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Dependent Relative Revocation

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DEPENDENT RELATIVE REVOCATION*

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INTRODUCTION: THE REGISTER OF WILLS

The Register of Wills is an elected official in each of the sixty-seven counties of the Commonwealth of Pennsylvania. His jurisdiction and duties are prescribed in various Acts of the Legislature, notably The Fiduciaries Act of 1949,[1] The Register of Wills Act of 1951,[2] and The Orphan's Court Act of 1951.[3] The Register's jurisdiction and the scope of his duties emanate primarily from these acts, although they have been the subject of extensive construction and delineation by the orphans' courts of the various counties and by the Supreme Court of Pennsylvania.

The essentially statutory nature of the Register's functions has created —not only for the public, but also for the Bar—a general impression that the Register is a purely administrative official. In many respects, it is correctly observed that the Register performs in a primarily administrative capacity; however, it is also true that he performs significant quasi-judicial functions. Prior to the enactment of the Register of Wills Act of 1951, the Supreme Court of Pennsylvania held, with sufficient frequency and clarity that there could be no doubt as to the import of its words, that the Register of Wills, as to matters concerning probate, was a judge whose decisions were unimpeachable except on appeal.[4] This classic view has been reaffirmed in decisions handed down subsequent to the enactment of The Register of Wills Act.[5] The judicial character of the functions performed by the Register is limited, however, to the extent that he has been granted jurisdiction over matters of probate only. His jurisdiction in this area, it should be remembered, is exclusive[6]—just as the authority to determine questions concerning distribution

* This is the third in a series of articles describing and evaluating the jurisdiction and functions of the Register of Wills in Pennsylvania. The first article in the series, entitled *Lost Wills and the Register of Wills*, appears in 111 U. PA. L. REV. 450 (1963); the second, *Copy Fair*, appears in 36 TEMP. L.Q.—(1963).

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1. PA. STAT. ANN. tit. 20, §§ 320.101-.1401 (1950), as amended, PA. STAT. ANN. tit. 20, §§ 320.102-.1102 (Supp. 1962).

2. PA. STAT. ANN. tit. 20, §§ 1840.101-.601 (Supp. 1962).

3. PA. STAT. ANN. tit. 20, §§ 2080.101-.801 (Supp. 1962).

4. Szmahl's Estate, 335 Pa. 89, 6 A.2d 267 (1939); West v. Young, 332 Pa. 248, 2 A.2d 745 (1938); Sebik's Estate, 300 Pa. 45, 150 Atl. 101 (1930); McNichol's Estate, 282 Pa. 187, 127 Atl. 461 (1925).

5. Lennox v. Clark, 372 Pa. 355, 372, 93 A.2d 834, 842 (1953); Mangold v. Neuman, 371 Pa. 496, 498, 91 A.2d 904, 905 (1952).

6. Martin Estate, 349 Pa. 255, 36 A.2d 786 (1944).

in the administration of decedents' estates is vested exclusively in the orphans' court.[7] This Article concerns itself with one of those areas in which the function of the Register of Wills as a "judge" is the dominant factor: the application of the doctrine of dependent relative revocation in the preparation of the copy fair.

Copy Fair

The order of the Register by which a will is admitted to probate has the force and effect of a judicial decree.[8] As a practical matter, when confronted with a will on which there are one or more unsigned additions, alterations, deletions, insertions, interlineations, notations or substitutions, the Register's decree of probate must distinguish that which he holds to be admissible to probate from that which is not. This is accomplished by the Register's making a physical copy of the document proferred including only that writing which he holds to be entitled to probate as the decedent's last will and testament. This may be effectuated with hearing or without, depending generally upon the nature of the unsigned marking, and upon the severity and substance of the dispute centered around it. Thus, the copy fair is, in its final state, a "fair copy" of so much of the decedent's will as the Register deems to be entitled to probate.

This Article will discuss in detail the situation where the testator has made an alteration, or a cancellation with an interlineation, or another writing which in and of itself is sufficient to operate as a revocation of the gift affected, and where the testator has at the same time attempted a substitutionary gift affecting either the same persons or property, which substitutionary gift is not valid because of a defect in its creation or because of the existence of circumstances beyond the testator's knowledge or control.

