATTER OF WILL OF RATCLIFF

A. Factual Background

In 2012, a confusing mess of litigation ensued between the four children of Mr. George Ben Ratcliff ("Mr. Ratcliff").[5] The litigants were his three biological children (Patricia, Amanda, and Ben Jr.) and his stepson (John Michael), whom Mr. Ratcliff viewed as one of his own.[6] The dispute began in 2007 when Mr. and Mrs. Ratcliff began having health problems.[7] Mr. Ratcliff struggled with the chronic effects of COPD,[8] which wreaked havoc on his pulmonary system and caused him to become very weak.[9] Their daughter, Amanda, moved in to care for both of her parents, but by the end of 2008, Mrs. Ratcliff passed away.

Shortly after her mother's death, Amanda moved out of the family home, but Mr. Ratcliff's health continued to decline. Along with COPD, Mr. Ratcliff suffered from nerve and back pain which, after surgery, required him to remain on pain medication for the rest of his life.[10] Mr. Ratcliff's health continued to decline, including a heart attack that landed him back on the operating table for a stent-placement procedure.[11] Because of this, once Amanda moved out of her father's home, Amanda's half-sister, Patricia, moved in to care for Mr. Ratcliff.[12] At that moment, the family dynamic began to change.

Before Patricia moved into Mr. Ratcliff's home, Amanda and Ben Jr. claimed to have kept in regular contact with their father.[13] However, after Patricia moved into the house, communications between Amanda, Ben Jr., John Michael, and their father ceased.[14] They all blamed Patricia for not allowing them to speak to their father.[15]

In September 2012, Amanda saw her father while running errands for her job.[16] Amanda noticed Mr. Ratcliff's van parked at the local attorney's office, so she pulled into the parking lot and met her father as he tried to exit the vehicle.[17] Amanda said that Mr. Ratcliff was in poor condition, and although he

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5. *Id.* at 1027-28.

6. *Id.;* Appellee's Record Excerpts at 65, *In re* Will of Ratcliff, 315 So. 3d 1025 (2019-CA-1011).

7. *See* Brief of Appellant at 13, *Ratcliff*, 315 So. 3d 1025 (Miss. 2021) (No. 2019-CA-01012), 2020 WL 4476156, at *14.

8. "COPD" stands for "chronic obstructive pulmonary disease" which is a "group of diseases that cause airflow blockage and breathing-related problems." *Chronic Obstructive Pulmonary Disease (COPD)*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/copd/index.html (last visited June 9, 2023).

9. *See* Brief of Appellant, *supra* note 7, at 13.

10. Affidavit of Amanda K. Ratcliff Boyd at 25-26*, Ratcliff,* 315 So. 3d 1025, No. 74-CH1:14-pr-00204-DKH (Miss. Ch. Ct. Nov. 5, 2018). Documents referenced throughout this section can be found at the Mississippi Supreme Court website under the filing entitled "Record Excerpts filed on behalf of Patricia Diane Smith- CORRECTED".

11. *Id.* at 26.

12. *Id.*

13. *See id.*

14. Affidavit of John Michael Eaton at 46-47, *Ratcliff*, 315 So. 3d 1025 (Miss. 2021), No. 74CH1:14-pr-204 (Miss. Ch. Ct. Nov. 2, 2018).

15. Affidavit of Amanda K. Ratcliff Boyd, *supra* note 10, at 26-27.

16. *Id.*

17. *Id.*

tried to speak, his labored breathing made understanding him nearly impossible.[18] Amanda left to continue running errands, but she returned a short while later and expressed her concern to Patricia about her father's health.[19] Patricia responded that their father was "fine" and that they were "tending to something [their father] should have done a long time ago."[20] Unknown to Amanda, at the attorney's office that day, Mr. Ratcliff drafted a new will (his "2013 will") and revoked all prior provisions of his previous 2009 will.

1. The two wills of Mr. George Ben Ratcliff.

Under the first will in 2009, Mr. Ratcliff left each of his children relatively equal portions of his estate.[21] The 2009 will appointed Patricia as the executrix of his estate, and in the event she became unwilling or unable to execute the will, Mr. Ratcliff appointed Ben Jr. to take her place as the contingent executor.[22]

The 2009 will specified how Mr. Ratcliff wished to dispose of his property and began with a prohibition against any conveyance or transfer of the land devised to his children.[23] The prohibition restricted the children from mortgaging or using as collateral any part of the land for a loan or other obligation.[24] Mr. Ratcliff reiterated the importance of this prohibition throughout his will and further added statements that he "specifically prohibited any waiver of the prohibition," and that he "understood and intend[ed] that this provision" would restrict any owner from financing the property or making improvements to the land disposed of in his will.[25]

Among the property disposed of in the 2009 will, Mr. Ratcliff left his daughter Patricia his home, all its contents, and the two acres surrounding it.[26] Mr. Ratcliff then split 100 acres of land between all four of his children, with the caveat that Patricia would receive two acres less than her other siblings since she received the two acres surrounding the house.[27] This 2009 will was valid in all respects but never probated.[28]

In September 2012, after Patricia moved in, Mr. Ratcliff conveyed the 100 acres of land, including his house, to Patricia by warranty deed.[29] This was the same land Mr. Ratcliff divided equally between his children three years prior in his 2009 will. Despite the conveyance of the warranty deed, Mr. Ratcliff purported to devise that same property less than one year later when he executed

18. *Id.*
19. *Id.*
20. *Id.* at 27.
21. Appellee's Record Excerpts, *supra* note 6, at 65-68.
22. *Id.* at 65-66.
23. *Id.* at 66.
24. *Id.* at 66-67.
25. *Id.*
26. *Id.* at 67.
27. *Id.*
28. Memorandum of Staff Attorney for Court at 92, *Ratcliff*, 315 So. 3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Chan. Ct. Nov. 19, 2018).
29. Order Dismissing Caveat and Granting Summary Judgment at 108-16, *In re* Will of Ratcliff, 315 So. 3d 1025 (Miss. 2021), No. 74CH1:15-pr-00074-DKH (Miss. Chan. Ct. Jan. 22, 2019).

his 2013 will.[30] Unlike the 2009 will, the 2013 will not only omitted the prohibition on the use of the property, but it also disinherited each of Mr. Ratcliff's children except for Patricia.[31] A follow-up provision explained that after consideration, Mr. Ratcliff decided to disinherit them, not because of lack of affection, but because he intended to name Patricia and her children as the sole beneficiaries.[32] Mr. Ratcliff reasoned that Patricia and her children provided constant care for him and his property, and "without their love, affection and care" he would not have been able to maintain his property or remain in his home.[33] Mr. Ratcliff passed away in 2013.[34]

B. Procedural History

Before reaching the Mississippi Supreme Court, *Matter of Will of Ratcliff*[35] began as three separate cases.[36] First, Amanda and Ben Jr. filed suit in 2014 ("Deed Case") to set aside the 2012 warranty deed conveying the 100 acres to Patricia.[37] In a separate proceeding ("Will Case"), Patricia petitioned to probate her father's 2013 will.[38] Third, Mr. Ratcliff's stepson, John Michael, then filed suit ("Land Case") against Patricia and claimed an interest in the land deeded to her.[39] The chancery court dismissed all three suits for mootness and failure to state a claim. The history of the Deed Case and Will Case are discussed below. The Land Case is not relevant to this Article.

1. Case 1: The Deed Case.

Shortly after Mr. Ratcliff's death, Amanda and Ben Jr. initiated the Deed Case to set aside the 2012 warranty deed conveying the 100 acres of land to Patricia. They alleged fraud, duress, undue influence, and the incapacity of their

30. *In re* Will of Ratcliff, 315 So. 3d 1025, 1027 (Miss. 2021).

31. Appellee's Record Excerpt, *supra* note 6, at 55-57.

32. *Id.* at 56-57.

33. *Id.*

34. *See Ratcliff*, 315 So. 3d at 1031 (Kitchens, J., dissenting).

35. *Id.* (majority opinion).

