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Spring 1983

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John E. Donaldson

William & Mary Law School

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Popular Media. 119.

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Law Reform—Suggested Revisions to Virginia's Wills Statutes

PART ONE

THE Executive Committee of the Virginia Bar Association in 1975 requested the Committee on Wills, Trusts and Estates to undertake a study of substantive law and procedure in Virginia relating to succession to property and the administration of estates. It was expected that the study would focus on the propriety of Virginia's adopting the Uniform Probate Code. In 1978 the Committee on Wills, Trusts and Estates determined that adoption of the U.P.C. as a whole was not warranted. It also determined to continue its examination of the adequacy of Virginia law and procedure relating to matters covered by the U.P.C. with a view to making appropriate recommendations to the Executive Committee as needed revisions were identified. The Committee's ongoing efforts in this regard have contributed importantly to the enactment of recent legislation involving such matters as the inheritance rights of children, multiple party accounts, family support allowances and exemptions and the disposition of community property.

The Committee now has under consideration a number of proposed statutory changes pertaining to the execution, interpretation, construction and revocation of wills. These proposals were developed by a subcommittee which studied Virginia case and statutory law in areas covered by Article 2, Parts 5 through 9, of the U.P.C. The Committee intends to complete its consideration of these proposals and make appropriate recommendations to the Executive Committee prior to the 1984 session of the General Assembly.

This article, which is to be published in two parts, is intended to inform the bar of the proposed changes and to invite comments and suggestions. In the discussion that follows, the primary focus is the ade-

quacy of Virginia statutory law governing the devolution of a testator's estate where the testator has not expressed his intent sufficiently. The principal function of the statutes examined is the implementation of the intent that the testator is presumed to have had in a number of different situations. These statutes thus reflect legislative guessing as to the probable desires of the "typical" testator in the situations addressed.

A. Death of the legatee or devisee prior to the death of the testator.

In well-drafted wills the circumstance of a named beneficiary predeceasing the testator is usually addressed by conditioning the bequest or devise upon the legatee surviving the testator. Often an alternate taker is designated. Where a will fails to address the circumstance of a legatee predeceasing the testator, the legacy, upon such occurrence and absent a statute, lapses or fails, thus falling into the residue or passing by intestacy. Statutes, commonly referred to as "anti-lapse" statutes, have been enacted in most states to "save" the legacy to a predeceasing legatee. This is typically accomplished by providing that the legacy is to pass to the issue of the deceased legatee.

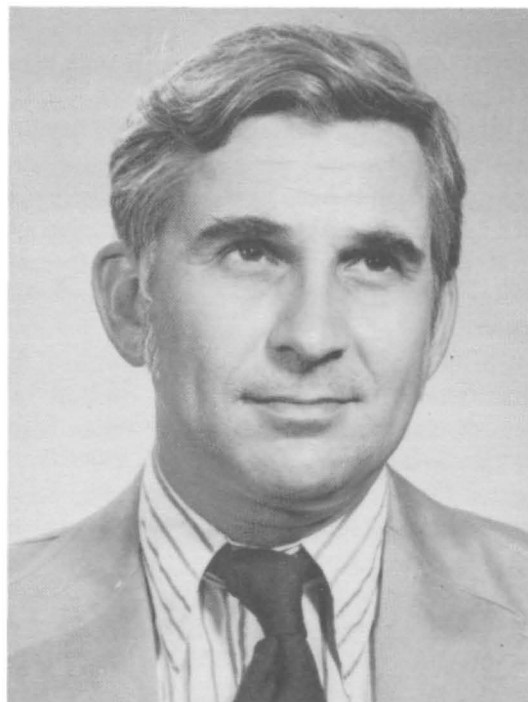
The Virginia anti-lapse statute, § 64.1-64, is deficient in several respects, especially given that the purpose of an anti-lapse statute is to implement the presumed intent of a testator where a devisee or legatee predeceases the testator. First, the Virginia statute is deficient in providing anti-lapse protection as to all devisees and legatees who predecease the testator and leave issue who survive the testator. In the case of a testator who has children by a prior marriage and a second spouse who also has children by a prior marriage, a legacy to the spouse, not conditioned on survivorship, would, where the spouse predeceases the testator, pass to the issue of the deceased spouse under the Virginia statute, to the exclusion of the testator's own issue by his prior marriage. Presumably, the testator would have preferred the bequest to pass to his issue (through intestacy or perhaps under a residuary clause) rather than to the issue of his spouse.

