

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
PROBATE & GUARDIANSHIP DIVISION
CASE NO. 06-6744ES-4

IN RE: THE ESTATE OF

VIRGINIA MURPHY,

Deceased.

JACK S. CAREY & GLORIA DUBOIS

Petitioner,

vs.

JACQUELINE ROCKE

Respondent.

ORDER ON REMAND

THIS CAUSE having come on to be heard upon a remand from the Second District Court of Appeal of Florida for further proceedings. The trial court was directed to clarify whether the court considered the applicability of the doctrine of dependent relative revocation when the court ruled that the residue of the estate should pass by the laws of intestate succession. The appellate court has further instructed the trial court to make factual determinations on this issue.

The opinion in Carey v. Rocke, 18 So. 3d 1266 (Fla. 2d DCA 2009), affirmed the trial court's ruling that the residuary clause in the 1994 was void and the product of undue influence. At trial, the cross-appellant, Jacqueline Rocke, argued in closing argument that the residuary of the estate might pass by February 1992 will, or in the alternative, by intestacy. (See Trial

Transcript, dated February 8, 2008, at 570, line 1 through 572, line 5). The trial court did consider the doctrine of dependent relative revocation and found it inapplicable to the facts in this case for a number of reasons.

The doctrine of dependent relative revocation (DRR) is essentially based upon a fiction: "...where a testator revokes a valid will, and the new will is found to be invalid, the prior will may be re-established on the ground that the revocation was dependent on the validity of the new will, and the testator would have preferred the earlier will to intestacy." Denson v. Fayson, 525 So. 2d 432 (Fla. 3d DCA 1988). It is not a rule of law, but rather, a rule of presumed intention. That presumption is rebuttable and can be overcome if contrary evidence concerning the testator's intent is admitted. In re Lubbe's Estate, 142 So. 2d 130, 135 (Fla. 2d DCA 1962). Application of DRR is dependent upon a showing that the testator only conditionally revoked the old will believing the new will would be effective. The proper application of the doctrine depends upon a sufficient showing that the provisions of the invalid will are not materially different from the prior will. If they are materially different, the doctrine is not applicable and the presumption is rebutted. See id.

The doctrine of DRR is more understandable when it is referred to by another name, such as ineffective revocation, the doctrine of retroactive revival, or revocation under mistake. See e.g., RESTATEMENT (THIRD) OF PROPERTY 4.3 cmt. a (1999) (ineffective revocation). See also Frank L. Schiavo, Dependent Relative Revocation Has Gone Astray: It Should Return to Its Roots, 13 WIDENER L.REV. 73, 96 (2006) (doctrine of retroactive revival); Joseph Warren, Dependent Relative Revocation, 33 HARV. L. REV. 337, 337 (1920). Historically the doctrine has dealt with cases of mistake: where there has been a revocation by physical act under a mistaken belief of fact or law or invalidity because of a defect in execution. Because of "mistake," all of the early cases go to a total, rather than partial, revocation of the subsequent will and reinstatement of the prior will. Onions v. Tyrer, 23 Eng. Rep. 1085 (Ch.); Hairston v. Hairston, 30 Miss. 276 (1855); Stewart v. Johnson, 194 So. 869, 870 (Fla. 1940); In re Estate of Johnson, 359 So. 2d. 425 (Fla. 1978); In re Estate of Pratt, 88 So. 2d 499 (Fla. 1956); In re Estate of Lubbe, 142 So. 2d 130 (Fla. 2d DCA 1962); First Union Nat'l Bank v. Estate of Mizell, 807 2d 78 (Fla. 5th DCA 2001).

As a general proposition, the doctrine of DRR has been used only to revive a will in its entirety. It has been found to be inapplicable in several cases where the proponents attempted to argue its use to revive a single provision of a will which also contained a valid revocation clause. For example, Florida law, § 731.07, Fla. Stat., disqualified bequests to individuals who were named in a will as beneficiaries and acted as a witness to that instrument. In the case of In re Estate of Lubbe, 142 So. 2d 130, 135 (Fla. 2d DCA 1962), the disqualified beneficiary argued DRR should be applied to revive an identical bequest in a prior will to which he was not a witness. The appellate court found:

...[the testatrix's] last will was essentially valid. The evidence is not sufficient to justify a conclusion that [she] would have preferred her previous will had she known that the residuary bequest of her last will would be inoperative; nor was there demonstrated any legal basis or justification for a partial application of the doctrine of dependent relative revocation.

