Washington and Lee Law Review

Volume 18 | Issue 1 Article 22

Spring 3-1-1961

Virginia Changes Its Rule Regarding The Revival Of A Revoked Will

State	Years of Separation	Party Who May Sue	Nature of Separation
Virginia	Three	?	?[21]
Washington	Five	Either party without regard to fault in separation.	Living separate and apart.[22]
Wisconsin	Five	Either	Voluntary separation.[23]
	Five	Either	Living apart pursuant to a judgment of legal separation.[23]
Wyoming	Two	Available only to party who is not chargeable in whole or in a material part of inducing the separation.	Living apart without cohabitation.[24]

VIRGINIA CHANGES ITS RULE REGARDING THE REVIVAL OF A REVOKED WILL

If a testator in a valid instrument expressly revokes a prior will and later revokes the revoking instrument, whether the deceased dies testate under his first will or intestate will vary with the jurisdiction in which the question arises. A number of states, following the common law view, hold that the revocation of a revoking instrument revives the earlier will as a matter of law. This holding is based upon the view that the second will is ambulatory and does not become effective until the death of the maker. Connecticut,[1] Illinois,[2] Louisiana,[3] Rhode Island,[4] and South Carolina[5] may be placed in this category.

---

[21]Va. Code Ann. § 20-91(9) (Supp. 1960).
[22]Wash. Rev. Code § 26.08.020 (1953).
[23]Wis. Stat. § 247.07 (1959).
[24]Wyo. Comp. Stat. Ann. § 20-47 (1957).
[1]Whitehill v. Halbing, 98 Conn. 21, 118 Atl. 454 (1922).
[2]Stetson v. Stetson, 200 Ill. 601, 66 N.E. 262 (1903).
[3]Succession of Dambly, 191 La. 500, 186 So. 7 (1938). The Civil Law State of Louisiana reaches the common law result on the basis of its code provisions.
[4]Bates v. Hacking, 28 R.I. 523, 68 Atl. 622 (1907).
[5]Kollock v. Williams, 131 S.C. 352, 127 S.E. 444 (1925).

A second view is that destruction by the testator nullifies the subsequent will, unless it is proved that the destruction took place with an intent to die intestate. Florida,[6] Maryland,[7] and Pennsylvania[8] adhere to this rule. A third position is that the earlier will is not revived unless republished. The theory of this view is that both wills have been revoked by the testator and there is nothing to indicate an intention to revert to the first will. Kentucky,[9] Michigan,[10] Texas,[11] Wisconsin,[12] and New York[13] have taken this approach.[14]

Until 1960 Virginia was generally considered to follow the rule that the execution of a subsequent will with a revocation clause revoked the prior will, and republication was necessary in order to revitalize the prior will.[15] However, the recent case of *Timberlake v. State-*

---

[6]Schaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1924).

[7]Rabe v. McAllister, 177 Md. 157, 8 A.2d 922 (1939).

[8]In re Burtt's Estate, 353 Pa. 217, 44 A.2d 670 (1945).

[9]Singleton v. Singleton, 269 Ky. 330, 107 S.W.2d 273 (1937).

[10]Danley v. Jefferson, 150 Mich. 590, 114 N.W. 470 (1908).

[11]Brackenridge v. Roberts, 114 Tex. 418, 267 S.W. 244 (1924).

[12]In re Laege's Estate, 180 Wis. 32, 192 N.W. 373 (1923).

[13]In re Stickney's Will, 161 N.Y. 42, 55 N.E. 396 (1899); In re O'Donovan's Will, 168 Misc. 362, 6 N.Y.S.2d 456 (Surr. Ct. 1938); N.Y. Deced. Est. § 41.