In this context, the questions which initially confront the Register of Wills, when the testamentary writing is offered for probate, are: (1) Was the original gift effectively revoked? (2) If so, is the substitutionary gift valid? (3) If not, does the invalidity of the later gift render inoperative the revocation of the original gift? These questions are necessarily preliminary to the ultimate question for the Register, which is: what shall be admitted to probate? The determination of this question will depend upon whether or not the doctrine of dependent relative revocation is applicable under the particular set of facts presented. The impact which the acts of revocation and substitution have on the determination of the testator's dispositive intent and upon the property and beneficiaries affected imports an obvious necessity that the

7. Rockett Will, 348 Pa. 445, 35 A.2d 303 (1944); Carson's Estate, 241 Pa. 117, 88 Atl. 311 (1913); Hegarty's Appeal, 75 Pa. 503 (1874).

8. Authorities cited and text accompanying notes 6 and 7 *supra*.

Register of Wills should have a clear and complete understanding of the doctrine of dependent relative revocation and of the circumstances in which it applies.

Dependent Relative Revocation Defined

The doctrine of dependent relative revocation and the requirements of the rule have been stated generally as follows:

> Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force . . . .[9]

It will be shown that Pennsylvania courts have refused to adopt the doctrine without qualification; several important restrictions have been grafted upon its application.[10] These restrictions and their efficacy shall be treated in full.

Where the Doctrine Does Not Apply

Initially, it should be observed that circumstances may arise where a cursory view of the fact situation seems to dictate the determination of the problem through the medium of the doctrine of dependent relative revocation, but where a closer scrutiny of the facts will disclose that the doctrine properly has no application whatever. These circumstances should be noted with some care in order that an early appreciation may be realized of the rather limited—indeed isolated—area in which the doctrine has been permitted to operate in Pennsylvania.

The effective revocation of a testamentary gift must be predicated upon capacity and intent.[11] Therefore, where the testator executes a revoking

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9. Braun Estate, 358 Pa. 271, 275, 56 A.2d 201, 203 (1948), quoting 1 JARMAN, WILLS 135 (7th ed. 1930). It will soon be observed, however, that the doctrine also embraces changes made by codicil and interlineation; it is not limited to changes made by will as is suggested.

10. See Holt Estate, 405 Pa. 244, 174 A.2d 874 (1961); McClure's Estate, 309 Pa. 370, 165 Atl. 24 (1933); Price v. Maxwell, 28 Pa. 23 (1857).

11. The Wills Act of 1947, PA. STAT. ANN. tit. 20, § 180.5 (1950), provides as follows:

> No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than:
> (1) Will or Codicil. By some other will or codicil in writing,
> (2) Other Writing. By some other writing declaring the same, executed and proved in the manner required of wills, or
> (3) Act to the Document. By being burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revocation by the testator himself or by another person in his presence and by his express direction. If

instrument while under a mental or other incapacity, the original gift remains unrevoked. This result obtains, not by reason of the doctrine of dependent relative revocation, but because the purported revoking instrument is itself not valid in light of the testator's lack of requisite capacity and intent to execute it and to vest it with validity; that is, it is not a question of reviving an original and revoked gift because the original gift is never revoked at all.[12] Similarly, where the substitutionary gift is the product of undue influence and is therefore invalid, the original gift is never effectively revoked; its vitality, although seemingly stemming from reinstatement, has in fact never really been interrupted.[13] Under the same rationale, it appears that where the ostensible revocation of the original instrument occurs through inadvertence and without intent to revoke (*e.g.*, accidental destruction), there is no effective revocation of the instrument.[14] The foregoing discussion is intended to demonstrate the inapplicability of the doctrine of dependent relative revocation where the attempted revocation of the original gift was ineffectual *ab initio*.

