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PARTIAL REVOCATION OF A WILL BY "REVOCATORY ACT": COLORADO COURT OF APPEALS' GUIDANCE*

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By the time you were measured for your cap and gown during your final semester of law school (or at least by the time you were done studying for the bar exam), you were most likely aware of the different ways that a client could make a will, whether it be holographically or the more the traditional way. A holographic will is a document of which the "material portions" are in the testator's own handwriting and signed by the testator.[1] In contrast, a non-holographic will must, in general, be in writing (i.e.; oral wills are not acceptable) and signed by the testator or by some other individual, in the testator's conscious presence, at the testator's direction.[2] In addition, as of July 1, 2010, a non-holographic will in Colorado must be either "attested to" by at least two witnesses signing an attestation clause within a "reasonable time" after witnessing the testator's signature or the testator's acknowledgement of that signature or of the will itself,[3] or "acknowledged" by the testator before a notary public.[4]

It should be noted that, although the will execution statute was changed in 2010 so that a will is valid with only a notary's signature and no witnesses, it remains a good practice to have witnesses attest to the testator's signature of the will, as a will with the required signature of the testator and witness attestation may be admitted into informal probate "without further proof."[5] Otherwise, the probate registrar has the authority to request a sworn statement or affidavit of someone having knowledge of the circumstances of the will execution, before admitting the will into informal probate.[6] Furthermore, it is an even better practice to have the will both attested by

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witnesses and acknowledged by a notary, in the form set forth in the "self-proved will" statute, C.R.S. § 15-11-504, as the testimony of the witnesses will then not be required to show that the will was properly executed in the event of a will contest.[7] In contrast, a will that is notarized but not witnessed only raises a "rebuttable presumption" that the will was properly executed, and, even worse, a will that is witnessed but not notarized will require the testimony of at least one of the two witnesses to establish proper execution.[8]

You may also be aware, from your Wills & Trusts class, that a client can completely revoke a will by destroying it or executing a new will that specifically revokes the old will.[9] But what about only revoking a part of the will? It has been clear for some time that a portion of a will can be revoked by a subsequent will or a "codicil" that expressly revokes that portion or provides inconsistent terms of the prior will.[10] However, it has not always been clear if a part of a will could be revoked by the performance of a simple "revocatory act" on the will, such as the crossing out of a devisee's name. Moreover, if such a partial revocation by revocatory act is valid, it has been questioned whether just the performance of the revocatory act was sufficient or if some additional formality should be required, such as the client signing or initialing the will next to, or in the margin of the will adjacent to, the cross out.

Statutory History

Under prior law, a partial revocation of a will in Colorado by a revocatory act was not permitted. That version of Colorado's will revocation statute provided that, only a complete revocation, rather than a partial or complete revocation, would be permitted by revocatory act.[11] Thus, the Colorado Court of Appeals, in 1979, did not give effect to a testator's crossing out of the name of a beneficiary in his will, observing that "the statutory provisions for revocation of wills must be strictly construed."[12]

This remained the rule in Colorado for another 15 years, until the Colorado legislature amended Section 15-11-507 of the Colorado Revised Statutes. Prior to that amendment, the statute provided, "A will is revoked by being burned, torn, cancelled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction."[13] Under the amended statute, though, the phrase "or any part

thereof" was added, so that it now reads that "a will or any part thereof is revoked . . . [b]y performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part of it . . ."[14] In addition, the legislature set forth a non-exclusive list of permissible revocatory acts: "burning, tearing, canceling, obliterating, or destroying".[15] In the 17 years since this change, this version of the statute was not considered by the Colorado courts until recently, in In re Schumacher Estate.