36. Each of the three cases arose after Mr. Ratcliff's death. Like here, probate courts must routinely determine the intent of an individual who has already passed away. This Article promotes the idea that Mississippi courts would be better equipped to make this determination in light of clear and convincing evidence of an individual's true intent. The UPC approach would allow Mississippi courts to consider this type of extrinsic evidence and would further promote correct probate determinations within the state.

37. *Id.* at 1031 (Kitchens, J., dissenting).

38. *Id.* at 1031-32.

39. Order Dismissing Caveat, *supra* note 29, at 110-11. Upon learning of the warranty deed that Mr. Ratcliff conveyed to Patricia, Mr. Ratcliff's stepson, John Michael, mailed a letter and asserted an interest in the deeded land. John Michael argued that his grandmother, Hoyte (along with Mr. Ratcliff), owned the property as tenants-in-common. And when his grandmother died, her interest in the property flowed to him since he was her only living heir. John Michael insisted that the warranty deed must fail since it purported to convey interest that did not belong to Mr. Ratcliff. In response to John Michael's allegations, Patricia filed a motion to dismiss the claim because John Michael had no standing to contest the validity of the will since he was neither a beneficiary under the will nor a possible heir of Mr. Ratcliff in the absence of a will. The chancellor found that although the couple were, in fact, tenants-in-common under a 1962 warranty deed, the couple re-executed the deed in 1965 and named themselves as "tenants by the entirety." The couple's ownership of the land as tenants by the entirety meant that, when Hoyte died, her interest automatically passed to Mr. Ratcliff making him the sole owner of the 35-acre tract of land and leaving no interest to John Michael. Since John Michael lacked interest in the land deeded to Patricia, the court dismissed his claim with prejudice.

father.[40] In support of this argument, they offered evidence that Patricia isolated Mr. Ratcliff from the rest of his family and even went so far as to have Amanda arrested when she attempted to visit their father.[41] Amanda and Ben Jr. argued that Patricia used her confidential relationship[42] to exert undue influence over Mr. Ratcliff, which caused him to convey all his property to her.[43] Little did they know that within the two years leading up to Mr. Ratcliff's death, Patricia secured her interest in the land through the warranty deed *and* the terms of the newly-drafted 2013 will.

2. Case 2: The Will Case.

While the Deed Case was pending, Patricia offered Mr. Ratcliff's 2013 will for probate in the Will Case. Three years after the will's admission to probate, Patricia filed a motion to dismiss the Deed Case for mootness since she would receive the property as the sole beneficiary of Mr. Ratcliff's will even if the court found the deed invalid.[44] She based this argument on the fact that the statute of limitations to contest Mr. Ratcliff's will had run, making the will forever binding.[45] The chancellor accepted this argument and dismissed Amanda and Ben Jr.'s claim.

3. The probate errors begin to unfold.

Five months after Patricia filed her motion to dismiss the Deed Case, the chancery court clerk noticed that when Patricia filed Mr. Ratcliff's will for probate three years prior, Patricia mistakenly recorded the 2009 will instead of the more recent 2013 will.[46] This was significant because Amanda, Ben Jr., and John Michael were all beneficiaries under the 2009 will but were disinherited entirely from the 2013 will. A few days later, the chancery court issued a formal order for Patricia, Amanda, and Ben Jr. to show cause why the misfiling error[47] should not be corrected.[48] The court notified the parties of two separate misfilings. First, Mr. Ratcliff's prior 2009 will was recorded in the Book of Wills, as opposed to the more recent 2013 will.[49] Second, the copy of the 2013

40. *Ratcliff*, 315 So. 3d at 1031 (Kitchens, J., dissenting).

41. Affidavit of Amanda K. Ratcliff Boyd, *supra* note 10, at 27; *see also* Appellee's Record Excerpt, *supra* note 6, at 165.

42. Appellee Record Excerpt, *supra* note 6, at 165 (outlining the factors a court considers when determining whether a confidential relationship exists: (1) whether somebody has to be taken care of by others; whether one has a close relationship with another; (3) whether one provided transportation and has medical care provided; (4) whether one is physically or mentally weak; and (5) whether one is of advanced age or poor heath).

43. Transcript of the Proceedings at 164-66, *Ratcliff,* 315 So. 3d 1025, No. 74CH1:14-pr-00204-DKH (Miss. Ch. Ct. Jul. 15, 2019).

44. *Ratcliff*, 315 So. 3d at 1032 (Kitchens, J., dissenting).

45. *Id.*

46. Memorandum of Staff Attorney, *supra* note 28, at 92.

47. The court also ordered the parties to show cause as to why the docket numbers should not be corrected to reflect the proper docket entries of the will.

48. Order to Show Cause Why Filing Errors and Docket Entries Should not be Corrected at 93-95, *Ratcliff*, 315 So. 3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Ch. Ct. Nov. 19, 2018).

49. *Id.* at 94-95.

will that was admitted to probate was incorrectly filed in the Deed Case records instead of its correct location in the Will Case records.[50]

In responding to the court's order to show cause, Patricia "concurred" that the court should make the corrected filings.[51] Amanda and Ben Jr. disagreed and argued that the clerk should not correct the misfilings because it was an uncontradicted fact that the 2013 will was not delivered to the court clerk until November 2018.[52] Amanda and Ben Jr. disputed this because their ability to bring a will contest under Mississippi law depended on whether the court decided to correct the misfiled documents. Specifically, if the court fixed the misfilings, then Amanda and Ben Jr. would be barred from bringing a will contest since the 2013 will would be substituted for the 2009 will, which was filed more than two years earlier; whereas, if the court refused to correct the misfiling, then their will contest would be timely since the 2013 will was not submitted to the court clerk until November 2018.

Amanda and Ben Jr. filed a caveat in the Will Case. They argued that although Patricia filed a petition to probate Mr. Ratcliff's last will in April 2015, the original copy was never filed with the chancery clerk. Since the court clerk never accepted the original will nor recorded it in the Book of Wills, they argued that the statute of limitations to bring a will contest had not run.

The caveat also alleged that Patricia, along with her two children and son-in-law—Sarah, Christopher, and Holmes—[53] had confidential relationships with Mr. Ratcliff, which they used to exert undue influence over him.[54] They claimed that their father "did not have full knowledge of his actions," nor did he exhibit independent consent.[55] In their view, Mr. Ratcliff's newly drafted 2013 will was the direct result of Patricia's undue influence over the incapacitated Mr. Ratcliff, who was "of advanced age and poor health."[56]

In response to the caveat, Patricia filed a motion to dismiss for failure to state a claim because the statute of limitations[57] barred any will contest not brought within two years of offering the will to probate. Patricia argued that regardless of whether the clerk received the original will or whether Patricia accidentally filed the 2009 will instead of the 2013 will, the court nevertheless accepted for probate a copy of the 2013 will more than two years prior.[58]

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50. *Id.* To the outside world, it looked as though the 2009 will (that distributed the property equally to all Ratcliff children) would govern the administration of the estate. But, in reality, the misfiled 2013 will (that disinherited everyone but Patricia and her children) would govern the estate's distribution.

51. Response to Order to Show Cause at 97, *Ratcliff*, 315 So. 3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Ch. Ct. Jan. 8, 2019).

52. Response in Opposition to Order to Show Cause at 99, *Ratcliff*, 315 So. 3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Ch. Ct. Jan. 8, 2019).

53. Patricia's son-in-law is Ben Holmes Jr., but this Article refers to him as "Holmes" for easy reference.

54. Caveat of Amanda Ratcliff Boyd and George Ben Ratcliff, Jr. Against Probate of 2013 Last Will and Testament at 82-83, *Ratcliff*, 315 So.3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Ch. Ct. Nov. 29, 2018).

55. *Id.* at 83.

56. *Id.*

57. MISS. CODE ANN. § 91-7-23 (1972).

58. *See* Response by Patricia Ratcliff Smith to Caveat of Amanda Ratcliff Boyd and George Ben Ratcliff, Jr. at 87, *Ratcliff*, 315 So. 3d 1025, No. 74CH1:15-pr-00074-DKH (Miss. Ch. Ct. Jan. 8, 2019).

