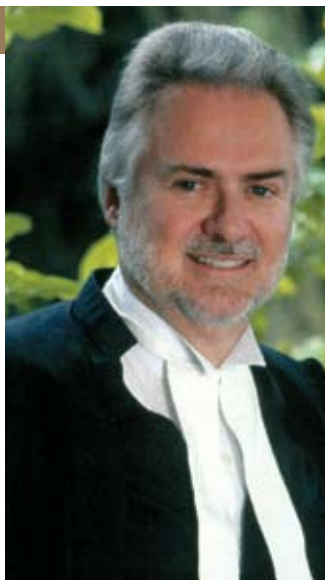


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Revocation of Wills

Every Will is revocable—even a Will whose terms purport to make it irrevocable is in fact revocable.

Generally speaking, a Will may be either revoked by the operation of law or deliberately revoked by the testator.

Deliberate revocation requires a voluntary act by a testator, which is done *with a specific intention to revoke the Will*. Unless the testator has this specific intention to revoke the Will, then even the physical destruction of a Will does *not* revoke that Will.

Revocation may sometimes occur, inadvertently, by operation of law in circumstances involving a change in the marital status of the testator. In such cases involving marriage or divorce, our BC law *may* deem there to be a revocation of the entire document or portion of a previous Will.

In this article, we will briefly sketch the law surrounding the revocation of Wills. We will also examine the presumption of revocation that may arise where the original Will cannot be found.

The Wills Act

In British Columbia the *Wills Act* sets forth the statutory law relating to Wills revocation.

Sections 14 and 15 of the *Wills Act* in effect provide that a Will,

or part of a Will, is revoked in the following circumstances:

1. upon the subsequent marriage of the testator *unless* the Will contains a declaration that the Will is made in contemplation of *that* marriage;
2. by another Will made in accordance with the *Wills Act*, that is, *formally* executed;
3. by a written declaration of revocation made by the testator in accordance with the *Wills Act*, that is, *formally* executed; and
4. by the destruction of a Will, *in the presence of a testator who intends to destroy the Will to revoke it*. The destruction may be effected by the testator personally or effected by another person, at the testator's direction **and** in his or her presence.

As noted above, the testator's marriage will automatically revoke any existing Wills and codicils.

The Act, section 16, further provides that where a marriage is effectively ended by divorce, by a judicial separation, or by court order of annulment, then any gift or power of appointment given by Will to a former spouse shall be deemed to be revoked.

Similarly, any testamentary appointment of the former spouse as executor or trustee will be deemed to be revoked. In either circumstances, the Will shall take effect as if the spouse has predeceased the testator. The only exceptions to such deemed revocations are cases where a contrary intention specifically appears in the Will.

Revocation of a Will By Marriage

As noted above, the testator's marriage will automatically revoke any existing Wills and codicils. This revocation occurs by operation of law, whether or not the testator wishes or intends such a revocation.

Unfortunately, not all marriage partners will be aware of this deemed revocation and the law may occasionally be viewed as creating some hardship to the disappointed beneficiaries. The rationale for this rule, however, is to ensure that any children and new spouse will benefit, that is, by creating an intestacy in the absence of a new Will.

An exception to this general rule is made if, and only if, the Will contains a specific declaration that it is made in *contemplation of marriage to a specific person*.

To fit within this exception, the Will must make it clear that the testator contemplated marriage to a specific person, not simply marriage in general. The best practice for the drafter of such a testament Will is to

name the intended spouse, describe him or her as fiancé or fiancée, and set forth the intention to make this Will in contemplation of marriage to that named fiancé(e).

By way of example, in *Re. Pluto* (1969) 69 W.W.R. 765, the Supreme Court of British Columbia held that the testator's Will, leaving "all to my wife" and specifically naming her, was nevertheless revoked by his marriage to that woman the following day.

This is *not* a situation in which one wishes his or her client to be found. It can be avoided by including a clear indication that the testator intends to marry the fiancé(e) named and is making this Will in contemplation of that marriage.

Revocation by a Voluntary Act

Pursuant to section 14 of the *Wills Act*, a Will may be revoked, in whole or in part, by the formal execution of a written declaration of revocation, whether this declaration stands alone or is found as part of a subsequent Will or codicil. To be effective, however, the testator must *intend* to rescind the prior Will, in whole or in part.