Id. at 136-137.

In a case involving Florida's now repealed Mortmain Statute (§ 731.19, Fla. Stat.), the Florida Supreme Court rejected the application of DRR. A charitable bequest in a will executed only a few days prior to death was found to violate the Mortmain Statute and was declared invalid. The charity argued that DRR should revive a similar charitable bequest in an earlier will because the decedent would prefer the prior bequest to the charity to intestacy. The Florida Supreme Court disagreed and held the subsequent will was properly admitted to probate and its terms alone would be enforced to the extent that the law allowed. In re Estate of Pratt, 88 So. 2d 499, 503 (Fla. 1956).

The Second District took a contrary view of the applicability of DRR to a portion of a will containing a valid revocation clause in In re Estate of Jones, 352 So. 2d 1182 (Fla. 2d DCA 1977). In that case, the will revoked all prior wills, but contained a residuary clause that violated the Rule Against Perpetuities. A daughter who was not named in either will argued that the estate should pass by intestacy. The appellate court found that the testatrix had demonstrated an unequivocal intention in both wills to disinherit her daughter. Allowing the estate to pass to that

heir by intestacy would defeat her intent. Instead of allowing the residuary to pass by intestacy, the court held that the residuary clause of the prior will should be construed together with the valid provisions of the later will. See id. at 1186.

The cross-appellant, Jacqueline Rocke, has cited the case of Wehrheim v. Golden Pond Assisted Living Facility, 905 So. 2d 1002 (Fla. 5th DCA 2005) to the appellate court in support of the application of DRR. In Wehrheim, the testatrix's children attempted to prevent admission of a 2002 will for probate based upon undue influence and lack of capacity. The assisted living facility, primary beneficiary of the 2002 will, argued that DRR would revive one of the decedent's wills, none of which mentioned the children. The children asserted that all of the decedent's prior wills were revoked by the express revocation contained in the 2002 will. The Court agreed that a valid revocation clause revoking the decedent's prior wills would prevent the application of DRR. The case was remanded for findings of fact. In remanding the case, the Court instructed that the children would have to prove that the revocation clause was not invalidated by undue influence and that it was not conditioned on the validity of the testamentary provisions of the current will. See id.

A case involving much the same circumstance as the instant case is In re Estate of Lubbe, 142 So. 2d 130 (Fla. 1962). In that case, the last will was valid and only the residuary was void by reason of a statutory incapacity to inherit. Those cases which involve total invalidity of the last will are materially distinguishable from the present case and Lubbe. Citing its decision in Pratt, the Florida Supreme Court opined:

We know of no principle of law which would authorize us to look beyond the probated will for testamentary intent in such a case. We do not understand that the 'dependent relative revocation' doctrine, useful and salutary as it is in a proper case, carries with it the authority to disregard so well-established a rule as that which forbids us to write a new will for the testator in the face of a clear intent expressed in a proper instrument.

In re Estate of Lubbe, 142 So. 2d 130, 134 (Fla. 2d DCA 1962) (quoting In re Estate of Pratt, 88 So. 2d 499, 503).

In First Union National Bank v. Estate of Mizell, 807 So. 2d 78, 80 (Fla. 5th DCA 2001), the Fifth District Court of Appeal described the circumstance this court finds in the instant case:

We can envision a circumstance where undue influence may not prevent the operation of an express revocation clause since it is possible that the undue influence may be limited to particular aspects of a new will, not the decision to make a new will. Incapacity is another matter.

Id at 79.

The court in Mizell found that the testator's lack of capacity rendered the revocation clause ineffective. The entire instrument was procured through undue influence and the testator was not competent when he executed the will.

In another case where there was no suggestion of fraud or undue influence, Pratt, the court ruled that the doctrine of DRR cannot be applied in a case in which there is a completely valid will with an express revocation clause. Also see Rosoff v. Harding, 901 So. 2d 1006 (Fla. 4th DCA 2005). In the present case, there is a validly executed will with an invalid residuary clause. Under the circumstances, the court is not free to cut and paste testamentary provisions of several wills to reach a testamentary plan preferred by either party. There is nothing on the face of the document that demonstrates Virginia Murphy preferred one residuary devise over another. She made no statement in her last will that her testamentary disposition was substantially the same as that of any prior will, which would demonstrate her intent to prefer a prior disposition to intestacy. The court finds that the prior wills were revoked by a valid revocation clause in the 1994 will.