Patricia explained that under Mississippi law, "If some person does not appear within two years to contest the will, the probate shall be final and forever binding."[59] As for the remaining allegations, Patricia denied the existence of a confidential relationship or undue influence between her and Mr. Ratcliff.[60]

4. The chancellor resolved all three cases.

In a single order, the court resolved each of the three cases litigated by the Ratcliff family.[61] To decide whether the statute of limitations barred Amanda and Ben Jr.'s will contest, the court analyzed the statutory provision[62] that governed the period to contest a will.[63] Although the statute specified that an interested party may bring a contest against the validity of a will probated without notice, the statute failed to specify what triggered the beginning of the two-year limitations period.[64] To answer this question, the chancellor interpreted the statute to run "from the date of the entry of judgment admitting the will to probate" based on the idea that this interpretation ran parallel to the statutory language of "when a will is 'probated without notice'."[65]

The chancellor found no plea or evidence that justified tolling the limitations period since neither party made an allegation of concealed fraud.[66] Although Patricia mistakenly filed the 2009 will instead of the 2013 will, neither party realized the mistake until November 2018, and there was no evidence that the misfiling was anything other than a mistake.[67] The chancellor concluded that regardless of the mistake in filing, Amanda and Ben Jr.'s claims were barred since they were filed more than two years after the probate of Mr. Ratcliff's will.[68] This finding led the chancellor to dismiss the case.[69] On appeal, the Mississippi Supreme Court upheld the chancellor's decision that the two-year statute of limitations expired before Amanda and Ben Jr. filled their will contest, rendering each of their claims moot.

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59. *Id.*; MISS. CODE ANN. § 91-7-21 (1972).

60. *Id.* at 88. Patricia also denied the existence of a confidential relationship between her children, son-in-law, and Mr. Ratcliff.

61. Order Dismissing Caveat and Granting Summary Judgment, *supra* note 29, at 103-15.

62. MISS. CODE ANN. § 91-7-23 (1972) ("Any person interested may, at any time within two years, by petition, or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been first known or discovered."). In *In re* Will of Fields v. Harris, 570 So. 2d 1202, 1203 (Miss. 1990), the Mississippi Supreme Court interpreted this statutory language to constitute a statute of limitations.

63. Order Dismissing Caveat and Granting Summary Judgment, *supra* note 29, at 106-07; MISS. CODE ANN. § 91-7-21 (1972) governs will contests that are brought before a will is admitted to probate. The chancellor found this statute inapplicable since no party contested the fact that Patricia probated the will before Amanda and Ben Jr. filed their will contest.

64. Order Dismissing Caveat and Granting Summary Judgment, *supra* note 29, at 106.

65. *Id.*

66. *Id.* at 106-07. The court also noted that no interested party was an infant or of unsound mind.

67. *Id.* at 107-08.

68. *Id.* at 108.

69. *Id.*

II. HISTORY OF THE LAW

As technology continues to advance, so too does the interpretation of law. The probate process thrived in Mississippi well before the 1900s, yet the specifics of the process remained undefined.[70] The lack of specifics rarely caused problems until the rapid advancement of technology led courts to question the true meaning of words that existed without definition for so long.[71] The meaning of words seemed to transform overnight, and those that seemed clear became ambiguous such as the word "original." Whether the decision was influenced by the advancement in electronic filing, the natural evolution of words, or something altogether different, the Mississippi Supreme Court held for the first time in 2021 that an original document *or its photocopy* satisfied the statutory language requiring the probate of "original wills."[72]

The court's decision in *Matter of Will of Ratcliff*[73] brought new relevance to the word "original" under Mississippi's probate law and to Mississippi's insistence on strict compliance with will formalities. An analysis of this case reveals how the state supreme court gravitated towards finding harmless error for a non-compliant will but did so under the guise of strict compliance. The remaining background sections unveil the leading approaches to probate law and a historical analysis of Mississippi's probate process. Each section provides context to the Mississippi Supreme Court's interpretation of the word "original" in *Matter of Will of Ratcliff*.[74]

A. The Traditional Concept of Strict Compliance to Will Formalities

Mississippi is steadfast in its traditional roots, including remaining loyal to the historical concept of strict compliance to will formalities.[75] The strict compliance approach presumes that a will is invalid unless it fully complies with the applicable will statute.[76] To satisfy Mississippi's statute,[77] an attested (non-holographic) last will and testament must be: (1) created by a person who is at least eighteen years old; (2) created by a testator of sound and disposing mind;

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70. There is no "inherent or constitutional right to make a will disposing of . . . property." Wilson v. Polite, 218 So. 2d 843, 849 (Miss. 1969). Instead, statutes grant and govern the statutory right to probate a will. *Id*. Because the meaning of words naturally changes over time, litigants rely on the courts to interpret ambiguous language within Mississippi's will statutes. *In re* Will of Fields, 570 So. 2d 1202, 1204 (Miss. 1990) (holding that the word "probate" within the applicable statute referred to the act of the court clerk accepting the will for probate as opposed to the act of closing the estate); Sheehan v. Kearney, 21 So. 41, 41-42 (Miss. 1896) (interpreting the statutory word "written" to include printing, engraving, and lithographs).

71. *See In re* Will of Fields, 570 So. 2d at 1203 (defining the word "probate"); *see also Kearney*, 21 So. at 41-42 (interpreting the statutory word "written" to include printing, engraving, and lithographs).

72. *In re* Will of Ratcliff, 315 So. 3d 1025, 1031 (Miss. 2021).

73. *Id.*

74. *Id.*

75. ROBERT A. WEEMS, MISSISSIPPI PRACTICE SERIES: WILLS AND ADMINISTRATION OF ESTATES IN MISSISSIPPI § 3:5 (3d ed. 2021) (citing Estate of Greer v. Ball, 218 So. 3d 1136 (Miss. 2017) (a provision in a lease was held to be testamentary because it did not convey a vested right but was not effective because the lease/contract did not comply with the statutory formalities required of a will)).

76. Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 598 (2014) (citing JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 171 (9th ed. 2013)).

77. MISS. CODE ANN. § 91-5-1 (1972).

(3) in writing; (4) signed by the testator,[78] and (5) attested by two witnesses. A writing that does not comport with these components will fail, regardless of whether a proponent can establish the testator's intent by clear and convincing evidence.[79] Non-compliance ends any inquiry under the strict compliance rule "no matter how earnestly [a person] may intend and desire to make a will."[80]

Using strict compliance, a probate court relies on the prescribed formalities to determine the will's authenticity instead of the substance of the will.[81] The justification is that a properly executed will presumptively shows that the testator embodied serious, genuine, and authentic testamentary intent.[82] While some advocates believe that adhering to formalities guards against careless mistakes and wrongdoing such as fraud or undue influence,[83] others oppose the rule for allowing harmless errors to defeat testamentary intent.[84] The individuals opposing strict compliance argue that the rule "actually promote[s] litigation, by inciting courts to bend the ostensible rules in a way that make the outcomes hard to predict."[85] In recognizing the competing views and the harsh results of strict compliance, the question arises whether Mississippi's strict compliance doctrine fulfills its purpose of furthering a testator's intent.[86]

B. The Uniform Probate Code's Modern Reform and the Harmless Error Rule

Unlike Mississippi, the UPC explicitly recognizes the harmless error rule,[87] which dispels with formalistic strict compliance.[88] This rule allows a court to excuse noncompliance if a proponent can show by "clear and convincing

78. *Id.* Mississippi's statute of wills allows another person to sign the last will and testament on behalf of the testator as long as the signing occurs in the presence of the testator. *Id.*

79. *In re* The Last Will and Testament of Massingale v. Young, 199 So. 3d 710, 713 (Miss. Ct. App. 2016). To constitute a valid holographic will in Mississippi, a writing must be entirely written by the testator's hand and signed by the testator. MISS. CODE ANN. § 91-5-1 (1972); *In re* Estate of Rowell, 585 So. 2d 731, 734 (Miss. 1991). Mississippi also requires the subscription of a holographic will (i.e., must be signed at the bottom), and anything written below the signature has no testamentary effect and is not considered part of the will. *In re* George's Estate, 45 So. 2d 571, 572 (1950).