[14]Some jurisdictions hold that an earlier will is not revived unless the testator manifiested an intent to revive the prior will when he revoked the subsequent will. This is a variation of the third view which requires formal republication. In re Johnson's Estate, 188 Cal. 336, 206 Pac. 628 (1922); Kern v. Kern, 154 Ind. 29, 55 N.E. 1004 (1900); Aldrich v. Aldrich, 215 Mass. 164, 102 N.E. 487 (1913); Lane v. Hill, 68 N.H. 275, 44 Atl. 393 (1895); In re Davis' Estate, 31 N.J.L. 161, 35 A.2d 880 (Ct. Err. & App. 1944).

A small number of jurisdictions hold without presumption either way that revival is solely a question of the intention of the testator. Blackett v. Ziegler, 153 Iowa 344, 133 N.W. 901 (1911); Williams v. Miles, 68 Neb. 463, 94 N.W. 705 (1903); Ewell v. Rucker, 28 Tenn. App. 156, 187 S.W.2d 644 (1945); In re Gould's Will, 72 Vt. 316, 47 Atl. 1082 (1900).

[15]This is the rule that was adopted by the English Statute of Wills, 1 Vict. c. 26 (1837).

The common law view applied in courts of law in England was that a former uncancelled will was not revoked by a subsequent will containg an express revocation clause or an inconsistent disposition of the testator's property if the subsequent will was revoked. The reason given was that since all wills are ambulatory until death, the second will containing the revocation clause was revoked before it ever became effective. Goodright v. Glazier, 4 Burr. 2512, 98 Eng. Rep. 317 (K.B. 1770). See also Harwood v. Goodright, 1 Cowp. 87, 98 Eng. Rep. 981 (K.B. 1774).

The Ecclesiastical courts refused to follow this automatic rule and revocation, presumed or established, of a second will which implied or expressly revoked a prior will raised no presumption as to the validity of the first will. Revival or non-revival depend upon the intention of the deceased as determined from the circumstances of each case. Usticke v. Bawden, 2 Add. 116, 162 Eng. Rep. 238 (Ad. & Eccl. 1824).

The Wills Act of 1837 resolved this conflict by abolishing both of the existing rules and substituting a new and different rule. The effect of sections 20 and 22

Planters Bank[16] appears to have changed this rule. In *Timberlake* the testatrix made two wills, both of which were properly executed. The second will contained a clause expressly revoking any will or codicil previously made. After the testatrix's death the second will could not be found (although a carbon copy had been preserved by a bank) and the first will was probated. The heirs appealed, contending that the revocation clause of the subsequent will operated upon execution to revoke the testatrix's first will and the first will was never thereafter revived or republished in accordance with section 64-60[17] of the Code of Virginia; therefore, the testatrix died intestate. In opposition, the proponents of the first will relied upon the presumption that a will which cannot be found and which was last in the custody of the decedent was revoked before death.[18] Therefore, they contended, the first will was never revoked because the second will was presumed to have been revoked before death and never became effective. The court sustained the latter argument by ruling that the Code of Virginia section 64-59,[19] which specifies the procedures for revoking a will, had not been complied with.[20] Therefore the first will

---

of that act was to make the revocation of the first will by the second effective upon execution, so that republication of the prior will was necessary if it was to be revived. Sections 20 and 22 are substantially the same as sections 64-59 and 64-60 of the present Code of Virginia. The leading case of Major v. Williams, 3 Curt. 432, 163 Eng. Rep. 781 (Adm. & Eccl. 1843) held that the revoking instrument does not need to be in existence at the time of the death of the testator. Brown v. Brown, 8 El. and Bl. 876, 120 Eng. Rep. 327 (K.B. 1858).

These particular sections of the Wills Act were adopted without substantial change in Virginia in the Code of Va. tit. 33 ch. 122 §§ 8, 9 (1849). Prior to that time, the common law view of England was apparently effective in Virginia, although there is no case in point. Bates v. Holman, 10 Va. (3 Hen. and M.) 502 (1809). In Rudisill's Ex'r v. Rhodes, 70 Va. (29 Gratt.) 147 (1877) the testator executed three wills with the second and third containing revoking clauses. The third will had been revoked and the second uncancelled will was offered for probate. The court held that revocation of the subsequent will did not revive the prior will under the new sections of the Revised Code of 1849 and cited Major v. Williams, supra, as authority. By dictum this rule was extended to a situation where a subsequent inconsistent will would revoke a prior will if itself was unrevoked. Clark v. Hugo 130 Va. 99, 107 S.E. 730 (1921).