Editor's Note: Prof. Donaldson is Chairman of the Ad Hoc Subcommittee on Virginia Wills Statutes of the Committee on Wills, Trusts and Estates of The Virginia Bar Association. Other members of the subcommittee, who all contributed to this effort, are Vincent L. Parker, Robert H. Powell, Stanley L. Samuels and Robert M. Saunders.

Second, under the Virginia statute a bequest to an unrelated legatee who predeceases the testator survived by descendants may pass to such person's descendants. It is, of course, difficult to estimate the course of succession that a testator may have preferred where an unrelated legatee predeceases him. Most states that have addressed the issue have presumed that the testator would not have preferred to "save" a legacy to a predeceasing unrelated legatee and in effect provide that such a legacy falls into the residue or passes by intestacy. In a 1960 survey (see 46 *U. Va. L. Rev.* 899), it was determined that 37 states required the predeceasing legatee to have been related to the testator before their anti-lapse statutes became applicable and that only nine states, including Virginia, had statutes that were applicable in the case of predeceasing unrelated legatees. Also, given that where a legatee is related to the testator family ties and family interests are likely to be the motivating forces underlying the legacy, the application of an anti-lapse statute where the legatee predeceases the decedent has the effect of preventing a "branch" of the family from being penalized solely because of the death of a member (usually the "head") of the branch. In this regard, the anti-lapse statute functions in much the way that the statute of intestate succession functions when an heir apparent dies leaving issue surviving. However, the motive of friendship which presumably underlies most legacies to non-relatives is less likely to be coupled with "family" considerations of the kind that underlie legacies to relatives and the testator is less likely to be concerned about protecting the "family" of an intended unrelated legatee from the untimely death of such intended legatee. Although not free of doubt, it is submitted that the majority approach, which is also reflected in U.P.C. § 2-605, best approximates the presumed intent of a testator in requiring that the predeceased legatee be related in a particular degree to the testator before an anti-lapse statute will be applicable. In this regard, the approach of the U.P.C. in defining relatedness in terms of descent from a grandparent, while arbitrary, is nonetheless reasonable in that it embraces kindred through first cousins, including first cousins several times removed, but excludes the more distant relatives who are less likely to have genuine "family" bonds with the decedent.

Another deficiency in the anti-lapse statute, § 64.1-64, arises from a 1980 amendment that sought to apply the statute to testamentary pourovers to trusts having remaindermen who predeceased the testator. This problem will be addressed in the second installment of this article.

A minor deficiency in the statute lies in its structure



John E. Donaldson is Professor of Law at the Marshall-Wythe School of Law of the College of William and Mary. Professor Donaldson received his B.A. degree from the University of Richmond, his J.D. degree from William and Mary, and his I.L.M. degree from Georgetown University. He is a member, College of Probate Counsel; was Chairman of the Virginia Bar Association Committee on Eminent Domain, 1977-80; and was Chairman, Section on Taxation, of the Virginia Bar in 1981-82.

and relationship to other relevant provisions. The last sentence of § 64.1-64, in treating the circumstances of the death of one of several residuary legatees without issue surviving, more appropriately belongs in § 64.1-65, which is discussed below.

Set forth in the Appendix are proposals (1) and (2) which would implement these recommendations by appropriate amendments to § 64.1-64 and § 64.1-65.

B. Failure of testamentary provisions.

Minor changes in statutory law are needed to better provide for the disposition of bequests and devises that are not saved by the anti-lapse statute. For example, what becomes of a legacy or devise to a beneficiary who predeceased the testator without issue surviving? In substance, Virginia law closely parallels U.P.C. § 2-606. Both treat lapsed legacies as falling into the residue. Also, both treat residuary

legacies to two or more persons as not subject to partial failure by reason of the death of one legatee without issue surviving. Such a death is treated as enlarging the shares of the other residuary legatees rather than resulting in partial intestacy.