Virginia Murphy executed six wills between 1989 and 1994. Each will contained an express revocation clause. From will to successive will, she changed specific devisees as devisees either passed away or entered her life, such as adding her caregivers as devisee in her February 2, 1994 will. Over the course of six wills, the changes in specific bequests were insubstantial.

In contrast, the bequests under the residuary clause changed dramatically between the 1989 will and the 1991 will; and again between the 1991 and February 1992 wills and the August 1992 will.

	5/10/1989	6/11/1991	2/4/1992	8/25/1992	1/29/1993	2/2/1994
Northwestern University	Entire residuary					
Rocke	\$150,000	¼ res. + \$400,000	¼ res. + \$400,000	\$400,000	\$400,000	\$400,000
Carey	\$50,000	¼ res. + \$100,000	¼ res. + \$100,000	½ res. + \$100,000	½ res. + \$100,000	½ res. + \$100,000
Tornwall	\$50,000	¼ res. + \$100,000	¼ res. + \$100,000	½ res. + \$100,000	½ res. + \$100,000	½ res. + \$100,000
Dubois	\$50,000	¼ res. + \$100,000	¼ res. + \$100,000	½ res. + \$150,000	½ res. + \$150,000	½ res. + \$150,000

The cross-appellant argued at trial that the court should invalidate the residuary bequests and allow them to pass by intestacy or revive the residuary clause in February 1992 will. At trial, the cross-appellant orally withdrew her previously pled prayer for relief which requested the court to admit the 1991 will to probate.

In order to probate the February 4, 1992 residuary clause by application of DRR, the trial would have to find:

1. The residuary clause of the February 4, 1992 will did not suffer from the same infirmity of undue influence as the residuary clause in the August 1992 will, the 1993 will and the 1994 will;
2. The revocation clause contained in the 1994 will was tainted by undue influence and, was therefore, ineffective; and
3. The residuary clause in the 1994 will was only conditionally revoked and was dependent on the validity of all of the testamentary provisions of the 1994 will.

As the trial court found and cross-appellant has admitted in the pleadings, the pattern of undue influence can be traced as far back as the June 11, 1991 will when Carey and Dubois first became residuary beneficiaries (See **Trial Court Order, August 1, 2008 at page 13 and Jacqueline Roche's Response to Petition for Administration and Counter Petition for Administration, filed February 27, 2007, at pages 4-6**). The trial court went to great lengths to describe the elements of undue influence which permeated the residuary bequests dating back to the June 1991 will (See **Trial Court Order, August 1, 2008 at page 9-22**). The February 1992 will suffers from the same infirmity as the 1994 will. Choosing one residuary clause over another would be an unreasonable and legally unsupportable act by the court.

In spite of the infirmity of undue influence which permeates the residuary clause, the trial court finds the undue influence inconsequential to the issue presently before it. In its trial order, the court concluded that the residuary clause in the 1994 will was the product of undue influence, and therefore, void. The other testamentary provisions of the 1994 will were untainted, *including the express revocation clause*. By validly executing the 1994 will, the decedent intended to revoke all prior wills. (" I, Virginia E. Murphy, of Pinellas County, Florida, do hereby make and publish this will, hereby revoking any and all other wills and codicils by me at any time made.") There is no evidence that the decedent's intent to revoke her preceding wills was equivocal or conditional. Nor is there any evidence that Mrs. Murphy sought to revive any prior will by republication.

The cross-appellant's position is that the inability to probate the residuary clause of the 1994 will renders the express revocation clause equivocal or conditional. To construe the doctrine of DRR in this manner would ignore the rule that revocation of a later will does not

automatically revive a prior will. §732.508(1), Fla. Stat. Further, the inference that decedent would have preferred probate of the residuary clause in the February 1992 will over intestacy is purely speculative. In the court's view of the documentary evidence, decedent's intention to revoke all prior wills when she executed the 1994 will is clear and unequivocal.

