Denver Law Review

Volume 6 | Issue 12 Article 3

July 2021

Revocation of Wills - How Accomplished and the Effect

J. Warner Mills Jr.

REVOCATION OF WILLS—HOW ACCOMPLISHED AND THE EFFECT

By J. Warner Mills, Jr., of the Denver Bar

An address delivered before the Law Club.

THE question of the drafting and probating of wills is a branch of law of peculiar interest to all lawyers. There are many lawyers who, during their practice of law, may have no occasion to familiarize themselves with the law pertaining to torts, negligence, public utilities, bankruptcy and many other branches of specialized law. But I question whether or not there is any lawyer who actively engages in the practice of law, who has not, sometime or other, been called upon to prepare a will or present a will for probate.

As my space is limited, I will not be able to discuss the making or drafting of a will. I will not determine whether or not a blind man may legally execute a will; I will not consider the propriety of any provisions in a will; neither will I enter into a mathematical calculation as to the resulting increase in population which will be derived from the provisions of the will of Charles Vance Miller, in Toronto, who has just left $2,000,000 to the woman who gives birth to the most children during a stated period which terminates in 1935.

For the purposes of this paper it will be assumed that a person, sound in mind and memory, and over the age of 17 years, if personal property only is disposed of, and over the age of 21 if real estate is devised, has executed a will in the manner provided by statute. After this will has been properly attested, declared and published the testator finds that one of the objects of his bounty has died or else the testator has since been married and naturally, therefore, determines to have a new will drawn by his lawyer. You will note that the man whom I have in mind is a wise and cautious man who will not leave this important question even to the skilled experts of a trust company. Among the first questions which he asks his lawyer is: "How can I dispose of the will which is now in existence. Of course, I do not want any contest to arise over my estate by having two wills in existence".

The lawyer appreciates the responsibility placed upon him and so makes a careful study of the question involved. He finds that there are two ways of revoking a will, namely,

A. Revocation by operation of law.

B. Revocation by intent of testator.

A. Revocation by Operation of Law

Revocation by operation of law results when some change of circumstances occurs which the statute states shall constitute a revocation or else some act or situation is construed by the Courts to be a revocation irrespective of the intention of the testator.

Section 2, Chapter 194, Session Laws 1923, provides:

> Section 2. No will shall be revoked otherwise than by the subsequent marriage of the testator, or by burning, tearing or obliterating the said will by the testator himself, or in his presence, by his direction and consent, or by some other will or codicil in writing, declaring the same, executed, declared and attested as provided in Section 13 thereof, and no words spoken shall revoke or annul any will in writing executed, declared and attested as aforesaid.

1. The first method of revocation by operation of law, as set forth in the statute, is the "subsequent marriage of the testator". Marriage of course may revoke or provoke most anything.

2. A will may be at least partially revoked or altered by Section 5190, Compiled Laws, 1921, prescribing that a beneficiary under a will is not qualified to act as a witness to the will. If a beneficiary so acts the statute provides that the legacy or interest of such beneficiary shall be null and void. If the beneficiary is also an heir at law, then the legacy is void only to the amount in excess of that which the beneficiary would derive from the estate as an heir in the event that the testator had died intestate.

3. Section 5189, Compiled Laws 1921, provides that where a child is born after the execution of a will, and there is no provision in the will for such child, and nothing to show an intention of the testator to disinherit such child, then all legacies and devisees shall be abated in equal proportions, to raise a portion for such child equal to that which the child would have received had the testator died intestate.

4. A husband or widow may, as provided by Section 5185, C. L. 1921, elect to receive one-half of the estate as provided by statute, in lieu of taking under the terms of the will, and to that extent a will may be considered revoked.

5. Session Laws, 1923, page 712, Section 1, provides that any person convicted of murder in the first or second degree shall not take by devise, inheritance or otherwise, and this also may operate to revoke a will.