The Virginia statutes setting forth this treatment, which is believed sound, are § 64.1-64 (last sentence) and § 64.1-65. As has been noted above, the last sentence of § 64.1-64 more appropriately belongs in § 64.1-65. That latter section, in its present format, is misleading in that it addresses only the question of the disposition of lapsed devises and leaves the ancient principles of the common law to furnish the rule that failed legacies fall into the residue. In the interests of clarity, the treatment of failed legacies should also be addressed in the statute.

Proposal (2), set forth in the Appendix, presents draft legislation which, if adopted, would implement these recommendations.

C. Revival of former wills; effect of revocation of later will.

An issue on which American jurisdictions are widely divided involves the question of the proper treatment of an earlier will where a testator executes a later will which purports to revoke the former, and the later will is itself revoked. In such circumstances does the former will thereby become operative at death? Three basic approaches have been followed. A large number of jurisdictions, including those which have adopted the U.P.C., apply various rebuttable presumptions as to whether the decedent intended the former will to be operative upon the revocation of the later and permit extrinsic evidence to establish intent. This approach has been criticized by commentators as violative of the spirit of wills acts in inviting the use of parol evidence to establish testamentary intent.

A small number of jurisdictions follow a second approach which is sometimes referred to as the common law rule of "automatic revival." This approach, which is rather mechanistic, is based on the principle that a will does not "speak" until death and a later will which purports to revoke an earlier will has no effect on the earlier will if it, the later will, is revoked. Thus the revocation of a revoking will prevents the revoking will from speaking language of revocation and as a consequence the earlier will is not revoked. This "automatic revival" approach has the advantage of certainty, but it is questionable whether it accurately reflects the testamentary wishes of the decedents involved.

A third approach observed in a number of jurisdictions approximates that employed in Section 22 of the English Wills Act of 1837. Under that Act there is no

revival of an earlier will by reason of the revocation of a later will and revival occurs only by the reexecution of the earlier will or by a codicil expressing an intent to revive the earlier. The purpose of the Act was to reverse by statute the "common law" rule that resulted in automatic revival of the first will upon the revocation of the second. Since only a "revoked" will can be "revived," the Act presumes that the revocation of the first will occurs at the time of execution of the second, which revokes the first expressly or by implication, and not when the second will "speaks" at the death of the decedent. That under the Act the second will revokes the first will at the time of execution of the second will was confirmed by the English judiciary in 1843 in *Major v. Williams*, 3 Curt. 432, 163 Eng. Rep. 781. The English approach thus employs the concept of automatic non-revival of a first will upon the revocation of the second and has the virtue of eliminating resort to parol or extrinsic evidence.

For a listing of the states that fall into each of the three main groupings of American responses to the revival issue, see the *Comment*, 49 Denver L. J. 593 (1973).

The current condition of Virginia law with respect to this issue is derived from strained and convoluted statutory interpretation and is much in need of revision. The applicable Virginia statutes appear to place Virginia in the third grouping of states, those which follow the English Wills Act of 1837 and its rule of "automatic non-revival." However, the Virginia Supreme Court, by construction, has placed the state in the second grouping, which follows the rule of "automatic revival." How this came about is most unusual.

Both the Virginia revocation statute, § 64.1-58, and the Virginia revival statute, § 64.1-60, are, in all material respects, identical to counterpart provisions of the English Wills Act of 1837, both being first adopted in this State in 1849. *The Report of the Revisors of the Civil Code of Virginia* (1849) states at page 623:

The late English statute of wills . . . introduced some valuable improvements. . . . We 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. . . .

Presumably, the code revisors in 1849 were aware that the English judiciary had, in 1843, construed the English Wills Act in the manner indicated above, and that under that Act the execution of a second will revoking the first is the event at which revocation of the first occurs. Presumably, the revisors were also aware that the purpose of the Act was to reverse the common law rule that a second revoking will, if itself

revoked, never “speaks” to revoke the first will.

The Virginia legislation of 1849 was not construed until 1877, where in *Rudisill v. Rhodes*, 70 Va. 147, the court, expressly relying on English precedent, *Major v. Williams*, *supra*, held, in accordance with legislative history and purpose, that the revocation of a second will does not operate to revive a first will. None of the twelve states which derive their law from the English Wills Act have held otherwise in cases where the second will expressly revokes the first. Nor is any distinction usually drawn in these states between second wills which revoke the first expressly, and those which revoke the first by implication through inconsistency. See *Page on Wills* (Bowe-Parker Revision, 1960), Vol. 2, p. 444.

