

Revocation of Wills

In this month's CPD we are going to consider the ways in which a will or sections of a will can be revoked. A Will is ambulatory in nature and may be revoked by the testator at any point during their lifetime provided they still have the mental capacity to do so; the *Banks v Goodfellow* test for capacity to make a will also applies to a testator's capacity to revoke a will. The main methods of revocation that we will consider will be express revocation by the creation of a new will or codicil, revocation by marriage or civil partnership, and revocation by destruction.

Express revocation

The simplest method of revoking a will is by validly executing a further will. Section 20 of the Wills Act 1837 states that the whole or part of a will may be revoked by another duly executed will or codicil. The clearest manner in which this can be expressed is by including a revocation clause in the later Will, for example:

'I revoke all former Wills and Testamentary dispositions and declare this to be my Last Will and Testament "my Will".'

This simple clause will revoke all previous wills and codicils.

It is important that revocation clauses are drafted correctly as was demonstrated in the case of *Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* [1953]. The issue in *Lowthorpe-Lutwidge v Lowthorpe-Lutwidge* was whether the testator had successfully revoked a former will as the revocation clause stated in the will 'I revoke all former wills this being my last will and testament'.

The court held that the opening words in this clause were essential in determining the testator's motivation. Should the opening words have simply stated 'This is my last will and testament' it would have failed to be sufficient for an express revocation. Langton, J held that the earlier dispositions were revoked because the burden of proving that the testator had intended to revoke them had been discharged due to the expression and the use of the word revoke within the express clause within the will.

If a new will is validly executed and no express revocation clause is included then it is implied that the later will revokes the parts of the earlier will that conflict. The clauses in the earlier will that do not conflict with the later will remain in place.

It is important that the will writer determine whether the testator has any other wills in foreign jurisdictions. If the testator has other wills dealing with foreign property then care must be taken by the drafter to ensure that the English will does not revoke any foreign wills. If the standard revocation clause were used then any foreign wills would unfortunately be revoked.

A modified revocation clause should be used, for example the below clause which will act only to revoke the testator's previous wills that relate to their estate in the UK:

'I revoke all earlier Wills to the extent that they relate to any part of my estate in the United Kingdom only.'

Or the following clause, which will revoke all previous wills that relate to their estate everywhere apart from France:

'I revoke all earlier Wills to the extent that they relate to any part of my estate in any part of the world other than France.'

Sometimes the whole will may be impliedly revoked by a later one, an example would be where the wills are totally inconsistent, or where the later one covers the same ground or is meant as a substitute for the earlier. The documents will be read together to ascertain the testator's intention of what should happen upon death. This point was seen in the case of *Lemage v Goodban* (1865), in which Wilde J stated:

'The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And so this court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that were designed to revoke or to retain it'

Another good example of 'implied revocation' can be seen in the case of *Re Hawksley's Settlement* [1934]. In this case the testatrix made a will with professional advice and then later in 1927 made a homemade will which did not contain a revocation clause, however it described itself as her 'last will and testament' and referred to the earlier will as the 'cancelled will'. The provisions of the later will were wholly inconsistent with the earlier will. The court held that the phrases such as 'last will' and 'cancelled will' did not in themselves constitute express revocation, but that the earlier will was nevertheless totally ineffective because it was impliedly revoked by the 1927 will.

A will may be partially impliedly revoked. If only some of the provisions of the later will are inconsistent with the earlier will then only those parts are revoked. The provisions of the earlier will that are unaffected by the later will remain intact and are not revoked.

A testator may revoke their will either partially or in its entirety without creating a new will or codicil. Section 20 of the Wills Act 1837 states that a will may be revoked by 'some writing declaring an intention to revoke the same'. For revocation carried out in this way to be valid the writing must be duly executed attestation in the same manner as the will.

Partial Revocation

In some cases the testator may only wish to revoke parts of the clauses in a will and leave the rest of the clauses in the document to run. The testator may wish to only revoke a certain clause, for example the election of executors in the will. For this kind of partial revocation a codicil may be suitable.

A will may be partially revoked through the use of a codicil (again, as stated under section 20 of the Wills Act 1837). This allows a clause of a will to be revoked and replaced either in whole or in part by a later codicil.

The codicil needs to be drafted to show a clear intention to revoke part or all of a clause which exists in the original will. These documents are similar in style to that of a will, but they tend to be aimed at amending the will to reflect the wishes of the testator.

Below is a simple example of a codicil amending the testator's wife's name to substitute his second wife for the first:

'I [testator] of [address] Declare this to be the first codicil to my will dated theday ofWHEREAS

(1) My wife [name] referred to in my said will has since died and I have married [name].

(2) By clause [#] of my said will I gave my residuary estate to my trustees to hold the same in trust for my late wife [name] for life with a gift over on her death to my children and issue.

1. NOW I HEARBY DECLARE that the name of my wife [name] shall be substituted for the name of my late wife [name] in clause [#] of my said will aforesaid and the same shall be read and construed accordingly.

2. In all other respects I confirm and revive my said will and DECLARE that for all purposes my said will as hereby modified shall operate and take effect as if it had been made on the date of this codicil and after my marriage with my wife [name].'

The codicil must then be executed in the same manner as a Will.

Although codicils are used as a practical method of making small alterations to wills they are not seen as the best way of dealing with larger changes in the will. If the changes are more substantial then the best way of dealing with such changes is to undertake a complete rewrite of the whole will. An example would be in the revocation of a large gift in a will by the use of a codicil. This may not be best way of revoking this type of gift, as the codicil is a separate document from the Will and there is always the risk that it could be lost.