6. In addition to the five methods of revocation by operation of law as stated above, a will is construed by the courts to be revoked or at least altered where the testator sells or loses any property which was specifically willed to a legatee, without any provision for substitution; where a testator mis-describes property owned by him; where a beneficiary dies leaving no heirs at law; where the will violated the rule in Shelley's case; where the provisions of a will are so indefinite and uncertain that they cannot be executed; where it is found that the testator was insane or acting under undue influence at the time the will was executed. There are also other cases similar to these where the courts construe the will revoked or altered.

B. Revocation by Intent of Testator

This second general method of revoking a will includes by far the most numerous and divergent means of revocation. The statutory provisions of "burning, tearing or obliterating" will be first considered together. This would also include, as provided by statutes in many states, the words "canceling" and "destroying".

The paramount question to consider in this matter is "What was the intent of the testator". This intent of the testator must be first of all manifest on the face of the instrument itself. Also the intent must be expressed by one capable at that time of performing a legal act or as the cases say "An act by one having capacity to make a will". For instance, the act of an insane man cannot revoke a will. (In re Goldsticker, 192 N. Y. 35; 18 L. R. A. N. S. 99; 84 N. E. 581) nor the act of one suffering from delirium tremens, nor the act of one who is drunk.

It is also true that even though a testator destroys a will, still if he did not actually intend to do so, it does not necessarily operate to revoke the will. (in re Allens Will, 88 N. J. Eq. 291, 102 Atl. 147). The difficulty in such cases grows out of the inability to prove by whom, or under what circumstances the will was torn, destroyed or the like. If the will was in the testator's custody and such acts were done before his death there is a presumption that such acts were done lawfully, and that they were done by testator, or by someone in his presence and with his authority. Another problem arises when it is sought to probate such will. If the will has been destroyed it cannot be presented to the court, and the court is then governed by the statutory rules which govern the probating of a lost will.

No matter what may be the intention of the testator, if it is not manifest on the face of the instrument it does not operate as a revocation. Authority to another to burn, cancel or otherwise destroy a will does not amount to a revocation if the will itself is not actually burned or destroyed in pursuance of such authority. In such cases, we have the intent but not the act. So, also, even if the authority to burn or destroy a will is in writing, it is not a substitute for the doing of the act. (Harris vs. McDonald, 152 Ga. 18; 108 S. E. 448.)

Now, considering our statute in detail, the first method mentioned of revocation by intent of testator is that of burning.

1. *Burning*

Assuming that the question of intent is proven, the act of burning must go so far that a portion of the paper upon which the will is written is burned, so that such burning is visible. It is not necessary that any part of the writing be burned or rendered illegible. (White vs. Casten, 46 N. C. 197; 59 Am. Dec. 585). Where the envelope in which the instrument is contained is burned but the will itself is untouched, this is not burning the will in compliance with the statute. (In re Silva's Estate, 169 Cal. 116; 145 Pac. 1015).

2. *Tearing*

Tearing the paper or parchment on which the will is written, with intention of revoking the will, constitutes a re-

vocation. It has been held under a statute similar to ours that tearing includes cutting. (Burton vs. Wylie, 261 Ill. 397; 103 N. E. 976). The degree of tearing or the portion of the will torn is not the controlling feature of this method of revocation. A slight tearing, if done with the intention of revoking a will, is sufficient. The most frequent method used is tearing off the signature of the testator or tearing off the attestation clause. Even tearing off an unnecessary part of the will, such as a seal where the will need not be under seal, may also constitute a revocation. (White's Will, 25, N. J. Eq. 501).

3. *Obliterating*

Obliterating is literally and technically a blotting out. (Townsend vs. Howard, 86 Me. 285; 29 Atl. 1077). The word "cancelling", though not used in our statute, is sometimes used in the same sense as obliterating. Thus drawing lines across the will, or through the words thereof, is frequently spoken of as an obliteration as well as a cancellation. Marking out the signature of the testator with a lead pencil, wherever such signature appears, and drawing lines through the principal gift, has been improperly spoken of as an obliteration, although the original words were legible. (Townsend vs. Howard, 86 Me. 285; 29 Atl. 1077).