It is also to be observed that dependent relative revocation has in most jurisdictions[15] no applicability where the revoking instrument has been lost. The general rule is that a lost will may be proved,[16] although this is not true where the sole purpose of such proof is to establish the revocation of an earlier will.[17] Thus, where the revoking instrument has been lost, the first will remains operative, not by reason of dependent relative revocation, but because its revocation is not susceptible of being proved.

Revocation and Substitution

Unless the testator possesses the capacity and intent to revoke an earlier gift, the doctrine of dependent relative revocation has no applicability, re-

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such act is done by any person other than the testator, the direction of the testator must be proved by the oaths or affirmations of two competent witnesses. See Kapp's Estate, 317 Pa. 253, 176 Atl. 501 (1935).

Note that revocation by the doing of an act to the document requires specific intent. Revocation by will or codicil or by another writing requires capacity to execute such an instrument in accordance with the provisions of § 1 of the act (Pa. Stat. Ann. tit. 20, § 180.1 (Supp. 1962)) which provides in part:

(a) Persons Twenty-one or Older. Any person of sound mind twenty-one years of age or older may by will dispose of all his real and personal estate . . . .

12. See Bregy, Intestate, Wills and Estates Act of 1947, at 2369 (1949).

13. Rudy v. Ulrich, 69 Pa. 177 (1871). The same problem was raised and discussed in Ash Will, 351 Pa. 317, 41 A.2d 620 (1945).

14. See Bregy, *op. cit. supra* note 12, at 2355, 2375-76, and cases therein cited.

15. 57 Am. Jur. *Wills* § 518 (1948) and cases therein cited.

16. See Walsh, *Lost Wills and the Register of Wills*, 111 U. Pa. L. Rev. 450 (1963).

17. *Id.* at 456. See Koehler's Estate, 316 Pa. 321, 175 Atl. 424 (1934); Shetter's Estate, 303 Pa. 193, 154 Atl. 288 (1931).

gardless of other circumstances, including later testamentary provisions. The requirement for an animus revocandi is absolute. Further, the doctrine applies only where an effective revocation is coupled with a substitutionary gift which is, in fact, provided for; where a substitutionary gift is only *intended*, but is in fact never *made*, a clear revocation of the orginal gift is given effect, and that gift will, under no circumstances, be reinstated.[18] In addition to the elements of intentional revocation and substitution already mentioned, it must be made to appear that the testator intended the revocation of the original gift *only if* the substituted gift were effective.[19] Therefore, in order that the doctrine should come into consideration at all, it must be determined that the testator would not have revoked the earlier gift had he known that the substituted gift was invalid, that is, that revocation was not to be operative independently of these other circumstances.[20] The issue, then, is clearly one of intent, and the solution is one of construction.[21]

In summary, the application of the doctrine of dependent relative revocation may be said to rest upon two requirements: (1) that testator, possessing the capacity so to do, intentionally revokes a testamentary gift and, with the same capacity and intent, creates a gift which is to be substituted for the one revoked; and (2) that testator intends the revocation of the original gift to be dependent upon the validity of the substitutionary gift, which gift contrary to his wishes is invalid.[22]

It has been stated that the determination of the testator's intent is a matter of construction. The instance in which the construction of his intent is most favorable to the application of the doctrine is where the revocation and the substitutionary gift are made concurrently, as, for example, where both are provided for in the same codicil.[23] Nevertheless, the mere concurrence of revocation and substitution is not conclusive; it must still be shown that the effectiveness of the former was intended to depend upon the validity of the latter.[24] This determination is to be based upon an evaluation of the writings

18. Holt Estate, *supra* note 10; Emernecker's Estate, 218 Pa. 369, 67 Atl. 701 (1907); Heller Estate, 158 Pa. Super. 194, 44 A.2d 528 (1945).

19. Braun Estate, *supra* note 9; McDermott's Estate, 1 Pa. D. & C. 789 (Orphans' Ct. 1922); Lutz's Estate, 9 Pa. County Ct. 294, 27 W.N.C. 403 (Orphans' Ct. 1890).

