

Memorandum 81-54

Subject: Study L-603 - Probate Code (Revocation of Wills; Proof of Lost or Destroyed Wills; Revival of Revoked Wills)

A prior memorandum (Memo 81-31, considered at the July meeting) discussed the effect on a will of a later marriage or divorce. This memorandum deals with the remaining issues relating to revocation of wills, proof of lost or destroyed wills, and revival of revoked wills.

VOLUNTARY REVOCATION BY LATER INSTRUMENT

The basic California provisions concerning voluntary revocation of a will by a later will (or by an instrument executed with the same formalities as a will) are in Section 72 and a portion of Section 74 of the Probate Code. These sections provide:

72. A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; but the mere naming of an executor in the prior will need not be given effect by the court when the subsequent will is otherwise wholly inconsistent with the terms of the prior will, the intention of the testator in this respect being left to the determination of the court.

74. Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities required for the execution of a will; . . .

See also Probate Code § 73 (revocation by instrument affecting property, discussed later in this memorandum).

The Uniform Probate Code covers the matter briefly in a portion of Section 2-507:

Section 2-507. [Revocation by Writing or by Act.]

A will or any part thereof is revoked

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency;

. . .

COMMENT

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the document the determination of whether the act is a sufficient burning, tearing, canceling, obliteration or destruction

and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each Court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in regard to the case of accidental destruction which is later confirmed by revocatory intention.

("Will" is a defined term under the UPC, and includes "any testamentary instrument which merely . . . revokes or revises another will." UPC § 1-201.)

As is apparent from a comparison of the California and UPC provisions, they are basically the same in substance, except for the California provision (not in the UPC) concerning the naming of an executor in a prior will. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 344 (1976). This California provision is discussed immediately below.

Naming of Executor in Prior Will

The last portion of the second sentence of Section 72 of the Probate Code (set out above) concerning the naming of an executor in a prior will was added to the section in 1931 at the suggestion of the California Code Commission. Evans, Comments on the Probate Code of California, 19 Cal. L. Rev. 602, 611 (1931). The purpose of the provision was to overrule a case that held that where a second will made a disposition of property completely at variance with that made by a prior will, the first will was revoked in its entirety even though it provided for the appointment of an executor and the second will was silent on the matter. Id. at 610; French & Fletcher, supra at 345 n.49.

Adoption of the UPC provision (Section 2-507, set out above) would appear to continue the broad discretion of the court under present California law to determine whether the inconsistency of the second will

with the first revokes the first will wholly or partially: According to the UPC Comment, Section 2-507 "leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially"

Professor Perry Evans (the draftsman of the 1931 Probate Code) argued for a provision to limit the court's discretion by requiring the court to appoint the executor named in the first will except where the person nominated is a beneficiary under the first will and not under the second (a circumstance which suggests that the omission of the nomination from the second will was intentional). See Evans, supra at 611.

Should we depart from the existing California and UPC rule, which gives the court broad discretion to determine whether a revocation by inconsistency is total or partial, and follow Professor Evans' suggestion? The virtue of Professor Evans' suggestion is that it offers some certainty and may tend to reduce litigation. On the other hand, there is benefit in having a rule which is the same as that in other UPC jurisdictions, particularly when it corresponds with existing California law as the UPC rule does here.

Revocation by Instrument Affecting Property

Section 73 of the Probate Code provides:

73. If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

This section has been applied principally in determining the effect on a will of a marital settlement agreement incident to divorce. French & Fletcher, supra at 344 n.48. However, the matter is now covered by Probate Code Section 80 which was enacted in 1980 specifically to deal with this problem. (Section 80 is not affected by Commission decisions made at the last meeting.) Aside from its possible and now obsolete application in marital settlement cases, Section 73 "has its utility, if any, in transactions more readily yielding to an ademption analysis than to revocation." French & Fletcher, supra at 344 n.48. Accord, Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 38 (1956). Ademption will be the subject of a later memorandum. However, for the purpose of revocation of wills, Section 73 appears

superfluous and unnecessary. The staff recommends that Section 73 not be continued, subject to another look at it in the ademption context.