In this connection, and with reference to tearing also, it may be said that where the testator tears or obliterates one word or one sentence with intent to alter or revoke the will only so far as that one word or sentence is concerned, but not intending to revoke the whole will, such act does not constitute a revocation of the will. The Court will give effect to the whole will as originally drawn if the clause stricken can be satisfactorily proven; otherwise, that portion of the will stricken is considered a part of the residuary estate. So also the erasure of the name of one legatee or devisee and writing in the name of another party will not be recognized by the court. (Hartz vs. Sobel, 136 Ga. 565; 38 L. R. A., N. S. 797; Ann. Cases, 1912 D. 165; 71 S. E. 995).

4. *Revocation by Some Other Will or Codicil*

The question of the revocation of a will by "some other will or codicil in writing, declaring the same, executed, de-

clared and attested" etc. as provided by our statute, opens a field for a great difference of opinion and one in which many interesting questions may arise.

In discussing this question, it is well to first call to mind the definition of a will. In the popular meaning of the term, "a will is a disposition, made by a competent testator in the form prescribed by law, of property over which he has legal power of disposition, which disposition is of such nature as to take effect at the death of the testator".

Under this definition more than one writing purporting to be a will may be in existence at one and the same time. The mere fact that a will is subsequently executed does not of itself necessarily revoke the former will. Both wills may be presented for probate unless the latter will expressly revokes the former or the terms are so in conflict with the former that the court cannot give effect to the former will. This condition is clearly set forth in the case of Whitney vs. Hannington, 36 Colo. 407. Judge Bailey, in discussing the question, said:

> "The same principle applies with greater force where there are two distinct instruments relating to the same subject matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made."

The moral to be derived from this case is to be sure that a revocation clause is contained in every will.

It is proper to mention at this time, in connection with the execution of codicils, the reason for the new act in regard to wills found in 1923 Session Laws (Chapter 194). The case of Twilley vs. Durkee, 72 Colo. 444, decided in January 1923, disclosed a state of facts where two wills were presented for probate, the latter will expressly revoking the former. In executing the latter will, the testatrix signed the will and then two witnesses were brought in who signed as attesting witnesses but who did not actually see the testatrix sign her name. The court, Judge Campbell delivering the opinion, held that where a will contained a revoking clause it was necessary that the will be signed in the presence of the witnesses, but this was not necessary if the will contained no revoking clause. The Court reviewed the cases in other states and particularly

those from Illinois, from which our law was copied, and said:

"Revocation of a former will can be made only in the ways authorized by our statutory law. When the method employed, which the statute authorizes, is by a subsequent will, a revocation to be effective must be expressly declared, and the later will, which destroys a former will, must be executed in accordance with the statute relating to revocations of wills. Mrs. Durkee's will, containing an express clause of revocation, was not executed in accordance with the provisions of our statute applicable to wills of this character, was void and should not be admitted to probate".

Justices Teller, Denison and Burke dissented, holding that the disposing clauses of the second will should be considered separate from the revocation clause, and even though the revocation clause was not effective the disposing clauses should be considered so, but they agreed, with the majority opinion, that a testator must sign a revoking will or codicil in the presence of the witnesses, but that such was not necessary if the will contained no revoking clause.

With this case in mind our law was amended, practically re-enacting our former statute relative to the revocation of wills, but providing that a revoking will or codicil should be executed as provided by the preceding section, that is the one pertaining to wills only.

5. *Effect of Revocation of a Subsequent Will*

What is the effect of a testator destroying a subsequent will or codicil? By so doing is the former will revived? Does the testator die intestate? Or does the testator die intestate only as to that particular property which is segregated by the codicil?

Probably if this question were submitted to any one of you, you would unhesitatingly say that any will which is found at the death of the testator is valid and should be presented for probate.