Section 14 requires both a written declaration expressing the testator's intent to revoke the prior Will and requires that such a declaration be properly executed in compliance with the *Wills Act* formalities.

Most often, the revocation will be included in a new Will or codicil. That, however, is not required as long as the declaration of revocation is properly executed in compliance with the *Wills Act* formalities.

Although the *Wills Act* specifically permits the partial revocation of a Will, such a practice may be risky because codicils or partial revocations can sometimes unfortunately create unintended confusion.

From a practice standpoint therefore, where a testator wishes to make changes to a previous Will, we suggest the safest practice usually is to start again by drawing a new Will revoking the previous Will entirely and thus avoiding any confusion. We recommend that, generally speaking, codicils not be used.

Wills in Multiple Jurisdictions

Another practice concern can be multiple Wills made in various jurisdictions. For example, one case we had involved a Canadian who made a Mexican Will providing for the disposition of his Mexican real estate. Unfortunately, that Mexican Will contained a clause revoking all previous Wills, including a BC Will that had dealt with the rest of the deceased's assets.

Another practice concern can be multiple Wills made in various jurisdictions.

The deceased clearly intended to amend his BC Will and relayed such instructions to his lawyer; he died suddenly, however, before he could do so. His untimely death created an intestacy with respect to most of his estate found in BC. He left several very disappointed beneficiaries.

Accordingly, if a testator has Wills in multiple jurisdictions, then drafting care must be taken not to inadvertently revoke previous Wills in the other jurisdictions.

Revocation by Destruction

As noted above, a Will, or part of a Will, may be revoked by the destruction of the Will by the testator or *by the testator's direction and in his or her presence, with the testator's intention of revocation.*

Notably the *Wills Act* requires both that the testator intend a revocation by destruction and be actually present for that destruction, whether it be the testator or his or her agent who physically effects the destruction.

Partial destruction will not revoke the entire Will unless those parts of the Will left intact cannot stand on their own.

The destruction must not merely be symbolic but must result in actual physical injury to the Will, such as cutting the Will into bits that could not be pieced together, or total incineration.

The intention to revoke, no matter how clear it may be, is *not* enough without a completed act of destruction of the Will. Similarly, destruction without intention to revoke does *not* revoke the Will.

In *Re. Krushel Estate* (1990) 40 E.T.R. 129, torn bits were found in a bag of garbage after the deceased shot himself. The court held that the throwing away of a mutilated Will did *not* amount to revocation because it was not proven that the mutilation was done at the request of the deceased.

This decision was followed by the Nova Scotia Court of Appeal in *Re. Theriault Estate* (1997) N.S.J.No.36, where a Will stored at the lawyer's office was destroyed by an accidental fire. Subsequently, the testator gave some indication of treating the fire as a revocation *after the fact.*

The court, however, refused to find a revocation by destruction because there was no evidence of intention to revoke the Will at the relevant time, that is, before the destruction.

It is possible to have only a partial revocation of the contents of a Will, that is, to revoke only particular gifts or appointments made under a Will. In *Re. Witham* (1938) 3 D.L.R. 142, the court admitted to probate a Will that had been mutilated by scissors with certain clauses cut out.

The court made this finding because one of the clauses had been pinned back on the Will in another place.

Similarly, in the British case of *Re. Nunn* (1936) 1 All E.R. 555, some lines had been cut out of the Will of a deceased seamstress. The remaining parts of the Will had been neatly stitched back together. The evidence established that the testatrix had carefully retained the Will in her exclusive possession until death.

Thus although the court ruled the deceased seamstress had destroyed the missing lines with the intention of revoking them, the court found no intention to destroy the entire Will. The court thus found a partial revocation.

Obliterations or Imperfect Alterations

In some cases, a testator may purport to alter a Will by crossing out and writing in some new provisions. Such attempted changes generally are not enforceable because the court will likely find this to be an attempted alteration rather than a properly executed revocation.

One twist on these facts arises where a testator succeeds in obliterating words so they become completely indecipherable. In this case, the court will *not* reinstate the deleted words but instead will grant probate to the Will, with a blank space left for the obliterated words. See *Re. Hebert* (1927) 3 W.W.R. 24.

A complete obliteration can be an effective revocation, even in the absence of evidence that the obliteration was effected by, or on behalf of, the testator and in his or her presence. In such a case, there will be a presumption that the obliteration was made by the testator personally.