80. Wilson v. Polite, 218 So. 2d 843, 849 (Miss. 1969).

81. WEEMS, *supra* note 75.

82. Jane B. Baron, *Irresolute Testator, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 24 (2016).

83. *See Polite*, 218 So. 2d at 849.

84. *See* Mark Glover, *In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron*, 73 WASH. & LEE L. REV. ONLINE 289, 293-94 (2016) ("The harmless error rule's primary goal is to prevent the invalidity of clearly authentic wills due to technical formal defects").

85. 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, 28 (1987).

86. *See Polite*, 218 So. 2d at 849 ("The purpose of statutes prescribing formalities for the execution of wills is not for the purpose of restricting the power of the testator to dispose of his property, but it is to guard against mistakes, impositions, undue influences, fraud, deception, etc., which would divert the property of the testator from those intended by him or her to inherit same.").

87. UNIF. PROB. CODE § 2-503 (amended 2019) ("Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section 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.").

88. *See id.*; *see also* DUKEMINIER & SITKOFF, *supra* note 76, at 174.

evidence" that the testator intended the document to be his or her will.[89] While the UPC sought to update and simplify the probate process, the harmless error approach sought to combat the harsh effect of the strict compliance rule.[90] The UPC operates on the premise that strict compliance often defeats a testator's intent despite its purpose of furthering the power of disposition.[91] Today, eleven states have adopted a version of the harmless error rule seen in the UPC.[92] This Article seeks to encourage Mississippi to become the twelfth.

The harmless error rule is justified because humans inevitably make errors.[93] Strict compliance invalidates wills for any deviation from the will formalities even when it is undisputed that the testator intended the document to be a will. The harmless error rule, on the other hand, will excuse non-compliance to the will formalities if there is clear and convincing evidence of the testator's intent.[94] The clear and convincing evidence requirement allows a probate court to use extrinsic evidence to avoid incorrect probate determinations.[95]

The practical effect of the Mississippi Supreme Court's holding in *Matter of Will of Ratcliff*[96] is to move the state toward the UPC's harmless error approach on an ad hoc basis. However, instead of expressly adopting the harmless error rule, the court justified its holding under the guise of strict compliance. In doing so, the court's holding produces confusing case precedent and calls into question other well-established areas of probate law, such as the procedure for probating lost and foreign wills.

C. A Historical Analysis of Mississippi's Probate Process

In Mississippi, an individual can probate a will in common or solemn form. Probate in solemn form requires the proponent of a will to notify and involve all "interested persons" when the will is offered for probate.[97] This section focuses on the second way to probate a will–in common form. This approach is less formal and only requires a "presentation of the original will" along with the affidavits of two attesting witnesses.[98] The presentation of the original will for

89. *See also* Dukeminier & Sitkoff, *supra* note 76, at 174; Baron, *supra* note 82, at 5. The Restatement (Third) of Property followed the UPC in adopting its own version of the harmless error rule finding that an error in the execution of a will is excused "if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 (AM. L. INST. 2015).

90. Baron, *supra* note 82, at 5.

91. Baron, *supra* note 82, at 4-5.

92. DUKEMINIER & SITKOFF, *supra* note 76, at 176.

93. Baron, *supra* note 82, at 64 ("Let us return to the reform' premise: it is only human to err.").

94. *Id.* at 25 ("The 'central insight' underlying the harmless error rule is just the mirror image: '[T]he law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one'." (citing John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 500 (1975))); UNIF. PROB. CODE § 3-503 (amended 2019).

95. Glover, *supra* note 84.

96. *In re* Will of Ratcliff, 315 So. 3d, 1025, 1031 (Miss. 2021).

97. MISS. CODE ANN. § 91-7-19 (1972); *see* JEFFREY JACKSON, MARY MILLER & DONALD CAMPBELL, MISSISSIPPI PRACTICE SERIES: ENCYCLOPEDIA OF MISSISSIPPI LAW § 32.5 (3d ed. 2021).

98. MISS. CODE ANN. § 91-7-23 (1972); *see* JACKSON, MILLER & CAMPBELL, *supra* note 97, § 32.5.

probate is vital because probate in common form lacks the mandatory notice and inclusion of parties that exist for probate in solemn form.[99]

The lack of a notice requirement for probate in common form is at the crux of the issue regarding Patricia's incorrect filing of Mr. Ratcliff's older 2009 will. The no-mandatory-notice requirement made the other Ratcliff children responsible for investigating the probate of this will. However, even further investigation would not have given the other children proper notice because the records indicated that the 2009 will (that left each sibling relatively equal portions of the estate) was offered for probate instead of the 2013 will that disinherited everyone but Patricia and her children. The lack of notice and inability to contest the will because of a misfiled document conflicts with Mississippi's probate jurisprudence and raises the question of whether proper procedure occurred in the probate of Mr. Ratcliff's will.

1. A historical overview.

In 1972, the Mississippi legislature enacted the current statutory provisions to govern the probate process, including a provision setting forth the two-year limitations period to contest a will.[100] In *In re Will of Fields*,[101] the Mississippi Supreme Court defined the meaning of the statutory word "probate"[102] and answered the question of what triggered the start of the two-year limitations period.[103] There, the court held that the word probate "refers to the act of the clerk accepting the will."[104] Despite this interpretation, questions still arose about what *exactly* constituted "the will?" Namely, whether the clerk must accept the original, non-copy version of a testator's will or if the clerk may accept a photocopy. The Mississippi Supreme Court faced this question in *Matter of Will of Ratcliff* for the first time.[105]

In *Matter of Will of Ratcliff*,[106] the court held that the statutory language "original will" allowed a proponent to submit a copy of a will for probate instead of the original. The court's holding contradicts the historical background requiring the original–not a copy–version of a will.[107] Absent from the court's decision is a discussion of the policy behind the procedural safeguard of

99. *See* MISS. CODE ANN. §§ 91-7-19, 91-7-23 (1972).

100. MISS. CODE ANN. § 91-7-23 (1972) ("Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced by the will of the testator or not. If the person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. In case of concealed fraud, the limitations shall commence to run at, and not before, the time when such fraud shall be, or with reasonable diligence might have been, first known or discovered.").

101. *In re* Will of Fields, 570 So. 2d 1202, 1204 (Miss. 1990).

102. MISS. CODE ANN. § 91-7-23 (1972).

103. *In re* Will of Fields, 570 So. 2d at 1203.

104. *Id.*

105. *In re* Will of Ratcliff, 315 So. 3d 1025, 1031 (Miss. 2021).

106. *Id.* at 1031.

107. *See* WEEMS, *supra* note 75, § 3.13 ("If someone were to make a photocopy of an original, signed will, the product would be a copy of the signed will. Technically, this copy could not be probated. If no original could be found, the proper course of action for the proponent would be to probate a lost will, with the copy presented in evidence as proof of the contests and execution of the last will.").

requiring the original will for probate purposes instead of a photocopy. Mississippi's process and procedure for dealing with foreign and lost wills shines a light on this policy.

2. The policy behind probating an original will in the context of foreign or lost wills.

Within the law of probate, courts often label wills based on their surrounding circumstances. For example, Mississippi courts label wills as "foreign" when a testator executed the will while "domiciled in a state other than Mississippi at his or her time of death."[108] Before 1880, Mississippi courts required a party to first probate the foreign will in the state of its execution before offering a copy of the will for probate in Mississippi.[109] Illustrating this point is *Bailey v. Osborn*,[110] where the court "was without jurisdiction to grant probate of an original will of a person domiciled at the time of his death in a sister state" because the will was not first probated in the domicile of the testator.[111] Later decisions began to refute this requirement,[112] until the Mississippi legislature finally addressed the issue.[113]

Before Mississippi's modern statutory scheme was enacted, the statutes governing probate were codified in what was then called the "Hemingway's Code."[114] Under the amended Hemingway's Code, which is identical to Mississippi's current foreign will statute,[115] the legislature set forth the guidelines for the probate of foreign wills[116]:

Authenticated copies of wills, proven according to the laws of any state of the union, or of the territories, or of any foreign country, and affecting the or disposing of property within this state, may be admitted to probate in the proper court; but such will may be contested as the original might have been if it had been executed in this state, or the original will may be proven and admitted to record here.

