

The Two-Family Friction

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My involvement recently in a couple of classic two-family fights over money caused me to take a look at two long-forgotten tools, the joint or mutual will and the contract to make (or not to revoke) a will.

John and Mary were married 30 years ago. She was a mid-level executive with an insurance company and he was a building contractor and real estate investor. Each had two children from previous marriages.

Mary was stricken by cancer and pronounced terminal. She wished to leave her community property interest to her two children. John resisted, pointing out that he needed their capital in order to continue building, buying and selling real estate. She agreed to reciprocal wills (all to the surviving spouse, otherwise to the children equally), and John promised to leave his estate one-half to each set of children.

25 years and a failed marriage after Mary's death, John died. His children started a probate proceeding, reporting to the court that John died without a will. An investigation by Mary's children led to discovery of an executed duplicate will in the safe of John's attorney. The battle was thereon joined, and I was asked to testify to the agreement of the parties.

The attorney for John's estate argued that because no will was found among John's records, this creates a rebuttable presumption that the will was revoked, citing *Probate Code* Section 6121. In the absence of evidence that the will was *not* revoked (for example, found and destroyed after John's death by his children), John died without a will.

Mary's children responded that there was a contract to make – and not revoke – a will between Mary and John. The law existing at the time the will was executed was changed in 1984. The pre-1985 law governs the determination of a contract to make a will.

That law provided that an agreement to make a will (and to forbear from revoking a will) is valid and enforceable if it complied with the general requirements of a valid contract.¹ It was ordinarily required to be in writing, but could be oral if it was sufficiently definite to be specifically enforceable or if there was an estoppel.² “Estoppel” means if one party performed his or part of the agreement, the other party should not be permitted (should be “estopped”) to deny a duty to perform his or her part.

The attorney for Mary's children argued that the agreement of John and Mary was oral, but sufficiently specific in all its material terms to be enforced, and Husband should be estopped from revoking his will if indeed he ever sought to do so.

Under current *Probate Code* Section 6124, if *neither* the original nor a duplicate original will is found after John's death and it is shown that the will was last in his possession *and* that John was competent, it is presumed that he destroyed the will with the intent to revoke it. The application of this statute is conditioned on the non-existence of a ". . . will or duplicate original of the will. . . ." That was not here the case: an executed duplicate original of John's will was before the court, precluding the application of Section 6124.

John's children had the burden of proving revocation.³ In that pursuit, they introduced the testimony of John's attorney that John shortly prior to his death stated that he did not have a will. This is probably admissible as an exception to the hearsay rule and by analogy to *Probate Code* Section 6111.5.

Section 6121 deals with revocation of a will executed in duplicate, providing that revocation is effected *only* by being ". . . burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction."

John's children asserted that the mere *absence* of one duplicate will, taken together with a purported statement by John that he had no will is sufficient to prove revocation. That is incorrect: the fact that one duplicate original is missing is not governed by the presumption of Section 6124, and a missing will does not fall within the ambit of Section 6121 as to the means by which to revoke a will.

Given that neither Section 6121 nor 6124 apply to establish even a presumption of a revocation, John's children were left with the testimony of John's attorney as their *only* evidence on this issue. As such, it lacks probative value inasmuch as such a statement – if correct, complete, accurate and offered together with the context in which it was made – could be explained in several ways. No evidence was before the court, for example, based on which the court might evaluate John's competence at the time of the purported statement. It could have been a partial statement, interrupted before he could say "[I have no will] to live any more." More than two decades passed between the date of the will and the date of the purported statement, so he could have merely forgotten. Certainly the vicissitudes of business, remarriage, a bitter intervening divorce and failing health at the time could have had an effect on his ability to recall matters from more than 20 years earlier. The purported statement – taken alone – should be given little weight in reaching a determination of revocation.

Underscoring the foregoing is the fact that nothing in the *Probate Code* prohibits a testator from proscribing the ways by which to revoke a will. In this case, the will provides that it may be revoked *only* by a subsequent will. There *is* no subsequent will, thus no effective revocation.

Nothing was said at the trial about the equities, and the equities are important. When confronted with her own imminent death from cancer, Mary determined to leave her property interests to her children. John persuaded her to instead leave it to him, promising to leave one-half his estate

to her children on his subsequent death. Mary in good faith left her entire property interests to John in reliance on that promise. She performed. She carried out her part of the bargain. John's family should not be permitted to circumvent it in seeking a windfall unless the law clearly requires no other result.

As to application of the law, neither *Probate Code* Section 6121 nor Section 6124 apply to prove or create a presumption of revocation. The court was therefore left with nothing before it but the absence of one duplicate original will and testimony that John, at one point and under unclear circumstances, stated that he had no will. Given the law and the evidence, the court should find that the will is the valid last will and testament of John, and should admit it for probate administration.

Unfortunately, that proved too logical. The contest went to a final hearing, and the judge – a criminal courts judge sitting by assignment – unable to understand the issues and the law and distracted by other criminal cases, ruled in favor of John's children.

The result was so distasteful that I recommended to Mary's children that they undertake an appeal. It seems likely to be reversed if the appeals attorney does a credible job with the facts and law.

Endnotes

¹ *Redke vs Silvertrust* (1971) 6 C3d 94, 98 CR 293; *Wood vs Wrigley* (1953) 119 CA2d 90, 258 P2d 1049.

² (Former *Civil Code* Section 1624(6); *Redke vs Silvertrust*, *ibid.*; *Halper vs Foula* (1983) 148 CA3d 1000, 196 CR 727.

³ *Probate Code* Section 8252(a).