In discussing this question, first consider the difference in effect between a codicil to a will and a second or subsequent will revoking all former wills.

The execution of a codicil is a re-affirmation or republication of the will. The codicil thereby becomes a part of the will, as much so as any clause in the will itself. On the other hand a revoking will takes effect upon the death of the testa-

tor and supersedes and wipes out of existence all former wills.

In view of the small number of cases involving the effect of the destruction of a codicil, the question will be considered from the point of view of the destruction of a subsequent will. The law would apply even more forcibly where a codicil only is involved.

Before the Statute of Frauds there was no attempt at statutory regulation of the revocation of a testament. The Statute of Frauds provided that a written testament could not be revoked by testator's oral declarations unless such revocation or will was reduced to writing, read to the testator and allowed by him. Three witnesses were necessary to prove such revocation.

The ecclesiastical courts adopted a rule to the effect that no presumption, either for or against the revival of a will would be indulged in by the revocation of the later testament. These courts held that the question of revival was solely a matter of intention of the testator to be shown by testimony, either verbal or written.

The common law courts took the position that a will was ambulatory and did not take effect until the death of the testator and that its operation as a revocation of a prior will was likewise ambulatory and did not take effect until the death of the testator.

The Statute of Victoria was then passed which provided that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof".

These four different theories are set forth here to show a reason or background for the great conflict of authorities in the United States at this time.

The first case in the United States to consider this question was that of James vs. Marvin, 3 Conn. 577. The Court found:

> "An express revocation is a positive act of the party, which operates by its own proper force, without being at all dependent on the consummation of the will in which it is found and absolutely annuls all precedent devises."

The Court then proceeded to justify its position by reference to an English case which was actually decided under an

ecclesiastical rule of law, that is that the intent of the testator to die intestate was shown by evidence and the revoking of a subsequent will did not thereby revive a former will.

The case of James vs. Marvin has been severely criticized by several cases in other states. It is a case which was decided upon an erroneous assumption of facts and really begs the very question in issue.

Nevertheless, this case has been adopted by other courts and is the basis for the law in the states of Michigan, Texas and Georgia.

Incidentally, Connecticut has now abandoned this theory and has adopted the common law rule. (Pecks Appeal, 50 Conn. 562).

In addition to the states mentioned, Mississippi and Wisconsin have adopted this rule, but do not base their decision on the case of James vs. Marvin.

The Ecclesiastical Rule

The application of this rule of law operates less harshly than any other and is in keeping with the actual intention of the testator. Under this rule no presumption arises, either for or against the validity of the first will, the question to be settled and determined by evidence as to the intention of the testator in destroying a subsequent will. This law, first pronounced by Massachusetts in the case of Pickens vs. Davis, 134 Mass. 252, has been looked upon with favor by several states.

Queen Victoria or Statutory Rule

The question in dispute has also been settled by some states adopting statutes regulating the revocation of a will and providing that any will or codicil revoked by a subsequent will cannot be revived except by republication and re-execution. These statutes follow, to some extent, the act of Queen Victoria. Typical of this is the state of New York, which statute is:

"If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation, that it was his intention to revive and give effect to his first will;

or unless after such destruction, cancelling or revocation he shall republish his first will"—*Section 41, Decedent Estate Law.*

You will note that this statute is a combination of the Queen Victoria Statute and the ecclesiastical rule of law.

North Dakota, South Dakota, Ohio, California and Indiana are among the states which have adopted statutes upon this subject.

Under such a statute a peculiar situation may arise. The Courts in New York have repeatedly held that where a codicil is executed segregating certain property from the corpus of the estate of the deceased, and such codicil is later destroyed, then the deceased dies intestate as to that property which is segregated by the codicil while the balance of the estate passes under the terms of the will.