This new language allowed two methods for an individual to probate a foreign will in Mississippi. The first method allowed an individual to "probate the will elsewhere and then probate an authenticated copy of the will in Mississippi"; the second method allowed an individual to "probate the will in Mississippi before doing so elsewhere."[117] In *Heard v. Drennan*,[118] the court explained that the first method's purpose was to get rid of the requirement for

108. *In re* Estate of High, 19 So. 3d 1282, 1287 (Miss. Ct. App. 2009) (citing ROBERT A. WEEMS, *Wills and Administration of Estates in Mississippi*, § 3:14 (3d ed. 2003)).

109. *See* Bailey v. Osborn, 33 Miss. 128, 129-30 (1857).

110. *Id.* at 129.

111. Bolton v. Barnett, 95 So. 721, 724 (Miss. 1923) (citing *Osborn*, 33 Miss. 128 at 130).

112. *Id.*; *see* Still v. Woodville, 38 Miss. 646, 650-52 (1860); *see also* Slaughter v. Garland, 40 Miss. 172, 177-81 (1866).

113. *See* MISS. CODE ANN. § 91-7-33 (1972).

114. *Barnett*, 95 So. at 724 (quoting Hemingway's Code § 1669 (1917) (current version at § 91-7-33)).

115. MISS. CODE ANN. § 91-7-33 (1972).

116. *Barnett*, 95 So. at 724 (quoting Hemingway's Code § 2003, Code of 1906).

117. *In re* Estate of High, 19 So. 3d 1282, 1288 (Miss Ct. App. 2009) (citing *Barnett*, 95 So. 721 at 725).

118. Heard v. Drennan, 46 So. 243, 243 (Miss. 1908).

"formal proof of the due execution of the will . . . where an authenticated copy is produced showing that it has [already] been proven" in another state.[119] Thus, the Mississippi Supreme Court historically allowed for substituting a photocopy rather than the original will, but only when another state court proved the validity of the testator's original will.

Alternatively, in *In re Estate of High*,[120] the court tackled the second method, which allowed for the probate of a will in Mississippi before doing so elsewhere.[121] There, a testator executed a will while living in Missouri, but the will disposed of property located in Mississippi.[122] After the testator's death, his next of kin could not locate the original will, so they offered a photocopy of the lost-foreign[123] will for probate in a Mississippi chancery court.[124] The court concluded that regardless of whether the will was foreign, "when the testator's original will cannot be produced, but only a photocopy can be located," the court must treat the situation as if the will were lost.[125] Accordingly, the elements necessary for probating a lost will are:[126] (1) proof that the will exists; (2) evidence that the will was lost or destroyed; (3) proof of the will's contents; and (4) evidence that the testator did not destroy the will with the intent to revoke it.[127] *In re Estate of High* illustrates that the Mississippi Supreme Court traditionally allowed for the probate of a will's photocopy but only when a party met the elements required for probating a lost will.

III. *MATTER OF WILL OF RATCLIFF* IN THE MISSISSIPPI SUPREME COURT

The Mississippi Supreme Court, in *Matter of Will of Ratcliff,*[128] faced an issue of first impression for the court. That is, whether presenting a non-original will for probate is sufficient to trigger the start of the limitations period. The circumstances of this case gave a unique perspective on the role of an original will in the probate process. While courts routinely accept certified copies of foreign, lost, stolen, or destroyed wills, none of these labels described Mr. Ratliff's will.[129] Instead, Patricia submitted for probate a non-original will even though she claimed possession of the original document the entire time. The Mississippi Supreme Court affirmed the chancellor's decision to excuse this non-

119. *Id.* at 244.

120. *In re Estate of High*, 19 So. 3d at 1282.

121. *See Drennan*, 46 So. at 244.

122. *In re Estate of High*, 19 So. 3d at 1285.

123. This will was "foreign" because it was executed in Missouri rather than Mississippi. And the will was "lost" because the next of kin could not find the original version of the will after the testator's death. *Id.* at 1284-87.

124. *Id.* at 1288.

125. *Id.* (quoting *In re* Estate of Mitchell, 623 So. 2d 274, 275 (Miss. 1993)).

126. *Id.*

127. *Id.*

128. *In re* Will of Ratcliff, 315 So. 3d 1025, 1025 (Miss. 2021).

129. *See* Order Dismissing Caveat, *supra* note 28, at 3, 5-6. This order explains that Patricia possessed the original copy the entire time and mistakenly filed the incorrect 2009 will with the court. *Id.* Once Patricia realized her mistake, she filed the original 2013 will with the court in 2018. *Id.* Since the original will was always in Patricia's possession, the will was neither lost, stolen, nor destroyed.

compliance of submitting a non-original will.[130] In fact, both the chancellor and the state supreme court found that Patricia's procedural error was actually in compliance with the state's wills act. This holding contradicts Mississippi's traditional strict compliance approach to the will formalities.[131]

A. The Majority Unveiled Its Meaning of the Word "Original"

Writing for the court's majority, Justice Coleman affirmed the chancery court's decision and found that the statute of limitations to bring a will contest barred all claims by Amanda and Ben Jr..[132] Since the court in *In re Will of Fields*[133] had already interpreted the meaning of the word "probate," the majority's opinion focused on whether the submission of a non-original will under these circumstances triggered the statute of limitations period.[134] The court answered this question in the affirmative and relied primarily on Mississippi Code Section 91-7-32[135] and Rule 6.15 of the Mississippi Uniform Chancery Court Rules[136] to justify its holding.

The majority first considered the issue of whether a non-original will provided "interested parties" with proper notice.[137] The court relied on *In re Estate of Winding*[138] to resolve the issue.[139] There, the court rejected the plaintiff's claim of concealed fraud to toll the two-year limitations period to bring a will contest.[140] Winding's original will was never found, so the estate executrix admitted a copy of the will to probate.[141] Under the will, Winding did not mention her oldest son, who predeceased her. After the estate closed, the child of the predeceased son (Winding's granddaughter) sued the executrix for concealed fraud and failure to notify all "interested parties" of the will's admission to probate.[142] The granddaughter claimed that this concealed fraud tolled the limitations period and made her will contest timely.[143] The court

130. *Ratcliff*, 315 So. 3d at 1030-31.

131. *See* Estate of Greer v. Ball, 218 So. 3d 1196, 1200 (Miss. Ct. App. 2016) (finding a lease that purported to transfer property upon death did not satisfy the statute of wills, and thus did not constitute a valid will); *see also In re* The Last Will and Testament of Massingale v. Young, 199 So. 3d 710, 714-15 (Miss. Ct. App. 2016) (holding that regardless of whether there was testamentary intent, a purported nonholographic will is invalid if the document does not comply with the statute of wills). Both cases illustrate Mississippi's traditional insistence on compliance with the will statute.

132. *Ratcliff*, 315 So. 3d at 1030-31.

133. *In re* Will of Fields, 570 So. 2d 1202, 1203 (Miss. 1990).

134. *Ratcliff*, 315 So. 3d at 1029-30.

135. MISS. CODE ANN. § 91-7-31 (1972) ("All original wills, after probate thereof, shall be recorded and remain in the office of the clerk of the court where they were proved, except during the time they may be removed to any other court under proper process, from which they shall be duly returned to the proper office. Authenticated copies of such wills may be recorded in any county in this state.").

136. MISS. UNIF. CH. CT. R. 6.15 ("Every petition to probate a Will must have a copy of the Will attached thereto.").

137. *Ratcliff*, 315 So. 3d at 1028.

138. *In re* Estate of Winding, 783 So. 2d 707, 709 (Miss. 2001).

139. *Ratcliff*, 315 So. 3d at 1028-29.

140. *In re Estate of Winding*, 783 So. 3d at 711.

141. *Id.* at 708.

142. *Id.* at 708-09. The granddaughter argued that since she would take by intestate succession absent a will, then she was an interested party that required notice.