This court's findings in its previous order provided some insight into Virginia Murphy's intent, (See **Trial Court Order, August 1, 2008 at pages 19-20**). Several decisions suggest that the testator's intent must be divined without resort to extrinsic evidence. See e.g., Wehrheim v. Golden Pond Assisted Living Facility, 905 So. 2d 1002 (Fla. 5th DCA 2006); In re Estate of Barker, 448 So. 2d 28 (Fla. 1st DCA 1984). The difficulty of this task is inherent in the nature of undue influence. The presence of undue influence is the absence of the testator's intent. In the presence of undue influence, the testamentary instrument only expresses the intent of those who are exercising the undue influence, not the testator's intent. "Undue influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and will power." Williamson v. Kirby, 379 So. 2d 693 (Fla. 2d DCA 1980). Therefore, discerning the testator's intent when it has been subsumed by the intent of another without consideration of extrinsic evidence presents a challenge for the court.

Nevertheless, if the trial court must discern the testator's intent without resort to the trial testimony or any extrinsic evidence, the court need only look at the prior dispositions to discover that intent. "Hence, in order to determine the testator's presumed intent, the courts in Florida consider whether the provisions of the present invalid will are sufficiently similar to the former will." Wehrheim v. Golden Pond Assisted Living Facility, 905 So. 2d 1002 (Fla. 5th DCA 2005), (citing Stuart v. Johnson, 194 So. at 871-72). In the present case of partial invalidity, the court has compared the void 1994 residuary clause and the February 1992 residuary clause, which the cross-appellant urges the court to adopt. The February 1992 residuary clause provided that Jacqueline Rocke would receive a \$400,000 specific bequest, as well as one-fourth of the residue. The other three residuary beneficiaries were George Tornwall (deceased), Jack Carey, and Gloria Dubois. The 1994 will did not include Jacqueline Rocke as a residuary beneficiary, nor was she a named residuary beneficiary in the August 1992 or January 1993 wills. In each of those wills she was the specific beneficiary of \$400,000. When one considers the post-tax size of the estate (\$7.5 million), the dissimilarity in the 1994 and February 1992 residuary devise is

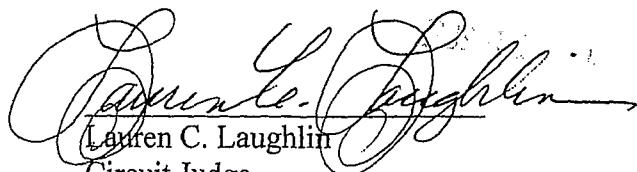
substantial. The court considers this a substantial change and one which does not reflect the same dispositive plan. The decedent's testamentary plan for the residuary of her estate is unknown and unfathomable to this court. To adopt any of the five residuary clauses, all unreflective of the testator's intent, would require this court to speculatively re-draft the testatrix's will. Speculation of that breadth is beyond the equitable powers of this court. Consequently, the court cannot presume that the 1994 will only conditionally revoked all prior wills and that Virginia Murphy intended her residuary estate to pass by any ascertainable plan.

This court is aware that the law disfavors intestacy. Whenever possible, wills will be construed to avoid that result. In re Gregory's Estate, 70 So. 2d 903 (Fla. 1954). The rule that intestacy will be avoided if possible is a rule of construction. Testate disposition is always subordinate to the testator's intention if it can be ascertained. In the present case, the court has not been asked to construe the meaning of the will. The testator has made certain residuary gifts which have been deemed invalid by reason of the exercise of undue influence by the beneficiaries. The will is still operative, but the named beneficiaries are ineligible to receive the benefit. Because the court's ruling of undue influence leaves no beneficiary to receive a residuary bequest, the property should be treated as a lapsed gift, or as if the disqualified beneficiaries had predeceased the testator.

The cross-appellant has argued that the residuary bequests in the February 1992 should be substituted for the 1994 residuary bequests. In doing so, she asks that court to infer an intention never possessed by the decedent. The court cannot create an intention, then ascribe it to the decedent and achieve a disposition she never contemplated; it is therefore

ORDERED that the doctrine of dependent relative revocation is not applicable to the facts in this case and the testator's residuary estate should pass by the laws of intestate succession.

DONE AND ORDERED this 12th day of March, 2010 in St. Petersburg, Pinellas County, Florida.


Lauren C. Laughlin
Circuit Judge