[16]201 Va. 950, 115 S.E.2d 39 (1960).

[17]"No will or codicil . . . which shall be in any manner revoked shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner herein before required, and then only to the extent to which an intention to revive the same is shown." Va. Code Ann. § 64-60 (1950).

[18]Tate v. Wren, 185 Va. 773, 40 S.E.2d 188 (1946).

[19]"No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some writing . . . executed in the manner in which a will is required to be executed, or by the testator . . . cutting, tearing . . . with the intent to revoke." Va. Code Ann. § 64-59 (1950).

[20]Timberlake v. State-Planters Bank, 201 Va. 950, 115 S.E.2d 39, 43 (1960).

was never revoked and no question of revival was involved. Stressing the ambulatory nature of a will, the court in effect held that the language of section 64-59 concerning the revocation of wills requires that the written revocation be fully operative at the death of the maker. The court also held that a revocation clause is an inseparable part of the will and is operative only if the remainder of the will is operative. The third and final basis for the decision was that the result reached would better carry out the intention of the testatrix.

The Code of Virginia of 1849 incorporated into the Virginia Statute of Wills many of the provisions of the English Statute of Wills of 1837.[21] Two of the sections, which were adopted from the English statute without substantial change, are the present sections 64-59 and 64-60.[22] These code sections were first interpreted in 1877 in *Rudisill's Ex'r v. Rodes*,[23] which contained a factual situation identical with the principal case. The court held that cancellation of a third will did not revive the second will under the provisions of the Revised Code of 1849. This interpretation was in accordance with that placed on the comparable English statutes.[24]

The *Rudisill* case was distinguished in 1958 in *Poindexter v. Jones*[25] wherein subsequent inconsistent wills were revoked by the testatrix, and the prior wills were allowed to be probated. The court refused to follow *Rudisill* on the ground that the subsequent wills in *Poindexter* did not contain express revocation clauses. The further and more substantial reason given for the decision was that the subsequent wills were not operative at the death of the testatrix because they were revoked. The court then concluded that there was never a revocation of the first wills under section 64-59 of the Code of Virginia, and therefore there was no issue concerning revival.

The court in the *Timberlake* case found its principal support in *Barksdale v. Barksdale*[26] wherein a second improperly executed will contained an express revocation clause. In that case the court refused to abstract the revocation clause to revoke the first will and ruled that a revocation clause is effective only if the will of which it is a part is effective. It is clear, however, that the *Barksdale* case can be distinguished from *Timberlake*. In *Barksdale* there never was a revocation, for the attempted second will was improperly executed.

---

[21]Code of Va. tit. 33, ch. 122 (1849).
[22]See notes 17 and 19 supra.
[23]70 Va. (29 Gratt.) 147 (1877).
[24]See note 15 supra.
[25]200 Va 372, 106 S.E.2d 144 (1958).
[26]39 Va. (12 Leigh) 535 (1842).