143. *Id.* at 709.

agreed with the contention that an interested party, to bring a will contest, included heirs at law who would take the deceased's property without a valid will.[144] The court similarly recognized that a party to an earlier will is necessary for a later will contest.[145] However, the court found the application of either rule irrelevant because the issue before the court was not whether the party was excluded from a proper will contest. Instead, the issue was whether the will contest was timely filed.[146]

In line with the court's opinion in *Winding*,[147] the majority in *Matter of Will of Ratcliff* quickly conceded that the facts of the case were "a matter of clear statutory language" regardless of whether the parties would inherit under intestate succession or prevail in a will contest.[148] Under Mississippi's statutory language, since Patricia probated the will in common form, no law required her to give notice or join any party not named in the will.[149] Since her notice procedure was proper, the remaining question was whether the limitations period had run.[150]

Amanda and Ben Jr. argued that failing to submit the original 2013 will for probate tolled the limitations period.[151] The court rejected this argument and offered its interpretation of when a party must present the original will during the probate process.[152] Notably, the court held that when Mississippi Code Sections 91-7-23 and 91-7-31 are "read together, the clear statutory language provides that probate is not final until after the two-year statute of limitations has run; *only then must the original will be recorded*."[153] This interpretation led the majority to affirm the chancellor's holding in favor of Patricia.[154]

B. The Dissent Rejected the Majority's Holding

Writing for the dissent, Justice Kitchens rejected the majority's view because it "under[took] the reinvention of Mississippi's longstanding law and procedure of testamentary probate."[155] The dissent opposed the notion that a chancery court may probate a will even though the original will was never submitted or examined.[156] To support this argument, Justice Kitchens explained

144. *Id.* (citing Hoskins v. Holmes Cnty. Cmty. Hosp., 99 So. 570, 573 (Miss. 1924)).

145. *Id.* (citing Estate of Schneider, 585 So. 2d 1275 (Miss. 1991)).

146. *Id.*

147. *Id.* at 711.

148. *Ratcliff*, 315 So. 3d at 1029.

149. *Id.* (citing MISS. CODE ANN. §§ 91-7-23, 91-7-31 (1972)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (emphasis added).

154. The majority relied on the above language from the chancery court opinion, as well as the earlier Mississippi Supreme Court case of *In re* Will of Fields, 570 So. 2d 1202, 1203 (Miss. 1990) to find that the chancellor did not err in the handling of the statute of limitations issue. The court then clarified that its prior holding in *In re* Estate of Kelly, 951 So. 2d 543, 547 (Miss. 2007) did not consider the question of whether the statute of limitations begins to run absent a filing of the original will, and thus, was inapplicable to the issue at hand.

155. *Ratcliff*, 315 So. 3d at 1032 (Kitchens, J., dissenting).

156. *Id.*

that the recordation of a will differs from the initial step of "*filing* the original will [in the chancery court] along with the petition for probate."[157] Probate is the process of proving a will, which requires the chancellor to inspect the original will to determine whether the document appeared to be what the petitioner said it was.[158] The foundational purpose of a probate proceeding is to establish a document as the unique writing of the testator, which must be done with the submission of an original will, as opposed to an unproven copy or photograph.[159] Justice Kitchens urged that a chancellor "is in no position to determine whether a writing is the will of the testator/testatrix unless shown the [original] writing itself."[160] This rule is standard in Mississippi, and the chancellor must probate original wills unless there is an authenticated copy of a foreign will or if the original will is lost, stolen, or destroyed.[161]

The dissent warned that the majority's opinion called into question the presumption of revocation in the absence of an original will.[162] When a testator's will cannot be found, there is a presumption that the testator destroyed the will to revoke it. The purpose of this rule is to protect against wrongdoing, which explains the additional requirements for probating a lost, stolen, or destroyed will.[163] Justice Kitchens believed that the procedural safeguards[164] used for lost wills should apply in all circumstances where a proponent offers a photocopy of a will for probate.[165] In the dissent's view, Amanda and Ben Jr.'s caveat and will contest filed in 2018 was timely because the statute of limitations did not begin to run until Patricia offered the original will to the court in November 2018.[166]

IV. AN ANALYSIS OF MISSISSIPPI'S NEED FOR CHANGE

Although grim, death is inevitable. A foundational fear of probate law is that the judicial system will become overburdened by lawsuits resulting from

157. *Id.* at 1033.

158. *Id.* at 1033-34. This process is evidenced by MISS. CODE ANN. § 91-7-7 (1972), which requires the court to prove the "due execution of the will." Justice Kitchens claimed that another clear statutory indicator that the original will is required is that the chancery court must issue letters testamentary to a qualified executor named in a will "admitted to probate here on an authenticated copy or on the original . . . ." MISS. CODE ANN. § 91-7-35 (1972).

159. *Id.* at 1038. Justice Kitchens explained that the "necessity of submitting the original will with a petition for probate is a fundamental, longstanding precept that is recognized by several learned treatises that set forth the procedures for probating wills" within the state.

160. *Id.* at 1034.

161. *Id.* at 1034-36. Justice Kitchens cited *In re* Estate of Kelly, 951 So. 2d 543, 547 (Miss. 2007) to illustrate the idea that prior case law recognized the requirements for probating a will, including "attach[ing] the *original* will to the petition, as well as affidavit of the two attesting witnesses stating that the decedent was of sound and disposing mind at the time he executed the will."

162. *Id.* at 1036.

163. *Id.* at 1036-37 (citing Warren v. Sidney's Estate, 184 So. 806, 806-08 (1938)). To avoid this in the context of lost wills, a proponent who offers a copy of a will for probate must prove by clear and convincing evidence the following: "(1) the proof of existence of the will; (2) evidence of its loss or destruction; (3) proof of its contents, [and] (4) that the testator did not destroy the will with the intent to revoke it." *Id.*

164. Such procedural safeguards may include compelling a person to produce a will if it is in his or her possession. *See id.* at 1038.

165. *Id.*

166. *Id.* at 1039.

improperly probated wills.[167] Unlike other areas of law that primarily affect a certain group of individuals, the world of probate engulfs every citizen because no one can live forever. This fear of litigation casts a shadow across the entire field of probate and explains the purpose behind the traditional will formalities.[168]

The formalities defend against the "worst evidence" conundrum of attempting to ascertain an individual's intent after death.[169] The hope was that these formalities would work together to imprint upon the testator the seriousness of drafting his or her last will so that if done properly, the court could readily infer the testator's intent and protect that intent from potential wrongdoings.[170] Historically, courts required strict compliance to these formalities and assumed invalidity for even minor mistakes.[171] However, the UPC codified a new school of thought that encourages courts to excuse minor mistakes and uphold a testator's intent when a proponent comes forward with clear and convincing evidence that a document is a testator's will, even if the will does not satisfy the statutory formalities.[172]

This "harmless error rule"[173] places the burden of proof on the proponent of the defective instrument and intends to impose "procedural standards appropriate to the seriousness of the issue."[174] The UPC envisioned that a clear and convincing evidence standard would prevent litigation by limiting the issues before a court to whether an instrument correctly expresses the testator's intent.[175] While strict compliance often defeats testamentary intent for any deviation from the wills act, the harmless error rule seeks to retain the "intent-serving" benefits of the will formalities while lessening "intent defeating outcomes."[176] Such a goal is feasible because the farther an instrument departs from the will formalities, the greater the proponent's burden of proof becomes.[177]

Although this harmless error rule departs from the harsh methods of strict compliance, this new rule is not without limitations. Simply put, not all errors are harmless. Not even the UPC bends far enough to excuse admission of a non-original will to probate when the proponent has neither proven by clear and convincing evidence that another state already authenticated the will nor

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167. David Horton and Reid Weisbord, *Probate Litigation*, 2022 U. ILL. L REV. 1149, 1153 ("Because millions of people die every year, disruptions to this conveyor belt can overload the judicial system.").