If the original words are still apparent, for example by holding the Will up to the light, then any alteration will not be effective unless it is properly executed. In the case of *Finch v. Combe* (1894) P.191, at 198, the obliterated portion became legible once held up to the window; the court thus held there was no revocation.

The court will not excise or erase scratches or blots that obliterate part of the Will nor will they remove paper pasted over part of the Will. Nevertheless, the court may allow the assistance of experts to decipher the words.

Lost Wills: The Presumption of Revocation

Where a destroyed or mutilated Will is found among the testator's papers or wherever such a Will might normally be expected to be found, the law will presume the act of destruction was committed by the testator *and* that it was done with the intention to revoke the Will.

Further, where a Will or codicil is missing after death and that document was last known to be in the testator's possession, then the Will

or codicil will be *presumed* to have been destroyed by the testator with the intention of revoking it.

The strength of this presumption of revocation varies according to the security of the testator's custody of the Will. In other words, the presumption will be stronger where the Will was kept by the testator in clearly secure circumstances.

In some cases, a testator may purport to alter a Will by crossing out and writing in some new provisions.

In *Sigurdson vs Sigurdson* (1935) 4 D.L.R. 529 (S.C.C.), this principle was stated as follows.

Where a Will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut that there must be sufficient evidence that it was not destroyed by the testator *animo revocandi* (with the intention to revoke it).

This presumption may be rebutted by evidence of nonrevocation, such as evidence of an accidental destruction of the Will, for example, a residential house fire. It also may be rebutted by evidence tending to show that the testator did *not* intend to revoke the Will but rather continued to reaffirm the terms of the Will and to evince goodwill to the named beneficiaries.

We had one recent case where an older woman, a compulsive hoarder, had made a Will leaving her entire estate to her goddaughter who was, in fact, her surrogate daughter. After her death, only a copy of the Will could be found.

Numerous affidavits from the deceased's longterm friends and minister attested to her very close relationship with the goddaughter, and her numerous reaffirmations of her intention to leave her estate to this goddaughter. Distant relatives argued for an intestacy. A copy of the

Will was successfully admitted to probate, however.

This presumption of destruction will *not* apply where it is shown that the original Will was *not* in possession of the testator, but was in the possession of a solicitor. *Re. Quinlan* (1985) 63 N.B.R. (2d) 429.

If the testator executed the Will while he or she was of sound mind, but subsequently became mentally incompetent, then there is no presumption that the destruction was carried out by the testator at a time when he or she was of sound mind.

Where a potential executor or heir seeks to establish the validity of a missing Will or to probate a copy of the Will, then the applicant must establish the following.

1. The proper execution of the original Will. (This is usually accomplished by the evidence of the attesting witnesses or the lawyer or Notary who prepared the Will and attended execution.)
2. The terms of the original Will. (This is usually accomplished with a copy of the Will. Some cases however, rely on the notes of the drafting solicitor and others on the evidence of a person who read the Will before it was lost.)
3. The presumption of revocation has been overcome and there is another explanation for the loss or destruction of the Will, other than destruction and revocation by the deceased.

The standard of proof required is the civil standard—proof on the balance of probabilities.

Conditional Revocation

What happens when a Will or codicil is revoked by a later Will and that later Will is ultimately found to be ineffective?

In such a case—for example where the new Will is struck down for improper execution, lack of mental capacity, undue influence, or the like—the court may breathe life back into the previous Will.

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It may do so by applying the doctrine of conditional revocation and finding that the testator's intention to revoke the first Will was conditional on the new Will being an effective substitution for it. The court will apply this doctrine to avoid an intestacy and admit the previous Will into probate.

Conclusion

We trust this article will give you some sense of the many pitfalls to be avoided in advising clients about making changes to their current Wills and the need for new Wills when they change their marital status.

It is particularly important to advise testators to safeguard their original Wills to avoid the presumption of revocation that arises when the original Will cannot be located. The Law Society of British Columbia cautions lawyers not to keep their clients' original Wills for safekeeping due to concern about potential liability, should the original Wills be lost.

Many testators seem to believe that the document that they possess is only a copy of the original and they often write intended changes to be made on the original Will.

Last, although it is not mandatory, all practitioners who prepare Wills should have them registered with the Director of Vital Statistics by filing a Wills notice for each Will or codicil that is executed. ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 33 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

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