An example in case law of the use of codicils is the rule from *Doe d Hearle v Hicks* [1832] which was applied in the case of *Re Stoodley* [1915]. In this case the testator made a will dividing the residue of his estate between the Vicar of Ilminster and the Society for Promoting Christian Knowledge. Two years later he made a codicil in which he referred to his will and stated '*The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locok*'.

Mabel claimed that the codicil should be interpreted as wholly revoking the gift of residue in the will, but the court held that what passed under the codicil was such portion (if any) of the residue as might ultimately turn out not to have actually been disposed of by the will. This highlights the importance of using clear words in a codicil so the testator's intention is properly expressed.

Revocation by Marriage or Civil Partnership

For the purposes of this paper any references to the testator's marriage are also inclusive of civil partnership.

In the absence of any contrary intention a will made before a marriage is automatically revoked when the testator enters into a marriage. This is provided for in section 18 of the Wills Act 1837 as substituted by s18 of the Administration of Justice Act 1982.

Section 18(3) and 18B(3) provide that the will shall not be revoked by a testator's marriage if it appears from the will that the testator was expecting to marry a particular person at the time that the will was made. A general intention to marry is not sufficient. The most obvious way to ensure

that it is clear on the face of the will that it was made in contemplation of marriage is to include an express clause to this effect. For example:

‘This Will shall not be revoked if the proposed marriage to my intended wife [NAME] takes place.’

In the absence of any express clause then references to the intended marriage may suffice to prove the testator’s intention, for example the inclusion of phrases such as ‘my intended wife’, or ‘my fiancée’. However, it is always preferable to include an express clause to avoid any potential confusion.

Sections 18(4) and 18B(4) provide that where the testator was expecting to be married to a certain person and he intended that a specific disposition should not be revoked by their marriage then the disposition will take effect notwithstanding the marriage, along with any other disposition in the will.

Revocation by Destruction

A testator may revoke their will by destruction. We again turn to section 20 of the Wills Act 1837, which states that a will may be revoked by an act of *‘burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same’*.

The physical destruction of a will without the intention to revoke the will is not sufficient to revoke it. In the event that a will is destroyed accidentally without the intention to revoke it a copy of that will or a reconstructed will can be submitted to probate and will successfully be seen as valid.

The physical destruction of the will must be more than simply symbolic. Simply crossing out words or paragraphs within a will is not sufficient to validly revoke a will. In the case of *Cheese v Lovejoy* [1876] the testator wrote across the will stating *‘all these are revoked’* and then crossed parts of the will out and went on to throw the will away. A housemaid later found the document, preserved it and it was produced on the testator’s death. The will was held to be valid. The court held that even though the testator had crossed out the gifts and expressed a desire to cancel the gifts the words expressing gifts were still legible and therefore the gifts in the will remained a valid as did the document.

Contrast this with *Re Adams (Deceased)* [1990]. In this case the testator crossed out clauses in his will that he intended to revoke so efficiently that the clauses could no longer be read and were completely illegible. As both the attesting witnesses and testator’s signatures had been obliterated the will was held to have been validly revoked.

The act of destruction must be complete to the extent that the testator intended. If the testator is stopped before completing the destruction then the will is not validly revoked. In the case of *Doe d Perkes v Perkes* [1820] the testator began to tear his will up intending to revoke it as he was angry with a particular beneficiary. He was stopped by the time he had torn it into 4 pieces. The testator, calmed by the apologies of the beneficiary, fitted the pieces back together and said “it is a good job it is no worse”. The court held that the will had not been revoked as the testator had not done all he intended by way of destruction.

The destruction may be carried out by someone other than the testator, but for the revocation to be valid the act of destruction must be carried out at the testator’s direction and in his presence.

In the case of *In the Estate of Kremer* [1965] the testator, by telephone, instructed her solicitor to burn her will. In this case the solicitor carried out the testator's wish and burnt the will. The court held the will was not revoked under the rules of section 20 of the Wills Act 1837 as the act of destruction was not carried out in testator's presence. The solicitor was adjudged to have made a considerable professional error.

A will is not validly revoked if it is destroyed by someone other than the testator not at his direction, even if he ratifies this after the event.

Presumptions

There are two rebuttable presumptions that apply if a will is missing at death, or if a will is found mutilated at death.

If a will was last known to be in the testator's possession but it cannot be found after their death there is a presumption that the testator has destroyed the will with the intention of revoking it. This presumption is rebuttable by clear evidence that the testator did not revoke the will, for example evidence that the will was destroyed accidentally or evidence showing that the testator did intend to adhere to the will.

The strength of the presumption will vary depending on the security arrangements the testator had for their will. The stronger the safety arrangements in place to protect the will, the stronger the presumption.

If the will cannot be found and the presumption that it has been revoked is rebutted then a draft or a copy of the missing will may be used to prove the contents of the will and admitted to probate.

Similarly to the above, a will that is found to be mutilated at the death of the testator gives rise to a presumption that the testator destroyed the will with the intention of revoking it. Again, this presumption is rebuttable. If the testator was known to have been of unsound mind at any point while the will was in his possession there is no presumption that the mutilation was carried out while the testator was of sound mind.

Conclusion

This paper has covered the main methods of revocation of a will, whether done expressly by the testator or automatically. The simplest method of revoking a will is to properly execute a new one ensuring that there is an appropriate revocation clause. This will ensure that there is no confusion as to whether the previous will has been impliedly revoked either fully or partially.