VOLUNTARY REVOCATION BY PHYSICAL ACT

Two Witnesses to Prove Destruction of the Will

The basic California provisions concerning revocation of a will by physical act such as destroying, defacing, tearing, or burning the will are in a portion of Section 74 of the Probate Code. This portion provides:

74. Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than:

. . . .

(2) By being burnt, torn, canceled, defaced, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

See also Probate Code § 76 (destruction of duplicate original will, discussed later in this memorandum).

The UPC covers the matter in a portion of Section 2-507:

Section 2-507. [Revocation by Writing or by Act.]

A will or any part thereof is revoked

. . .

(2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

COMMENT

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the document the determination of whether the act is a sufficient burning, tearing, canceling, obliteration or destruction

and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each Court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in regard to the case of accidental destruction which is later confirmed by revocatory intention.

The California and UPC provisions are virtually identical, except for the second sentence of paragraph (2) of Probate Code Section 74, which requires that if revocation is by destruction done by someone other than the testator, the direction of the testator and the fact of destruction must be proved by two witnesses. There is no such provision in the UPC. It is not clear under Section 74 whether the witnesses must be eyewitnesses, or whether the person who destroyed the will is a qualified witness. See French & Fletcher, supra at 347 n.51. Moreover, the two-witness requirement does not apply when the testator is the one who destroys the will, and circumstantial or hearsay evidence may be used to prove that the testator destroyed the will with the requisite revocatory intent. See Evid. Code § 1260; 7 B. Witkin, Summary of California Law Wills and Probate § 151, at 5667-68 (8th ed. 1974). If the purpose of the two-witness rule is to prevent fraudulent destruction of the will, then there is no justification for having the rule when destruction is by someone other than the testator, and not having the rule when destruction is by the testator.

The two-witness rule seems mainly to operate to defeat the testator's intent. The UPC applies the ordinary standard of proof for showing the will was revoked by destruction. French & Fletcher, supra at 351. The UPC rule seems preferable, and the staff recommends it.

Presumption That Lost Will Was Destroyed With Revocatory Intent

Under California decisional law, if it is shown that the will was in possession of the testator before his or her death, that the testator was competent until death, and that after death the will could not be found, it is presumed that the testator destroyed the will with intent to revoke it. 7 B. Witkin, supra § 381, at 5844. The common law rule in other jurisdictions is similar. See L. Simes & P. Basye, Problems in Probate Law 304 (1946). In Georgia, the rule has been extended by statute to cover cases where the will was not in the testator's custody, so that when the will cannot be found, revocation is presumed whether or not the testator had custody of the will. Id. Professors Simes and Basye have lauded the Georgia rule as "an aid to the prevention of fraud." Id.

Under the UPC, however, the contestant of a will has the burden of establishing that the will has been revoked, as well as establishing any fraud or mistake. UPC § 3-407. It appears that this provision applies whether the will is physically available or not. See French & Fletcher, supra at 351 n.62. Despite the arguments of Professors Simes and Basye

that a presumption that a lost will has been revoked prevents fraud, it seems equally likely that such a presumption may increase the opportunity for fraud. A third person with access to the testator's personal papers and who may benefit from the testator's intestacy may purloin the will during the testator's last illness or after death. A presumption of revocation would facilitate such a scheme.

On balance, the staff finds the UPC rule preferable. The staff recommends that we adopt the UPC rule which does not presume that a lost will has been revoked, and puts the burden of establishing revocation on the contestant of a will, whether or not the will is physically available. This will also solve the troublesome problem caused by the presumption of revocation when there are several duplicate original wills and the one which was in the testator's possession cannot be found. See discussion immediately below.

Destruction of Duplicate Original Will

There are many cases in other U.S. jurisdictions where the testator has executed two or more duplicate originals of a will, often leaving one with the attorney and retaining the other. See Annot., 17 A.L.R.2d 805 (1951). It is uniformly held that if the testator destroys one of the duplicate originals with intent to revoke, that revokes all of the duplicate originals. Id. at 808-12; see 79 Am. Jur.2d Wills § 549 (1975). California follows this rule by statute. Prob. Code § 76. Section 76 provides:

76. A will executed in duplicate is revoked if one of the duplicates is burnt, torn, canceled, defaced, obliterated or destroyed under the circumstances mentioned in subdivision 2 of section 74 of this code.