In re Schumacher Estate

On April 14, 2011, the Colorado Court of Appeals, in In re Estate of Schumacher, held that, so long as the two requirements of C.R.S. § 15-11-507(1)(b), namely, (1) the performance of a "revocatory act" on a part of a will (2) with the intent and for the purpose of revoking such part of the will, even absent any other formalities, such as the testator initialing or signing the newly amended will, the partial revocation is valid, and should be given testamentary effect. [16]

Facts

In December 2004, David Schumacher drafted a holographic will that met the requirements of C.R.S. § 15-11-502(2), as it was entirely in Mr. Schumacher's handwriting (in pen) and was signed by him. Under one provision of that holographic will, he left shares of stock in his family's closely held corporation to three cousins, Maria Caldwell, Cheryl Smart and Deborah Caldwell. Just over a year later, in January 2006, Mr. Schumacher brought the holographic will to his estate planning attorney. However, on the holographic will, two of the three cousin's names had been crossed out (in pencil) with regard to the bequest of the family business stock, leaving the third cousin, Deborah Caldwell, as the sole legatee. Mr. Schumacher asked his attorney to draft a new will with the same dispositive provisions as in the holographic will, including a provision that only Deborah Caldwell should receive the family business stock, and not the other two cousins.

The estate planning attorney inquired as to why the stock should pass to just the one cousin and not the other two, to which Mr. Schumacher answered that he "felt closest to his cousin, Deborah, and he had changed his mind and wanted the stock . . . after the death of his mother to go to Deborah alone."[17] However, although Mr. Schumacher presented the

holographic will, with the crossed out names, to the estate planning attorney as his current will, he did not state, nor did the estate planning attorney ask, whether Mr. Schumacher, in fact, crossed out the names himself.[18] Instead, the estate planning attorney testified, at a hearing before Judge Stewart in the Denver Probate Court, that he "was certainly aware that Mr. Schumacher had changed his mind and he decided he wanted the stock to just go to his cousin, Deborah."[19] The estate planning attorney retained a copy of the holographic will for his records.

At some point after meeting with his estate planning attorney, Mr. Schumacher had delivered to the house of his former secretary several boxes of documents.[20] Mr. Schumacher requested that the secretary hold on to the boxes and help him sort through the documents as he had funds to pay her to do so. The secretary stored the boxes in her garage. Some, but not all, of the boxes were opened and sorted through by the secretary. At the Probate Court hearing, the secretary testified, by affidavit, that no one else had access to the boxes or the documents therein prior to Mr. Schumacher's death.

The estate planning attorney drafted the new will for Mr. Schumacher and delivered it to him, with certain provisions left incomplete pending the gathering of additional information and the clients' comments. After some time had passed, the estate planning attorney followed up with Mr. Schumacher, and Mr. Schumacher, who was then in California visiting his mother, indicated that he intended to sign the will, as it was written, including the gift of the family business stock to just Deborah Caldwell, upon his return to Colorado. The new draft was never signed, though, as Mr. Schumacher died while in California.

Not initially being able to locate the original holographic will, the estate planning attorney, who had also been engaged as counsel by Mr. Schumacher's Personal Representative, lodged with the Probate Court the copy of the holographic will from his January 2006 meeting with Mr. Schumacher. However, the original will was later discovered.

After probate was opened, the Personal Representative, Mr. Schumacher's secretary and the secretary's sister began to go through Mr. Schumacher's previously unopened boxes, in one of which the secretary's sister discovered the original holographic will. The secretary's sister,

the secretary and the Personal Representative all testified at the Probate Court hearing, by affidavit, that the original holographic will was the same as the copy of the will that the estate planning attorney had lodged with the Probate Court, except that, in addition to the crossed out names with regard to the family business stock, Maria Caldwell and Cheryl Smart's names were also crossed with regard to other bequests on the original holographic will.[21] They also testified that none of them made any markings on the original holographic will[22] and that the original holographic will was immediately turned over to the Personal Representative, who delivered it to her counsel, who, in turn, lodged it with the Probate Court.[23]

Probate Court Decision

At a hearing before Judge Stewart, Mr. Schumacher's estate planning attorney testified and the affidavits of the estate planning attorney, the Personal Representative, Mr. Schumacher's secretary and the secretary's sister were admitted. In addition, Maria Caldwell and Cheryl Smart presented the testimony of a handwriting expert, who stated, after a review of the original holographic will, that she was unable to opine on whether Mr. Schumacher made the cross outs of Maria Caldwell's and Cheryl Smart's names with regard to the family business stock.[24] On cross-examination, the handwriting expert testified that she was also unable to opine that anyone other than Mr. Schumacher crossed out the names.