20. See AKER, PROBATE AND INTERPRETATION OF WILLS § 3.14M (1962); *but see* Melville's Estate, 245 Pa. 318, 91 Atl. 679 (1914); Swanson Estate, 74 Pa. D. & C. 358 (Orphans' Ct. 1950).

21. *Ibid.* See Hartman's Estate (No. 1), 320 Pa. 321, 182 Atl. 234 (1936); Baugh's Estate, 288 Pa. 308, 136 Atl. 210 (1927); Teacle's Estate, 153 Pa. 219, 25 Atl. 135 (1893).

22. See SUMM. PA. JUR. *Intestacy and Wills* § 259 (1956).

23. Braun Estate, *supra* note 9; Worrell's Estate, 11 Pa. D. & C. 364 (Orphans' Ct. 1928).

24. See authorities cited and text accompanying notes 19 and 20 *supra*.

involved,[25] the relationship between the affected gifts,[26] a determination of testator's over-all testamentary scheme,[27] and other pertinent circumstances.[28]

Braun Estate[29] is an excellent example of the manner in which the supreme court has approached the determination of the testator's intent. In that case, testator's will, executed when his adopted daughter was fifteen years of age, bequeathed the sum of fifty thousand dollars to trustees for her benefit, the entire corpus to be paid over to her at age thirty-five. By subsequent holographic codicil, testator provided: "I hereby revoke the Trust Fund in favor of my Daughter, Mildred, and substitute a lump sum of dollars in cash." The residuary legatee contended that the provisions of the codicil constituted an unqualified revocation of the daughter's legacy and that the substitutionary gift was void for uncertainty. The auditing judge disagreed and awarded the fund outright to the daughter who had then passed the age of thirty-five. His decision was grounded upon a finding that the revocation of the trust was conditional upon the validity of the substituted gift. The supreme court, affirming, observed that the doctrine of dependent relative revocation, although not adopted in its arbitrary form in Pennsylvania,[30] had never been forbidden by the authorities.[31] The court, after construing the will and the codicil together, concluded that testator nowhere indicated "that his daughter was to cease being an object of his testamentary bounty."[32] The following circumstances of the case were carefully considered: the daughter's age at the time of execution of the original instrument; her age at the time of the execution of the codicil; the language of the codicil which, but for the missing figure, clearly manifested an intent to give her some amount of money; and testator's natural desire to provide for an adopted child. These considerations led the court to conclude that testator's intent was to provide a substitutionary gift and not an unconditional revocation.

As yet, there has not been developed a definitive body of evidentiary rules peculiar to the context in which the doctrine of dependent relative revocation operates. This is unquestionably due to the absence of a requirement for specialized rules in view of the reluctance with which the courts have

25. *Ibid. Compare* Braun Estate, *supra* note 9, *with* Heller Estate, *supra* note 18.

26. See authorities cited and text accompanying notes 19 and 20 *supra*; Teacle's Estate, *supra* note 21.

27. An incomplete, ambiguous or equivocal direction which purportedly modifies a will cannot be used to defeat its general scheme, Baugh's Estate, *supra* note 21.

28. See, *e.g.*, Braun Estate, *supra* note 9 (family relationship between testator and disappointed beneficiary); Melville's Estate, *supra* note 20 (substituted legacy made to a charity within 30 days of death).

29. *Supra* note 9.

30. Citing McClure's Estate, *supra* note 10.

31. Braun Estate, *supra* note 9, at 273-74, 56 A.2d at 202.

32. *Id.* at 276, 56 A.2d at 203.

applied the doctrine. It appears that almost any pertinent evidence which will shed light on testator's intent will be admitted.[33] In fact, in *Braun Estate* the court engaged in an admittedly speculative venture with reference to testator's intent, at least for the sake of argumentative inference if not for evidentiary reasons.[34]

The means which the testator selects to effect the revocation of the original gift seem to be immaterial,[35] although it would seem that compliance with the applicable provisions of the Wills Act would necessarily be required.[36]