No provision like Section 76 appears in the UPC. In UPC jurisdictions, the common law will govern this situation with the same result as under Section 76 of the Probate Code. Thus, Section 76 could be repealed with a Comment to the effect that such repeal effectuates no change in the law. (It should be noted that Section 76 deals only with the situation where there are two or more executed duplicate originals. There is "no authority whatever that destruction or mutilation of a copy of the will, conformed or otherwise, is effective to accomplish a revocation." Annot., 17 A.L.R.2d 805, 807 (1951).) However, it may be preferable to retain an explicit provision on the matter. The staff is not certain

whether it is better to retain an explicit provision, or whether it is better to follow the UPC and not have an explicit provision.

Problems have arisen in other jurisdictions where a duplicate original which was in the testator's possession cannot be found after death and there is no evidence as to what happened to it. See Annot., 17 A.L.R.2d 805, 808 (1951); 7 B. Witkin, Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974). Most jurisdictions apply the same presumption of revocation in the multiple original case as they do where there is a single original which was in the testator's possession and cannot be found after death. Annot., 17 A.L.R.2d 805, 808 (1951). This rule has been criticized on the ground that it is likely that the testator assumed that since there were other executed originals of the will it was not necessary to preserve the copy in his or her possession. Id. at 808-09. This problem would be eliminated under the UPC which does not presume revocation from the fact that the will cannot be found. See discussion above under heading "Presumption That Lost Will Was Destroyed With Revocatory Intent."

PROOF OF LOST OR DESTROYED WILL

If the testator's will has been destroyed without revocatory intent or has been lost, the will is still in effect, both under California law and the UPC. 7 B. Witkin, supra § 378, at 5842; French & Fletcher, supra at 351. However, California law makes it difficult to get such a will admitted to probate, with the frustrating result that, although the missing will is a valid will, it may not be provable. French & Fletcher, supra at 351-54. The problem is caused by Section 350 of the Probate Code, which provides:

350. No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Section 350 presents three policy questions for resolution by the Commission:

(1) Should a missing but valid will be excluded from probate because it was not lost or destroyed under the narrowly defined circumstances set forth in Section 350?

(2) Should there be an extraordinary standard of proof ("clearly and distinctly proved") for establishing the provisions of a missing will?

(3) Should two witnesses be required to prove the provisions of a missing will?

These questions are addressed in order.

Exclusion From Probate of a Missing but Valid Will

Under Section 350 of the Probate Code, if a will has been lost or destroyed during the testator's lifetime other than by public calamity or fraud without testator's knowledge, the will may not be admitted to probate even though in theory the will may still be effective. See French & Fletcher, supra at 354; Niles, Probate Reform in California, 31 Hast. L.J. 185, 213 (1979). This contradiction has been criticized as "legal sophistry unless the refusal to admit it is based on reasonable doubt as to whether the will was really the testator's will," and has been called a "substantial defect" in California law. Niles, supra at 213.

Not only does Section 350 sometimes have the undesirable effect of excluding a valid and unrevoked will, but also may prevent the court from applying the ameliorative doctrine of dependent relative revocation to avoid injustice. For example, if the testator destroys a first will in the mistaken belief that a second will is valid, the law will presume that the testator intended to revoke only if the second will were valid. In other words, the revocation is not absolute, but is relative and dependent on the validity of the second will. 7 B. Witkin, supra § 155, at 5670. By requiring the will to be in existence at the testator's death, Section 350 would appear to preclude application of the doctrine of dependent relative revocation to save the destroyed will. L. Simes & P. Basye, Problems in Probate Law 300 (1946); see Niles, supra at 213.

The UPC has no provision comparable to Section 350, with the result that under the UPC any unrevoked will is provable whether or not the will is physically in existence. See French & Fletcher, supra at 351. This is also the rule of the common law. L. Simes & P. Basye, supra at 298.

Professor Turrentine concurs with the view of Professor Niles that to exclude a valid will from probate is anomalous and bad policy. See Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956). The staff agrees

with this view and recommends repeal of the requirement of Section 350 that a lost or destroyed will either have been in existence at testator's death or have been destroyed during the testator's lifetime under the narrowly described circumstances there set forth.

Extraordinary Proof Requirement for Provisions of Missing Will

In California, if the proponent succeeds in showing that the will is missing for a reason that satisfies Section 350 of the Probate Code and thus the will may be admitted to probate, the proponent faces the additional hurdle of the extraordinary proof requirement: The will provisions must be "clearly and distinctly proved." Under the UPC, if the will is missing, "informal" probate by written statement of the "Registrar" is precluded but proof of the will's provisions is by a preponderance of the evidence. French & Fletcher, supra at 351.

In most other U.S. jurisdictions, in the absence of statute, the rules for proof of contents of a will are substantially the same whether or not the will is physically available, although some cases require "clear and satisfactory" proof of the will provisions. L. Simes & P. Basye, supra at 298 (1946). This poses the policy question whether proof of the provisions of a missing will should be proved by a preponderance of the evidence as under the UPC or by clear and convincing evidence as under the present law of California and a few other jurisdictions.

Professor Turrentine has recommended that a clear and convincing proof standard should be used. Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 38 (1956). However, Professors French and Fletcher point out that the extraordinary proof requirement, along with the other stringent requirements of Section 350, "enlarges the hazard area, present with any will, in which there is no showing of revocation and yet not adequate proof to meet the quantitative standards [T]he result is the same as a revocation" French & Fletcher, supra at 354.

The staff is persuaded by the UPC position and by the view of Professors French and Fletcher that the provisions of a missing will should be proved by a preponderance of the evidence. The staff therefore recommends the repeal of the extraordinary proof requirement of Section 350.

Two Witnesses to Prove Provisions of Missing Will

California requires two witnesses to prove the contents of a missing will. Prob. Code § 350. Under the UPC, no minimum number of witnesses is required. French & Fletcher, supra at 351.

Some 15 states in addition to California have by statute adopted the rule that at least two witnesses are required to prove the provisions of a missing will. L. Simes & P. Basye, Problems in Probate Law 302 (1946). Professor Simes and Basye report that the two-witness rule "has not worked satisfactorily," saying that

[I]t may be questioned whether any definite number of witnesses should be required. The quality of evidence cannot be measured in terms of number of witnesses. In the final analysis it becomes a question of credibility of the witness, and credibility is neither aided nor defeated by a statutory requirement as to the number of witnesses. There may well be cases in which only one witness is available, yet this single witness may be of such credibility that no further proof is necessary, and none should be required.

Id.

The staff recommends that we follow the position of the UPC and the view of Professors Simes and Basye and repeal the two-witness requirement of Probate Code Section 350. Taken together, the staff recommendations concerning Section 350 amount to a recommendation that the section be repealed in its entirety.

EFFECT OF REVOCATION OF A WILL ON ITS CODICILS

Section 79 of the Probate Code provides that "[t]he revocation of a will revokes all its codicils." This apparent flat rule has been qualified somewhat by a case which held that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963). However, even as qualified, the California rule may defeat the testator's intent in some cases.

The UPC has no provision comparable to the California provision, leaving the matter to be resolved as a question of the testator's intent in the particular case. See French & Fletcher, supra at 348. Professor French suggests that perhaps statutory silence as under the UPC is the better way to deal with the problem. Id. The staff agrees, and recommends the repeal of Probate Code Section 79 with no replacement language.

REVIVAL OF REVOKED WILL

Section 75 of the Probate Code provides for revival of a revoked will under limited circumstances:

75. If, after making a will, the testator makes a second will, the destruction or other revocation of the second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction or other revocation, the first will is duly republished.

The UPC provision similarly provides for limited revival:

Section 2-509. [Revival of Revoked Will.]