Although Virginia, by statute, appears aligned with the “conclusive presumption of non-revival” position of the English Wills Act of 1837, the alignment changed in 1958. In *Poindexter v. Jones*, 200 Va. 372, 106 S.E. 2d 144 (1958), the court distinguished between second wills revoking the first by express revocation clause and second wills revoking the earlier by implication arising from inconsistency, holding, as to the latter, that a destruction of a second will merely inconsistent with the first, and not expressly revoking it, does not in fact revoke the first, because the inconsistent language never “speaks” in that circumstance. The holding of the court, while perhaps at odds with the legislative history, has some logic in that the laity probably regard language of express revocation to be immediately effective and could regard language of inconsistency to be ambulatory. See *Page on Wills*, *supra*, at page 443.

The retreat from the established interpretation of the Virginia revival statute which began with *Poindexter* became an abandonment of that interpretation in *Timberlake v. State Planters Bank*, 201 Va. 950, 115 S.E. 2d 39 (1960). There the court, as to a second will which expressly revoked a first will, and which second will, because not found, was presumed revoked by physical act, held that the second will did not “speak” at death to revoke the first. In short, the court held that until a will is revoked it continues in effect and a second will never revokes a first will if the second will is itself revoked.

As an exercise in statutory interpretation, the majority opinion in *Timberlake* is faulty for the following reasons:

1. Under the opinion, § 64.1-60 is virtually meaningless as a “revival” statute. In treating a first will as unrevoked by the express language of a second will until the second will speaks at death, which it cannot do if the second will is revoked, the revocation of a

second will can never present a revival issue because the first will, being unrevoked, is not in need of revival. The court’s attempt to find meaning in § 64.1-60 by attempting to distinguish between “declaratory” revocations and “testamentary” revocations is specious, and based on a case, *Barksdale v. Barksdale*, 39 Va. 535 (1842), decided seven years before Virginia adopted the predecessor provisions to § 64.1-58 and § 64.1-60.

2. The opinion overrules the previous statutory interpretation expressed in *Rudisill v. Rhodes*, *supra*, by ignoring the English authority upon which that case was decided.

3. The opinion results in an interpretation that is diametrically opposed to the purpose and intent of § 64.1-60 as first enacted, which was to reverse the “common law” rule that a second will never revokes a first will unless the second will “speaks” at death. Rather than reading § 64.1-60 to reverse the “common law” rule, the opinion, apparently oblivious to the fact that § 64.1-58 also was derived from the English Wills Act of 1837, construes § 64.1-58 in conjunction with § 64.1-60 to restore the common law rule that the statutes were intended to reverse.

The immediate task of determining the adequacy of Virginia law in contrast to the approach suggested in the U.P.C. thus results in the comparison of an emasculated, largely meaningless § 64.1-60 with U.P.C. § 2-509. The U.P.C., in inviting the use of parol evidence to resolve the question of whether revival of the earlier instrument was intended by the testator upon the revocation of a later will, introduces uncertainty to probate proceedings and invites the use of a kind of evidence that is traditionally regarded as unreliable. The Virginia “common law” approach required under the holding in *Timberlake* probably defeats the wishes of most testators who, having revoked a first will expressly by the terms of a second, revoke the second, perhaps in the hope of later executing a third. To suppose that a decedent, having once expressly repudiated a testamentary plan, would prefer that plan to intestacy upon the revocation of a later will is unrealistic, notwithstanding legalistic implications arising from the ambulatory character of wills. The “common law” position, concededly, does have the virtue, however, of making unnecessary inquiry into the question of whether a later will may have been executed and revoked.

Although, given the diversity of respectable opinion, the matter is not free of doubt, the approach to “revival” reflected in the English Wills Act of 1837, with slight modification, is believed preferable. Accordingly, it is submitted that the proper response to

the "revival" issue requires a statutory solution reflective of the following principles:

1. That revival of a former will by reason of the revocation of a later will should occur only when the decedent would probably have so intended, and that resort to parol evidence to determine such intention is improper.