The Common Law Rule

By a process of elimination it may be said that the remaining states in the United States have adopted the common law rule or else have not been called upon to pass on this question. In substance this rule is that a will is ambulatory and does not take effect until the death of the testator and that a revocation clause in any later or subsequent will must likewise be ambulatory and does not take effect at all unless in existence at the death of the testator. A majority of text writers consider this rule as the most logical.

The leading case of Stetson vs. Stetson, 200 Ill. 611, 66 N. E. 262, 61 L. R. A. 641, clearly sets forth the basis of the law. After reviewing the cases, the Court concluded:

"If he destroyed the will with the intention of cancelling or revoking it, it was cancelled or revoked as an entirety. So long as Jesse Stetson was alive this second will was merely ambulatory and had no operation and could have no operation until his death. While it was thus ambulatory and before his death, the presumption is that he destroyed it, and, if he destroyed it, the clause contained in it, which revoked all former wills, was cancelled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was cancelled or destroyed."

Again, in the case of Bates vs. Hacking, 68 Atl. 622; 28 R. I. 523; 125 A. S. R. 759; 14 L. R. A., N. S. 937, the Court declared:

"The writing declaratory of an intention to revoke is evidence of a present intention, and, when executed becomes of itself a complete revocation; but the revocation by will takes effect only when the will of which it forms a part becomes effective and that can never be in the lifetime of the testator. * * * "

"Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will. If he does not suffer it to do so, it is not his will. Here he had two. He has cancelled the second. It has no effect, no operation, it is no will at all being cancelled by his death. But the former which was never cancelled stands as his will."

In Marsh vs. Marsh, 3 Jones Law, 77; 64 Am. Dec. 598, a North Carolina case, the Court said:

"As wills are ambulatory and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator can in any wise affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death."

An examination of authorities shows that Colorado is among those states which have never been called upon to pass on the question at issue. We have no precedent in this state. The cases of Twilley vs. Durkee, 72 Colo. 444, and Freeman vs. Hart, 61 Colo. 456, discuss to a great extent the question of revocation of wills and the effect upon former wills but are determined under different facts.

It may also be said that Judge Rothgerber, during his term of office as County Judge here in Denver, was never called upon to decide this controversy. When this question was presented to Judge Luxford, he adopted the common law rule as stated in the case of Stetson vs. Stetson.

In conclusion, let me say that the common law rule, logical as it is in its reasoning, probably violates the actual intention of the testator in the greater number of cases, especially where the later will contains an express revocation clause. Most of the laity apparently believe that the express revocation clause revokes the first will at once; and the rule that the revocation of the second will automatically leaves the first will in effect, frequently results in giving effect to a testamentary disposition which the testator has long since forgotten and

which, if he had remembered it, he would have thought had no legal effect.

It is particularly unfortunate that there should be so great a conflict of authority upon a question which may be of such vital importance to the objects of the testator's bounty.

Personally, I believe that the fairest and most effective method of settling this question is to enact a statute similar to that adopted in New York.

(The following court order was submitted by Mr. Erl H. Ellis, who assures the editor that the original, written in long hand, really is a work of art worthy of photostatic reproduction.)

GARNISHEE ORDER TO TURN GOODS ATTACHED AND LEVIED ON OVER TO CONSTABLE W. H. STRANEY, TO BE IN HIS CUSTODY ACCORDING TO LAW.

The A. T. & S. F. Ry. Co. through its agent here, Mr. E. Springstead here, refusing to act any longer as garnishee and custodian of the goods billed by E. J. King to J. A. Wilsey, Denver, Colorado, and all others by R. J. King in this case and the said Mr. E. Springstead having been commanded either to ship aforesaid goods to their destination or have them removed from the company's premises, this Court hereby orders the A. T. & S. F. Ry. Co. Mr. E. Springstead, Agt., to turn said goods over to W. H. Straney, Constable, for him to take care of them according to law.

Witness my hand and seal this 13th day of August 1929.

F. E. SCHMIDT,
Justice of the Peace. (SEAL)