In a written opinion issued after the hearing, Judge Stewart held the cross outs of Maria Caldwell and Cheryl Smart's names with regard to the family business stock to be valid, finding that Mr. Schumacher did make such cross outs and intended that they cross out be a partial revocation of his will. Thus, the court ordered that 100% of the family business stock should pass solely to Deborah Caldwell. Maria Caldwell and Cheryl Smart then filed a timely appeal of the matter with the Colorado Court of Appeals.[25]

Appeals Court Decision

Revocatory Act

As noted, C.R.S. § 15-11-507(1)(b) first requires that, to partially amend a will, the testator must perform a revocatory act, such as the burning, tearing, cancellation, obliteration or destruction of a part of the will. As the Court of Appeals noted, "Canceling a part of a will can

be accomplished 'by drawing lines through one or more words of the will.'"[26] However, both at the Probate Court hearing and in her appeal, Maria Caldwell argued that it could not be shown that Mr. Schumacher had made the cross outs in question.

Maria Caldwell limited her opening brief to an inconsistency between the testimony of the estate planning attorney before the Probate Court and Judge Stewart's summary of such testimony in her decision. As noted, the estate planning attorney testified that Mr. Schumacher did not specifically state that he had made the cross outs in question. However, in her Order, Judge Stewart stated that the estate planning attorney's "testimony was unequivocal that the Decedent told him the he (the Decedent) had crossed out the . . . names with the intent and purpose of removing them from the provision of the . . . Will."[27] Although the Court of Appeals agreed that Judge Stewart's summary of the evidence was contrary to the evidence at trial, it refused to reverse Judge Stewart's order, "because other evidence supports the probate court's conclusion that decedent made the cross outs."[28] The Court of Appeals cited other parts of the estate planning attorney's testimony regarding his January 2006 meeting with Mr. Schumacher that showed that, despite the lack of a specific discussion as to who made the cross outs, it was made clear to the estate planning attorney, and that it was the estate planning attorney's understanding, that Mr. Schumacher had made the cross outs.

Possession Creates Presumption

In addition, the Court of Appeals observed that, under Colorado law, "if a properly executed will containing tears or cancellations is known to be in the possession of the testator at the time of death, the testator is presumed to have revoked all or some of it."[29] Thus, the Court addressed whether the presence of Mr. Schumacher's will, in the unopened box, in his secretary's garage, amounted to Mr. Schumacher's "possession" of the will, giving rise to such a presumption. First, the Court observed that the will need not be in the <u>exclusive</u> control of the testator, citing the fact that the case cited by Appellant in her brief, the Colorado Jury Instructions, and other Colorado cases on point require, simply, "possession", not "exclusive possession."[30]

Moreover, the Court noted that "the evidence necessary to find possession is contingent on the factual circumstances of each case."[31] Looking to cases from outside Colorado, the Court of Appeals held that possession of a revoked will can be shown in many different circumstances and that, "the presumption is not overcome when other persons who had access to the will, who may have had a motive or an opportunity to perform the revocatory act, did not know of its existence or would not benefit from the revocation."[32]

Using a "clearly erroneous" standard, the Appeals Court held that it would not disturb Judge Stewart's findings that the original holographic will was in Mr. Schumacher's possession at the time of his death. The Court cited specifically to the fact that Mr. Schumacher had stored his boxes, which, "unbeknownst to the secretary . . . included the will," in her garage.[33] Furthermore, those people who did eventually have access to the will did not benefit under the will and testified that "at no point did they alter the will."[34] Finally, the Court of Appeals agreed with Judge Stewart that, because of the employer/employee relationship between Mr. Schumacher and his secretary, the secretary was acting on behalf of Mr. Schumacher, and Mr. Schumacher was, therefore, in possession of the will.[35]