The Failure of the Substitutionary Gift

The discussion to this point has dealt primarily with the necessity of there being an effective revocation of a testamentary gift together with an ineffectual provision for a substitutionary gift. It next becomes necessary to study this substitutionary gift and to determine the extent to which its nature affects the application of the doctrine of dependent relative revocation. A substitutionary gift may fail for any number of reasons,[37] for example, want of execution in accordance with the provisions of the Wills Act,[38] incapacity of the beneficiary to take the gift,[39] ambiguity or incompleteness,[40] death of the testator within thirty days of making a charitable gift,[41] or violation of the rule against perpetuities.[42]

In Pennsylvania it is very clear that the applicability of the doctrine of dependent relative revocation depends upon the reason for the failure of the substitutionary gift. The rule is that where that failure is attributable to a defect intrinsic to the instrument or to its execution, the revoked gift may be reinstated by application of the doctrine of dependent relative revocation. Where, however, that failure is attributable to circumstances extrinsic to the testamentary writing, the revocation of the original gift stands and the doctrine will not be applied.[43] It is quite apparent from the cases that the

33. Aker, *op. cit. supra* note 20, § 3.14M.

34. *Supra* note 9, at 277, 56 A.2d at 204.

35. Aker, *op. cit. supra* note 20, § 3.14M; Summ. Pa. Jur. *Intestacy and Wills* § 262 (1956).

36. See note 11 *supra*.

37. See generally Walsh, *Copy Fair*, 36 Temp. L.Q.—(1963).

38. *E.g.*, Wright Estate, 380 Pa. 106, 110 A.2d 198 (1955); McClure's Estate, *supra* note 10; Ducommun Estate, 2 Fiduc. Rep. 69 (Pa. Orphans' Ct. 1951).

39. *E.g.*, Price v. Maxwell, *supra* note 10.

40. *E.g.*, Braun Estate, *supra* note 9.

41. *E.g.*, Hartman's Estate (No. 1), *supra* note 21; Price v. Maxwell, *supra* note 10.

42. *E.g.*, Stevenson's Estate, 48 Pa. D. & C. 140 (Orphans' Ct. 1943); Rice's Estate, 16 Pa. D. & C. 123 (Orphans' Ct. 1929).

43. Braun Estate, *supra* note 9; Worrell's Estate, *supra* note 23; *cf.* Hartman's Estate (No. 1), *supra* note 21; Teacle's Estate, *supra* note 21; and Price v. Maxwell, *supra* note 10.

origin of this distinction lay in cases concerning the invalidity of charitable gifts made within thirty days of death,[44] which invalidity results from statute and is therefore extrinsic. The perpetuation of this distinction hardly seems justified since the enactment of the Wills Act of 1947,[45] wherein it is provided that substituted charitable gifts shall be valid to the extent that they were valid in the original testamentary writing, notwithstanding death within thirty days.[46] In other words, the vitality of the distinction has been weakened by statute with regard to charitable gifts, while it apparently subsists in the area of non-charitable gifts;[47] at least there appears to be no authority indicating that the contrary is true.

Changes in the Will Proper

Another aspect of the application of the doctrine is the manner in which the revocation and substitution are made. For example, where the testator cancels the name of the executor or of a beneficiary in his will, the revocation is operative even though the interlined substitutionary appointment is invalid for lack of execution.[48] The reasoning behind the refusal to apply dependent relative revocation in such cases is logical; where testator cancels an executor or beneficiary in favor of a substituted appointee, it is fairly clear that his act arose as much out of a desire to remove the former as it did out of a desire to favor the latter.[49] This distinction, like others in this area, can be carried to unwarranted extremes. For example, in *Swanson Estate*[50] testator's brother predeceased him, after testator had executed his will; testator canceled out his brother's name and inserted in lieu thereof the name of the brother's son by ineffectual interlineation. Notwithstanding the son would, absent testator's abortive attempt to substitute his name, have shared in the gift under the provisions of the Wills Act,[51] the court did not apply the doctrine of dependent relative revocation, but held both gifts to be ineffectual. It does not appear from the report of the case or in commentary thereon[52] that the doctrine was argued in that case. Had it been urged, however, the

44. See, *e.g.*, Hartman's Estate (No. 1), *supra* note 21; Price v. Maxwell, *supra* note 10.

45. Pa. Stat. Ann. tit. 20, §§ 180.1-.22 (1950), as amended, Pa. Stat. Ann. tit. 20, §§ 180.1-.23 (Supp. 1962).

46. Pa. Stat. Ann. tit. 20, § 180.7(1) (1950).

47. For examples of the application of the distinction to noncharitable gifts see Mendinhall's Appeal, 124 Pa. 387, 16 Atl. 881 (1889); and McCalla's Estate, 33 Pa. D. & C. 643 (Orphans' Ct. 1938).