168. *Id.*

169. DUKEMINIER & SITKOFF, *supra* note 76, at 141.

170. Baron, *supra* note 82, at 9-10.

171. *See In re* Estate of Thomas, 962 So. 2d 141, 145 (Miss. Ct. App. 2007) (finding that a nonholographic will signed by the testator and a notary public was invalid as a matter of law for failure of witness attestation); *see also* Baker v. Baker's Estate, 24 So. 2d 841, 844 (Miss. 1946) (finding a purported holographic will that was unsigned at the bottom was invalid because it failed to satisfy the subscription requirement).

172. *See* UNIF. PROB. CODE § 2-503 (amended 2019); *see also* Baron, *supra* note 82, at 5.

173. UNIF. PROB. CODE § 2-503 (amended 2019).

174. UNIF. PROB. CODE § 2-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969).

175. *Id.*

176. *Id.*

177. *Id.*

established that the will was lost, stolen, or destroyed.[178] Admitting a non-original will to probate without enforcing other safeguards, such as a presentation of clear and convincing evidence or forcing formal probate, effectively guts the protective nature of the will formalities.

A. The Good Ole' Mississippi Way of Probate

When recognizing harmless errors, Mississippi courts have not pushed aside the idea of probating wills with minor deviations in compliance.[179] Mississippi courts excusing harmless error is not an issue; instead, the problem arises when courts excuse a will's harmless error but do so under the guise of strict compliance. Courts pull this off by creating colorful reasons why a non-compliant will somehow complies perfectly with the applicable will statute.[180] The courts seem to avoid formally adopting a harmless error standard and instead adhere to strict compliance, no matter the legal consequences it may bring. Such an approach naturally creates an uncertain foundation for the future of Mississippi probate proceedings, which seems to be the outcome Mississippi courts and the applicable will statutes seek to avoid.

The Mississippi Supreme Court case of *Matter of Will of Ratcliff* illustrates the method of excusing harmless errors but doing so under the justification of strict compliance.[181] Ironically, if two separate courts reviewed this case, one applying strict compliance and the other applying harmless error, both courts would reach the same result of denying the will for probate. Despite this, the Mississippi Supreme Court found a way to find compliance in the foundationally flawed process of admitting a non-original will to probate. It barred a claim to challenge the validity of the document.

1. *Matter of Will of Ratcliff* and the strict compliance rule.

Under a strict compliance standard, a court will deny probate to a will that does not comply with will formalities.[182] These formalities protect against fraud

178. *See id.* at § 3-303 (amended 2019), cmt. (UNIF. L. COMM'N 1969) ("Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings"); *see also* UNIF. PROB. CODE §3-402 (amended 2019) ("If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.").

179. *Compare* Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968) (finding that "[a]lthough under [the statute] the testimony of only one living witness is sufficient to establish a will's proper execution, proof of two signatures of witnesses is required to prove due execution where the witnesses to a will are deceased."), *with In re* Last Will and Testament of Beard v. Christmas, No. 2019-CA-01821-COA, 2021 WL 1975961 (Miss. Ct. App. May 18, 2021), *reh'g denied* (Sept. 14, 2021) (containing facts substantially similar to Estate of Willis, but coming to an opposite conclusion when it comes to the will formality of attestation).

180. *See* Langbein, *supra* note 85 ("[A]t least for execution defects of the near-miss type, the rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict.").

181. *In re* Will of Ratcliff, 315 So. 3d 1025, 1031 (Miss. 2021).

182. *See* Estate of Regan v. Estate of LeBlanc, 179 So. 3d 1155, 1158 (Miss. Ct. App. 2015) ("No matter how earnestly one may desire and intend to make a will, a paper, although fully intended by the writer to be a will, is ineffective and invalid unless its execution meets statutory requirements." (citing Wilson v. Polite, 218

at the time of the will's execution and at the time of the will's admission to probate.[183] The usefulness of these protections hinges on the assumption that the court is reviewing the testator's *original* will. As such, the foundational question for deciding the proper procedure when probating a will is whether the proponent can produce the original testamentary document. If the answer to this question is no, then there are additional safeguards in place for lost and foreign wills, which require separate procedures of certification or clear and convincing evidence.[184] The court followed neither of these procedures in the *Matter of Will of Ratcliff*. Under a true strict compliance standard, Patricia's attempt to probate a non-original version of Mr. Ratcliff's will would have failed for non-compliance to the will formalities.

Upon offering a non-original will to probate, a court following a true strict compliance standard would have assessed the document and noticed that Patricia presented a copy instead of Mr. Ratcliff's original will.[185] A court would then inquire into the whereabouts of the original document.[186] If Patricia claimed that the original document was with the court clerk, the chancellor would investigate, find, and authenticate the original document left with the clerk. If, instead, the chancellor found that Patricia never presented the original document to the clerk or the court, then the chancellor would reject Patricia's proposal for probate. However, these are not the steps that unfolded in *Matter of Will of Ratcliff*.[187] The court departed from strict compliance in favor of a more "harmless-error-like" approach. However, this outcome exceeds even the UPC's harmless error rule and contradicts the policy behind the rule's intended purpose.

2. *Matter of Will of Ratcliff* and the harmless error rule.

Whether the holding in Matter of Will of Ratcliff aligns with the rationale behind the UPC's harmless error rule remains. The UPC looks to simplify the probate process,[188] and the harmless error rule attempts to achieve this goal by recognizing a testator's intent despite imperfections in will execution.[189] This rule looks to excuse mistakes in the execution of a will, but only when those mistakes do not undermine the foundational purpose of the will formalities.[190]

So. 2d 843, 849 (Miss. 1969))); *see also In re* Estate of Thomas, 962 So. 2d 141, 145 (Miss. Ct. App. 2009) (finding a will signed by the testator and a notary public invalid for failure to comply with the statutory requirement of two attesting witnesses).

183. Glover, *supra* note 76, at 618.

184. *See* MISS. CODE ANN. § 91-7-33 (1972); *In re* Estate of Mitchell, 623 So. 2d 274, 275 (Miss. 1993) (establishing the evidentiary burden of probating lost, stolen, or destroyed wills (citing Warren v. Sydney's Estate, 184 So. 806, 806-07 (1938))).

185. *See Ratcliff*, 315 So. 3d at 1033-34 (Kitchens, J., dissenting) ("The *ex parte* probate, or proving, of a will contemplates an initial inspection of a written document by a chancellor in order for him/her to decide at the outset whether the document appears to be what the petitioner says it is: the will of a particular person, the testator or testatrix.").

186. *See id.* at 1034 ("[T]he original will must be submitted with the petition for probate in order for the chancellor to examine it and decide whether to admit it to probate.").

187. *See id.* (majority opinion).

188. *See* UNIF. PROB. CODE § 1-102(b)(1) (amended 2019).

189. Baron, *supra* note 82, at 25.

190. *See* UNIF. PROB. CODE § 2-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969) ("The larger the departure from § 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the

Namely, the purpose of requiring the original will and the remaining formalities serves the evidentiary function of shining light on the testator's intent and the protective function of guarding the testator against wrongdoing.[191]

The historical background, as well as the language of the UPC itself, suggests that offering a non-original will is not a harmless error. Therefore, a court cannot excuse this formality.[192] So, although this Article encourages Mississippi to adopt the UPC's harmless error rule, the more specific goal is to differentiate between the proper and improper use of this rule. Hopefully, this differentiation will aid courts and the legislature in implementing guidelines to properly recognize a testator's intent while lowering probate errors.

In applying the harmless error rule, a court would require Patricia to come forward with clear and convincing evidence of why the court should accept a non-original will for probate. Patricia could not satisfy this evidentiary burden since Mr. Ratcliff's will did not constitute a foreign, lost, stolen, or destroyed will. In fact, Patricia possessed the original will the entire time, but she carelessly submitted the non-original for probate.[193] Carelessness is not among the reasons for finding harmless error under the UPC,[194] and for this reason, not even the harmless error rule would allow admission of this will to probate.