(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

COMMENT

This section adopts a limited revival doctrine. If testator executes will no. 1 and later executes will no. 2 revoking will no. 1 and still later revokes will no. 2 by act such as destruction, there is a question as to whether testator intended to die intestate or have will no. 1 revived as his last will. Under this section will no. 1 can be probated as testator's last will if

his intent to that effect can be established. For this purpose testimony as to his statements at the time he revokes will no. 2 or at a later date can be admitted. If will no. 2 is revoked by a third will, will no. 1 would remain revoked except to the extent that will no. 3 showed an intent to have will no. 1 effective.

A possible substantive difference between the UPC and California provisions has to do with revival of a first will when the second and revoking will is revoked by an act such as destruction. The UPC permits the testator's intent to revive the first will to be shown by "the circumstances of the revocation of the second will" or by hearsay evidence of what the testator said. UPC § 2-509. California permits the testator's intent to revive the first will to be shown "by the terms of such revocation." Prob. Code § 75. Although there is no California case discussing the matter, it may be that when the second will is revoked by physical act such as destruction, the act cannot have "terms" sufficient to revive the first will. See In re Estate of Bassett, 196

Cal. 576, 238 P. 666 (1925); In re Estate of Johnston, 188 Cal. 336, 206 P. 628 (1922). But see In re Estate of Schnoor, 4 Cal.2d 590, 591, 51 P.2d 424 (1935). If this is the existing California law, the staff is of the view that the UPC provision is preferable. By permitting parol evidence of the testator's intent concerning revival of the first will when the second will has been destroyed with intent to revoke it, the UPC is more likely to avoid intestacy and to carry out the testator's wishes.

Professor Evans has argued for a rule of law to the effect that destruction of a second will which contains a clause revoking a prior will results in revival of the first will. See Evans, supra at 611-12. This proposal is in contrast to the limited revival rule of California law and the UPC under which there is no revival unless it may be shown that that is what the testator intended. Professor Evans thought that a rule of revival would be closer to "the ordinary intendment of the testator." Id. He further supported his view as follows:

The present law leaves an opening for the commission of fraud. Whenever a will is filed, although it may be the only one physically in existence, evidence may be offered that someone saw a later will which contained a clause revoking all prior wills, and that the alleged second will has disappeared, presumably having been destroyed by the testator. The testimony of but one witness as to the contents of the missing will is sufficient, since it has been held that this is not an attempt to "prove" the lost will.

As it is the policy of the law to require wills to be in writing, it would seem to be inadvisable to permit the effect of the only existing document to be nullified by oral testimony as to another alleged will which is no longer extant.

Another curious result of the present section would be brought about under the following circumstances: A person executes a will leaving all of his property to A. He then executes a second will, in the nature of a codicil, leaving \$10,000 to B. This revokes the first will pro tanto. Changing his mind with regard to the legacy to B, the testator destroys the codicil. When A offers the first will, it can be shown that the testator died intestate to the extent of \$10,000 by reason of the execution and subsequent revocation of the codicil.

However, it appears that most jurisdictions that have enacted statutes on the matter either have limited revival like California and the UPC, or are even more restrictive, requiring re-execution or a codicil in order to revive a revoked will. See T. Atkinson, Handbook of the Law of Wills § 92, at 477-78 (2d ed. 1953); French & Fletcher, supra at 357 n.75. The common law rule that "revocation of the second will revives the first regardless of the testator's intention is subject to

the objection that it is unreasonable to disregard testator's manifest desires." T. Atkinson, supra at 477. "On the other hand, the courts which freely inquire into the testator's intention are criticized because this determines the matter by a dangerous sort of parol evidence." Id.

The limited revival rule of California and the UPC seems to strike a reasonable balance between the need to effectuate the testator's intent as far as possible and the need to prevent the question from being determined solely on the basis of parol evidence. Accordingly, the staff recommends that Professor Evan's suggestion not be followed, and that UPC Section 2-509 be enacted in place of Probate Code Section 75.

Respectfully submitted,

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