48. Swanson Estate, *supra* note 20 (beneficiary canceled); Ducommun Estate, *supra* note 38 (beneficiary canceled); Cromer Estate, 69 Pa. D. & C. 81 (Orphans' Ct. 1949) (executor canceled); see Walsh, *supra* note 37, at ——.

49. See Bregy, *op. cit. supra* note 12, at 2370.

50. *Supra* note 20.

51. Pa. Stat. Ann. tit. 20, § 180.14(8) (1950).

52. 13 U. Pitt. L. Rev. 440 (1952).

result may have been the same under the rationale of the distinction presently being considered; on the other hand, the defect in the substitutionary gift was intrinsic to the instrument (lack of execution), so that there existed a clear opportunity for application of the doctrine. It seems to be firmly established in Pennsylvania that, where an attempt is made to substitute a beneficiary by interlineation, the gift to the canceled beneficiary cannot be reinstated; the identity of the substituted beneficiary is immaterial.[53]

Where the alteration or interlineation purports to change the amount of a cash legacy rather than the identity of the beneficiary, a different approach is employed by the courts. The distinction is not without merit in logic and involves different considerations depending upon whether the amount of the legacy is increased or decreased.[54] Where the legacy is increased in the manner described, it has been held that the original gift is valid, the theory being that the ineffectual attempt to increase it is the very antithesis of an intent to revoke the earlier gift.[55] Although such interlineation is not itself valid, because it is in the nature of a codicil, it is nevertheless admissible as evidence of testator's intent.[56] On the other hand, where testator has by ineffectual interlineation decreased the amount of a legacy, it cannot be argued that there was no intent to revoke the gift, at least *pro tanto*. The question is whether the legatee takes anything at all. There is dictum to the effect that both the cancellation and the interlineation should be disregarded and that the original gift be left unaffected.[57] Logic would seem to dictate that the original gift should be admitted as evidence of the extent to which testator intended it to be modified.[58]

Finally, in the context of cancellations coupled with interlineations there should be considered the situation in which the testator substitutes, instead of a beneficiary or the size of a legacy, the gift itself. *McCalla's Estate*,[59] involving a fact situation not precisely in point, was nevertheless somewhat analogous. Testatrix by codicil had revoked a legacy because she had made an inter vivos gift to the same beneficiary; this gift was subsequently voided on the grounds of undue influence in its procurement, but the legatee was unsuccessful in urging the application of the doctrine of dependent relative revocation to save the original bequest. The court determined that testatrix had revoked the earlier gift because of a mistaken belief that a

53. Melville's Estate, *supra* note 20.

54. SUMM. PA. JUR. *Intestacy and Wills* §§ 265-66 (1956).

55. Okowitz Will, 403 Pa. 82, 169 A.2d 84 (1961) (amount expressed in terms of percentage of residue); Rife Estate, 88 Pa. D. & C. 360 (Orphans' Ct. 1954) (amount of cash specified).