Intent and Purpose

In addition to having performed the revocatory act, it must be shown that the testator did so with the intent and purpose of revoking the devise in question. Again, the Court of Appeals agreed with the Probate Court that, from the estate planning attorney's testimony regarding his January 2006 meeting with Mr. Schumacher, it was clear that the making of the cross outs were specifically for the purpose of revoking the gift of a portion of his family business stock to two of his three cousins, and not so Mr. Schumacher's estate planning attorney could draft a new will.[36] Specifically, the Court of Appeals pointed to the estate planning attorney's questioning of Mr. Schumacher as to why he did not want the stock to pass to all three cousins and his recollection of Mr. Schumacher's answer. Also, as discussed above, because the will was found to be in Mr. Schumacher's possession, Colorado law presumes that the revocation was done with the intent to revoke part of the will.[37]

Formalities Required?

Finally, the Court of Appeals specifically addressed whether any formalities, other than that specifically set forth in C.R.S. § 15-11-507, are required to make a partial revocation valid. It is common practice, when a testator crosses out a provision of a will or adds missing language, for the testator to initial or sign the document close to or in the margin adjacent from such change. However, the Court of Appeals specifically found that this is not necessary to make the revocation valid or, even, to show the intent of the testator. Rather, the Court held that the requirement that a will be signed under C.R.S. §§ 15-11-502 and 503(2) for it to be probated relates only to the creation of the will, not for a partial revocation of it.[38]

Unanswered Questions

Although the Colorado Court of Appeals' decision is helpful, there are still many questions unanswered in this area. For example, Judge Wade comments in his book,

> Drawing lines through part of the provisions of the will or making additions, interlineations, alterations or erasures or other changes on the face of a will, giving a new meaning to it, while probably effective as an act of partial revocation under UPC II, are ineffective to create new dispositive provisions unless the changes are executed and attested as provided by law for the making of a will and such will must be admitted to probate as if the alterations had not been made.[39]

This comment was cited by the Appellant in In re Estate of Schumacher at the Probate Court hearing, arguing that the crossing out of two of three legatees amounted to a new bequest to the third. The court was not persuaded, finding that, instead, the crossing out of the two cousins names was only a partial revocation and not a new bequest. Thus, the question arises, if Judge Wade's comment is followed, as to what constitutes a new dispositive provision rather than a mere partial revocation. Furthermore, if it is, in fact, a new dispositive provision, then which formality should be followed. Are two witnesses and a notary needed, or do the changes amount to a holographic codicil, requiring only that the changes be in the testator's handwriting and signed by the testator? If the latter, are the initials of the testator, or is a full signature required? Also, can a difference be drawn between a partial revocation versus a change to the dispositive terms of the will? These questions, as well as others will most likely the subject of future litigation in the Colorado courts.

Conclusion

Based on the decision of the Colorado Court of Appeals in In re Schumacher Estate,[40] Colorado practitioners should be careful to advise their clients on how to handle their estate planning documents and how to make any desired changes. First, it is important that clients are instructed that they should not mark or write on their wills, especially original wills, as those markings or writings could be found to be amendments to the wills, especially if they are found in the clients' possession upon their deaths. Rather, each client should be advised that, if he or she desires to amend his or her will, it should be done through a codicil or an entirely new will that specifically revokes the prior will, prepared by an attorney and signed according to the Colorado Probate Code, so that there is no doubt as to whether an amendment was intended. Also, the concern that a client's markings on an original will may amount to a partial revocation may lead more practitioners to retain original wills, giving clients only a photocopy.