The court in the principal case also cited two recent Virginia decisions supporting the application of *Barksdale*. The first was *Bell v. Timmins*,[27] decided in 1950, which held that the court would not take an introductory revocation clause from a lost will to revoke an earlier will offered for probate when the subsequent will itself could not be proved. This case can be distinguished from the principal case, for in *Bell* the testator's last valid testamentary act was to make a will affirming his desire to die testate. The existence of a second will could not be proved to the satisfaction of the court. In the principal case, however, the existence of the second will was established. Thus the last act (presumed) of the testatrix was the revocation of her last will, and this act is devoid of any intent to die either testate or intestate. The second case cited was *Poindexter v. Jones*[28] wherein the testatrix executed two subsequent wills but later cancelled the subsequent wills. Probate of two prior wills (which together disposed of the entire estate of the testatrix) was allowed. This case can be distinguished on its facts, for the subsequent wills were merely inconsistent in their disposition of the estate, so that the intent of the testator as to his first will was equivocal, and it is arguable whether there was sufficiently clear intent to operate as a revocation.[29] The rationale the court preferred in *Poindexter*, however, was in effect the application of dependent relative revocation as announced in *Barksdale*.[30] That is, the court concluded that the testatrix intended the first will to be revoked only if the second will was effective at her death. The application fails in *Poindexter* for the same reason that it fails in *Timberlake*—because the last act of the testator was revocatory, rather than affirmative of an intent to die testate.

The court indicated that the rule announced in the principal case would carry out the intention of the testatrix better than would the

---

[27] 190 Va. 648, 58 S.E.2d 55 (1950).

[28] See note 25 supra.

[29] Where there is a revoking clause, the intent of the testator is quite clear and it is not necessary to look to the remainder of the will. An inconsistent, subsequent will only revokes by implication, however, as it supplants the prior will only to the extent that it makes inconsistent dispositions. It is logical, then, to require that the inconsistent provisions actually become operative in order to accomplish a revocation.

[30] Briefly stated, the rule of dependent relative revocation is: "If the testator cancels or destroys a will ... with the present intention of making a new one immediately, and the new will is not made, or if made fails of effect because not properly executed ... then the old will, having been conditionally revoked, still stands. [The law presumes] that he prefers his old will to intestacy; that the revocation was conditioned upon the new testamentary disposition being effective." Bell v. Timmins, 190 Va. 648, 659, 58 S.E.2d 55, 61 (1950).

former rule. It was argued that because the revocation was testamentary, it was more probable that the testatrix intended to revoke her revocation rather than to die intestate. But the testatrix rejected prior wills by execution of a subsequent will containing an express revocation clause, and then rejected the later testamentary disposition. This would seem to indicate that neither of her two wills was satisfactory to her. Furthermore, the present rule seems to preclude any testimony as to the intent of the testator at the time of revocation, because once a valid revocation is established the revoking clause falls and the prior will automatically springs up as the last will of the deceased.[31]

A final criticism of the principal case is that the rule is not consonant with the statutes enacted in 1849 pertaining to revocation and revival. While the section on revival did not distinguish between the effect of a testamentary act and a separate act of revocation *i.e.,* destruction of the will, a reading of the revocation and revival sections together indicate that revocation was intended to be effective at the time of execution of the clause.[32] If the revocation is effective at the time of execution, then the section dealing with revival is meaningful, because the testator can later revive his revoked will. But if the revocation clause is to take effect only at the testator's death, then the revival section of the statute is meaningless, for the testator cannot revive what was not revoked. Furthermore, at the time these statutes were adopted they had been interpreted in England to mean that revocation operated upon execution rather than at death.[33]

When viewed in the abstract, the rule of the *Timberlake* case is as satisfactory as the rule it replaced; it is followed in other jurisdictions. It is questionable, however, whether the rule as announced in *Timberlake* is more desirable than the doctrine of *Rudisill* which was overruled.

JOHN PAGE GARRETT

---

[31]Timberlake v. State-Planters Bank, 201 Va. 950, 957-58, 115 S.E.2d 39, 44 (1960). It was generally held in the common law courts that the destruction of a will containing a revocatory clause revived a former preserved uncancelled will, and no proof to the contrary was allowed. Id. at 959, 115 S.E.2d at 45.

[32]See notes 17 and 19 supra.

[33]See note 15 supra.

"The late English statute of wills ... has, we think, introduced some valuable improvements. ... [W]e have adopted nearly the whole of the statute, for double reasons that we approve its provisions, and that the adoption here of those provisions will give us the benefit of the English decisions upon them...." Report of the Revisors of the Civil Code of Virginia, p. 623 (1849).