56. Okowitz Will, *supra*; Rife Estate, *supra*.

57. Dixon's Appeal, 55 Pa. 424 (1867).

58. See BREGY, *op. cit. supra* note 12, at 2377-78.

59. *Supra* note 47.

valid inter vivos gift had been made, but decided the case on authority dealing with extrinsic defects,[60] indicating that revocation was effected under a mistake which was within testatrix' knowledge. It was not made clear and, in the opinion of this Register, it should have been made clear at the time of probate of the testatrix' will whether the undue influence which prompted the inter vivos gift was also exerted at the time when the original will was made (although the determination would not have affected the result in this case). The hypothetical case suggested—substitution of a gift by interlineation —has not been squarely presented; it is clear, however, that the doctrine of dependent relative revocation will not be applied where the substitution was due to a collateral mistake of fact under circumstances within the testator's knowledge or control. There is dictum to the effect that the revocation may be set aside where the mistake, even though collateral, was not within testator's knowledge.[61]

Changes Made by Codicil

Where testator provides for revocation of an earlier gift by codicil while providing therein for a substitutionary gift which is defective, the question is: should the revoking clause be given effect independently of the abortive disposition? Under the provisions of the Wills Act the revocation would, but for the doctrine of dependent relative revocation, be effective and operative.[62] The question appears to be one of applicability of the doctrine, that is, whether the revocation was intended in any event or only if the substitutionary gift were valid. The considerations which govern this determination have been discussed in detail heretofore. It should be noted, however, that the distinction between dispositions which fail because of intrinsic or extrinsic defects is carefully maintained.[63]

Where testator has provided for the same beneficiary in the codicil, there seems to be a tendency of courts to overlook or explain away a clause revoking the earlier gift without facing the real legal problem and alluding to the doctrine.[64] This is true whether the attempted substitutionary gift fails by reason of ambiguity, incompleteness,[65] or invalidity.[66] On the other hand, a complete change of beneficiary will cause the revocation to stand despite

60. McClure's Estate, *supra* note 10; Melville's Estate, *supra* note 20; Mendinhall's Appeal, *supra* note 47.

61. Mendinhall's Appeal, *supra* note 47; McCalla's Estate, *supra* note 47; Cummins' Estate, 37 Pa. Super. 580 (1908).

62. Pa. Stat. Ann. tit. 20, § 180.5(1) (1950). See note 11 *supra*.

63. See, *e.g.*, Melville's Estate, *supra* note 20.

64. See Morrow's Estate (No. 2), 204 Pa. 484, 54 Atl. 342 (1903); Sloan's Appeal, 168 Pa. 422, 32 Atl. 42 (1895); *cf.* Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948).

65. See Braun Estate, *supra*.

66. Stevenson's Estate, *supra* note 42; Rice's Estate, *supra* note 42 (rule against perpetuities violated); Lutz's Estate, *supra* note 19 (rule against accumulations violated).

the invalidity of the later gift,[67] except where testator has stated in the document that the revocation is dependent upon the validity of the substituted gift.[68]

Changes Made by New Will

It seems that where substitutionary gifts are made in a new but defective will, as opposed to codicil or interlineation, the doctrine of dependent relative revocation has no applicability and the revocation of the first will stands.[69] This is certainly true where a complete change of beneficiaries is attempted.[70] This also seems to be the rule where the beneficiary is the same but the amount of the gift is changed.[71] The most plausible rationale for the rule may be that testator could make no more dramatic or conclusive expression of an intent to revise his testamentary scheme than through the preparation of a new will.

Whether an instrument is a will or a codicil presents another question. Where an instrument called a will preserves certain gifts in an earlier instrument by reference to them, it is given the effect of a codicil and is governed by the rules pertaining to codicils,[72] but this is not so where the provisions of the earlier will are repeated.[73] It should be remembered, however, that the foregoing has no application where the second will is void for lack of capacity or intent on the part of the testator, because in such case the first will was never effectively revoked.[74]

Criticisms and Recommendations

It has been seen that the doctrine of dependent relative revocation has only a limited application in Pennsylvania. To an extent, the reason is plausible: "[I]t usually [furnishes] . . . only speculation or a wild guess as to testator's intention to make his absolute revocation merely conditional."[75] This, of course, is partially true; but it has always been a primary objective of the law to honor the testator's intentions.[76] Therefore, with testator's wishes being foremost, it seems unjust to refuse to inquire into