Furthermore, a mere initialing of a cross out or change to one's will may not be sufficient to be an amendment to the will. It may be common in some attorneys' practices, at will signings, when a client wants to make a last minute change or a mistake is found in the document, to have the client merely cross out the unwanted term, add in new language and then have the client initial the document next to, or in the margin adjacent to, the cross out or change. The presence of the client's initials might serve as proof that the client made the cross out or change, but it would still need to be shown that the initials are those of the client, that the client was the one who made the cross out or change and wrote his or her initials, and that the cross out or change was made at the same time as the initialing of the document. Also, some statement of the client or other evidence will still need to be proffered at the time the will is probated, to show that such cross out or change was intended by the client to be a change to the will and not for some other purpose, especially if the will was not in the possession of the client at the time of his or her death. If there is a need for a client to cross something out or make a change to a will prior to execution, it would be a good practice to have not only the client initial the change, but also the witnesses, to show consistency. Also, many attorneys have the client and the witnesses initial the bottom of each page of the will at the will signing. In that way, it can be shown that the page with the cross out or change was done at the time of the will signing and not later. These steps may not guarantee that the will, with the cross out or changes, will be admitted into probate, but

it will help the argument that the client made the changes and intended them to be part of his or her will.

In conclusion, as a general rule, any Colorado attorney who prepares estate planning documents should review his or her procedures, ensuring that clients are clearly instructed how to treat their wills and what to do in the event that they want to make changes.

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[1] C.R.S. § 15-11-502(2).
[2] C.R.S. § 15-11-502(1)(a)-(b).
[3] C.R.S. § 15-11-502(1)(c)(I).
[4] C.R.S. § 15-11-502(1)(c)(II).
[5] C.R.S. § 15-12-303(3)(first sentence).
[6] Id. (second sentence).
[7] C.R.S. § 15-12-406(1)(a).
[8] C.R.S. § 15-14-406(1)(b)-(c).
[9] C.R.S. § 15-11-507(1).
[10] C.R.S. § 15-11-507(1)(a).
[11] C.R.S. § 15-11-507(2) (1994).
[12] Scheer v. First Nat'l Bank, 605 P.2d 65, 66 (Colo. App. 1979).
[13] C.R.S. § 15-11-507(2) (1994).
[14] C.R.S. § 15-11-507(1)(b)(first sentence). [emphasis added].
[15] Id. (second sentence).
[16] 10CA0016 (April 14, 2011).
[17] In re Estate of Schumacher, 10CA0016, p.2.
[18] Id., p. 8.
[19] Id., p. 9.
[20] Id., p.2.
[21] These other cross outs were not at issue in the case at hand, as Mr. Schumacher did not own the property in question at the time of his death.
[22] In re Schumacher Estate, p. 17.
[23] Id., p. 3.
[24] Id. p. 6.
[25] Due to certain procedural steps, Cheryl Smart withdrew as an appellant and did not file any briefs with the Court. Thus, the court dismissed her appeal, leaving Maria Caldwell as the sole appellant
[26] In re Estate of Schumacher, 10CA0016, p.9, citing 2 Page on Wills § 21.8, n8 (2003).
[27] Id., p. 7.
[28] Id., p. 8.
[29] Id., p 11, citing CJI-Civ. 4th 34:9 (2011) and 3 W. Page, Wills § 29.140 (W. Bowe & D. Parker eds., rev. ed. 1961).
[30] Id., p. 13.
[31] Id., p. 14.
[32] Id., p15-16. [citations omitted].
[33] Id., p. 16.
[34] Id., p.17.
[35] Id. citing Raleigh c. Performance Plumbing & Heating 130 P.2d 1011, 1019 (Colo. 2006).
[36] Id., p. 19.
[37] Id., p. 11.
[38] Id., p. 22.

[39] Wade/Parks: Colorado Law of Wills, Trusts and Fiduciary Administration, § 4.12, (5th Ed., Supp. August 2009). [citations omitted].

[40] A rehearing of the Court of Appeals decision was not requested and the decision was not appealed to the Colorado Supreme Court.