The UPC's comment on the harmless error rule further supports the proposition that the circumstances of *Matter of Will of Ratcliff*[195] would not constitute a "harmless error." In explaining its purpose, the comment clarifies that this rule "allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will."[196] A textual reading of this purpose indicates that the rule was only meant to excuse harmless errors that occurred by the testator's actions. Specifically, this rule applies when the testator makes a mistake in the execution or revocation of his or her will.[197] The comment does not mention applying this rule to errors made by the proponent of a will to probate. In other words, the harmless error rule can stretch to cover Mr. Ratcliff's mistakes in the execution or attempted revocation of his will but *cannot* stretch to cover Patricia's mistake in the incorrect submission of a will to probate.

Patricia's error does not fall within the confines of what the harmless error rule intends to excuse. Because of this, a court following this approach would have rejected this will for probate, which would have prompted Patricia to resubmit the original 2013 will as opposed to the copy. This would have

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testator's intent.").

191. *See* Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 456 (2002).

192. *See* UNIF. PROB. CODE § 2-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969). The comment for UPC § 2-503 explains the two primary uses for the harmless error rule: (1) where the testator misunderstands the attestation requirements for a will; and (2) alterations to previously executed wills; *see also* DUKEMINIER & SITKOFF, *supra* note 76, at 46 ("If the petition is for probate of a will, the original will must accompany the petition (or an authenticated copy if the proceeding is ancillary" (citing UNIF. PROB. CODE § 2-503)).

193. *In re* Will of Ratcliff, 315 So. 3d 1025, 1027 (Miss. 2021).

194. *See* UNIF. PROB. CODE § 3-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969).

195. *Ratcliff*, 315 So. 3d at 1025.

196. UNIF. PROB. CODE § 3-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969).

197. *Id.*

resolved the evidentiary issue of using a non-original will and increased the likelihood of giving the other Ratcliff children notice. With proper notice, Amanda, Ben Jr., and John Michael could have had the opportunity to contest their disinheritance from the 2013 will timely. This outcome would have promoted rather than defeated the purpose of probate by allowing a more thorough determination of Mr. Ratcliff's true intent.

This Article highlights a court's momentous responsibility in making decisions that dictate the administration of an individual's estate. Unfortunately for the Ratcliff family, the court's outcome cut off a valid challenge to Mr. Ratcliff's will, arguably resulting from Patricia's undue influence over her father. Patricia satisfied the textbook definition of having a confidential relationship with Mr. Ratcliff. The surrounding circumstances were, at the very least, suspicious–Patricia lived with and was the primary caretaker of Mr. Ratcliff, who was isolated from his other children and dying of COPD, all of which took place during the time Mr. Ratcliff drafted his 2013 will that disinherited all his children except for Patricia.[198] The court turned a blind eye to these facts and effectively ripped everything away from the siblings and placed it all in the hands of Patricia.

B. The Current State of Probate in Mississippi

Mississippi's probate process is evolving, and this Article looks to assist that evolution. Instead of allowing courts to continue with make-shift decisions that bend the outer limits of strict compliance, this Article recognizes the need to adopt the UPC's harmless error rule formally.[199] Formal adoption of this rule would eradicate the need for the colorful reasoning seen in *Matter of Will of Ratcliff.* A court would no longer feel inclined to excuse a testator's harmless error under the guise of strict compliance. While the state may feel hard-pressed against departing from its traditional methods, Mississippi's adoption of the harmless error rule is a win-win game. However, if Mississippi remains steadfast in its current practice, the litigation will inevitably rise, and the recognition of a testator's intent will undoubtedly fall.

Mississippi's legislature and court system seek to avoid probate litigation like every other state. Nevertheless, this should not drive poor judicial and policy decisions. Probate law aims to recognize a testator's intent, and further

198. "Where a confidential relation exists between a testator and a beneficiary under his will, *and the beneficiary has been actively concerned in some way with the preparation or execution of it*, the law raises a presumption that the beneficiary has exercised undue influence over the testator, and casts upon the beneficiary the burden of disproving undue influence by clear and convincing evidence." Croft v. Alder, 115 So. 2d 683, 686 (Miss. 1959) (emphasis added). The presumption of undue influence also arises if the contestant proves "a confidential relationship *and suspicious circumstance in the execution of a Will*." Davion v. Williams, 352 So.2d 804, 805 (Miss. 1977) (emphasis added). A court may consider a number of factors in determining the presence of undue influence including: "(1) failure of testator to receive independent advice; (2) execution of will shrouded in secrecy; (3) reasonableness of the dispositive provisions of the will; (4) susceptibility of the testator to an importuning beneficiary; (5) existence of factor indicating a weakened mind; (6) abrupt change in prior estate plan; (7) hasty execution of a will; (8) dependence of testator upon a beneficiary; or (9) active involvement of beneficiary in the planning and execution of the will." Robert E. Williford & Samuel H. Williford, *Mississippi Probate and Estate Administration* § 21:7 (3d ed.).

199. *See* UNIF. PROB. CODE § 3-503 (amended 2019), cmt. (UNIF. L. COMM'N 1969).

the freedom of disposition,[200] but Mississippi's strict compliance to its wills act undermines that purpose. Strict compliance has created two primary issues of concern in the state. First, Mississippi courts have invalidated wills for harmless defects despite clear testamentary.[201] Second, other Mississippi courts have tried to recognize a testator's intent in a non-compliant will by bending the meaning of words and formalities in the name of strict compliance.[202] While the former defeats the purpose of probate in general, the latter creates a murky area of case precedent that only further complicates probate proceedings. These vital faults will perpetuate probate error in Mississippi unless the state decides to reform its practices.

The implications of the majority's holding in *Matter of Will of Ratcliff* have already begun to take effect. The Mississippi Practice series,[203] updated in January 2022, cites *Matter of Will of Ratcliff* as the primary authority for the newly added proposition that "the two-year statute of limitations begins to run when the will has been admitted to probate *whether the original will has been filed or not*." This marks a shift in Mississippi probate law, allowing courts to rely on a non-original will as the basis for deciding the disposition of an individual's property after his or her death. Due to this shift, stories like that of the Ratcliff family are more likely to result, which means time is of the essence for change.

In a step towards change, the Mississippi legislature should adopt the harmless error rule set out in the UPC. Courts across the country have interpreted this rule, providing Mississippi courts with a wealth of knowledge to forge a new path for probating non-compliant wills. Following this guidance will allow Mississippi courts to move away from the current piece-meal decision-making and decide when strict compliance is necessary or when clear and convincing evidence will suffice. This would place Mississippi in the best position to simplify the probate process while taking the steps needed to uphold and honor a testator's wishes.

CONCLUSION

As shown in *Matter of Will of Ratcliff*,[204] Mississippi courts already implement their versions of the harmless error rule but do so in a way that hinders rather than assists the probate process. If, instead, Mississippi formally adopted the harmless error rule, courts could shape a new mold for what they consider to be "harmless error." Specifically, this would allow courts to cut out the legal gymnastics and instead focus on developing hardline rules for navigating non-compliant wills. Such clarity would allow for more concrete

200. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L. J. 643 (2014).

201. *See In re* The Last Will and Testament of Massingale v. Young, 199 So. 3d 710, 713 (Miss. Ct. App. 2016) ("No matter the testator's intent, a nonholographic will or codicil remains invalid if the document fails to comply with the requirements of Mississippi Code Annotated section 91-5-1 (Rev. 2013)").

202. The second method illustrates the Mississippi Supreme Court's approach in the probate of Mr. Ratcliff's will. *Ratcliff*, 315 So. 3d at 1025.

203. WEEMS, *supra* note 75, § 8.3.

204. *Ratcliff*, 315 So. 3d at 1025.

precedent than the current scheme that leaves attorneys and testators across the state confused about what a court will accept for probate.

The Mississippi Legislature and court system face a demanding decision–whether to reform its laws to adopt the harmless error rule and promote the recognition of a testator's intent or to maintain its current scheme and risk undermining the foundational purpose of probate altogether. This Article contends that Mississippi's current approach to probate drives the state away from the ultimate goals of lessening litigation and promoting a testator's intent. The passing of a loved one is an already difficult situation, and Mississippi must take steps to ensure that the probate process eases rather than complicates the matter. Mississippi's probate process demands reform, and the adoption of the UPC's harmless error rule is the answer to satisfy that demand.