67. Melville's Estate, *supra* note 20.
68. McDermott's Estate, *supra* note 19.
69. Bregy, Intestate, Wills and Estates Act of 1947, at 2371, 2373 (1949).
70. McClure's Estate, 309 Pa. 370, 165 Atl. 24 (1933).
71. Hartman's Estate (No. 1), *supra* note 21; notice, however, that this case involved a charitable gift attempted within 30 days of death prior to the enactment of the liberalized provisions of section 7(1) of the Wills Act of 1947 (Pa. Stat. Ann. tit. 20, § 180.7(1) (1950)).
72. Bingaman's Estate, 281 Pa. 497, 127 Atl. 73 (1924).
73. Hartman's Estate (No. 1), 320 Pa. 321, 182 Atl. 234 (1936).
74. See text accompanying notes 11-14 *supra*.
75. Holt Estate, 405 Pa. 244, 250-51, 174 A.2d 874, 877 (1961).
76. See, *e.g.*, Wright Estate, *supra* note 38, referring to testator's intent as the "pole star" of construction.

them when a substitutionary gift fails. The doctrine of dependent relative revocation, if judiciously applied, could serve as a most effective expediter of testator's wishes. Indeed, many of the reasons given for refusing to apply the doctrine in the past have become strained[77] or anachronistic.[78]

In Pennsylvania, once the problem of animus revocandi has been resolved, the Register of Wills who is confronted with altered or conflicting instruments must begin to evaluate an assortment of causes for the failure of the substitutionary gift. Whether this is due to intrinsic or extrinsic causes seems to make less practical difference, insofar as many of the reported cases are concerned, since the enactment of the Wills Act of 1947 which validates certain charitable gifts made within thirty days of death.[79]

The rule which refuses to reinstate revoked gifts where the beneficiary has been changed is basically sound. Such a gift should not be given new life where it appears that the revocation would have been made regardless of the validity of the second gift. The rule has been strained, however, in *Swanson Estate*[80] which is a perfect example of the injustice which can result from inflexible application of a principle and which flies in the very teeth of reason.

The distinction which is recognized between legacies increased and decreased in amount by substitution should be emphasized. The rule pertaining to increases in the amount of legacies would ignore both the revocation and the new invalid gift. This is logical because of a clear absence of animus revocandi. But this does not hold true in the case of a decrease; there it would seem that the new amount should be given effect, with the earlier gift serving as evidence of the extent of the revocation intended. In this case it is clear that testator acted *in animo revocandi,* and it would be a clear violation of his intent to disregard both the revocation and the substitutionary gift.[81]

Finally, there seems to be no good reason why there should any longer be maintained a distinction between the various vehicles used to accomplish the revocation and substitution, that is, interlineation, codicil or later will. The distinction seems to be extremely artificial in light of the avowed end of the law to give effect to testator's intent.

Ultimately the matter is one of construction. It would seem to this Register that the remedy of appeal would provide a safeguard against abuse, should the doctrine of dependent relative revocation be adopted in

77. See, *e.g.*, Swanson Estate, 74 Pa. D. & C. 358 (Orphans' Ct. 1950).

78. See, *e.g.*, Price v. Maxwell, 28 Pa. 23 (1857), in the matter of charitable gifts made within 30 days of death.

79. PA. STAT. ANN. tit. 20, § 180.7(1) (1950); AKER, PROBATE AND INTERPRETATION OF WILLS § 3.14M (1962); see text accompanying notes 44-47 *supra*.

80. *Supra* note 77.

81. See BREGY, *op. cit. supra* note 69, at 2377-78.

Pennsylvania to the full extent of its generally accepted definition. In fact, a more simplified rule, such as that suggested by Jarman,[82] would assure a more just application; and the removal of strained, artificial and anachronistic distinctions would give the register, who may find the present battery of rules and distinctions more confusing than helpful, a more modern and flexible tool with which to work toward the result which the testator himself intended. In any event, a consideration of this problem should urge the Registers in this Commonwealth to hold full and complete hearings to determine to the best of their ability the actual intent of the testator.

82. Text accompanying note 9 *supra*. As applied, of course, this statement of the rule has been expanded to include dispositions by codicil or by cancellation and interlineation.