2. That when a second will expressly revokes a first will it is presumed to be the intention of the decedent that revocation occurs upon the execution of the second will and the later revocation of the second will does not make the first operative.

3. That where a later will does not expressly revoke a former will, but is merely inconsistent with it in whole or in part, the mere execution of the later will does not, of itself, operate to revoke the former, and if the later will is itself revoked, the vitality of the earlier will continues unaffected by the provisions of the later will. It is thus presumed, in such cases, that an earlier will, not expressly revoked, remains viable as a testamentary document until superseded by a document admissible to probate upon the death of the decedent, and not revoked prior to death. Fortunately, cases involving the application of this principle do not arise often, and generally involve holographic writings as in *Poindexter v. Jones*, *supra*.

4. A will may be revived by a duly executed later writing expressing an intention to do so.

These principles generally reflect the observations set forth in *Page on Wills*, *supra* Vol. 2, p. 443, as follows:

Most of the laity apparently believe that the express revocation clause revokes the first will at once, and the rule that the revocation of the second will automatically leaves the first will in effect, frequently results in giving effect to a testamentary disposition which the testator had long since forgotten, and which, if he had remembered it, he would have thought had no legal effect.

The courts which distinguish between the cases in which the later will has an express revocation clause and those in which it is merely inconsistent with the prior will, probably come nearer to the intention of the greater number of testators.

Legislative proposals (3) and (4), which amend § 64.1-58 and § 64.1-60, are set forth in the Appendix and would, if enacted, implement these recommended changes.

The Committee on Wills, Trusts and Estates, in considering these recommended revisions, and those which will be discussed in the second installment of this article, is mindful that succession statutes of long

standing which are familiar and have well defined meanings through judicial interpretation are valuable to the public and the bar because of the element of certainty they afford. However, statutes that furnish rules of construction designed to approximate the intent of testators whose actual intent is unexpressed are especially deserving of periodic review, for what may appropriately have been the presumed intent of a typical testator in a generation past is not necessarily a measure of such intent today.

Appendix

Proposal 1. It is proposed that § 64.1-64 be amended and reenacted to read as follows:

§ 64.1-64. When children or descendants of devisee, legatee, etc. to take estate.—Unless a contrary intention shall appear in the will, if a devisee or legatee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will or fails to survive the testator, the issue of the deceased devisee or legatee who survive the testator take in the place of the deceased devisee or legatee and if they are all of the same degree of kinship to such deceased devisee or legatee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee or legatee under a class gift if he had survived the testator is treated as a devisee or legatee for purposes of this section whether his death occurred before or after the execution of the will.

Proposal 2. It is proposed that § 64.1-65 be amended and reenacted to read as follows:

§ 64.1-65. How devises and bequests that fail, etc. to pass.—Unless a contrary intention shall appear by the will, and except as provided in § 64.1-64, if a devise or bequest other than a residuary devise or bequest fails for any reason, it becomes a part of the residue, and if the residue is devised or bequeathed to two or more persons and the share of one fails for any reason, such share shall pass to the other residuary devisee or legatee or devisees or legatees in proportion to their interests in the residue.

Proposal 3. It is proposed that § 64.1-58 be amended and reenacted to read as follows:

§ 64.1-58. Revocation of wills generally—

(a) If a testator having an intent to revoke, or some person at his direction and in his presence cuts, tears, burns, obliterates, cancels or destroys a will or codicil, or the signature thereto, or some

(continued on page 28)

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(continued from page 8)

provision thereof, such will, codicil or provision thereof is thereby void and of no effect.

(b) If a testator executes a will or other writing in the manner in which a will is required to be executed, and such will or other writing expressly revokes a previous will, such previous will, including any codicil thereto, is thereby void and of no effect.

(c) If a testator duly executes a will or codicil which does not expressly revoke a former will, but which expressly revokes a part thereof, or contains

provisions inconsistent therewith, such former will is revoked and superseded to the extent of such express revocation or inconsistency if the later will becomes effectual upon the death of the testator.

Proposal 4. It is proposed that § 64.1-60 be amended and reenacted to read as follows:

§ 64.1-60. Revival of wills.—No will or codicil, or any part thereof which shall have become void and of no effect under the provisions of § 64.1-58 shall thereafter become operative otherwise than by the reexecution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown.