DEPENDENT RELATIVE REVOCATION HAS GONE ASTRAY: IT SHOULD RETURN TO ITS ROOTS

by

FRANK L. SCHIAVO*

* Associate Professor of Law, Barry University Dwayne O. Andreas School of Law. B.S. 1956, Wharton School, University of Pennsylvania; J.D., 1959 Villanova University School of Law; LL.M. (Taxation), 1965, New York University. The author teaches in the area of Wills, Trusts & Estates, Contracts, and Federal Income Tax. He expresses his appreciation to Professors Barry H. Dubner, Mark A. Summers and Leonard E. Birdsong for their valuable comments. In addition, he thanks Kevin Wimberly not only for his technical help but also for his skills in creating the Flow Chart.

I. INTRODUCTION

The doctrine of Dependent Relative Revocation has lost its way. After examining many cases, there does not appear to be any consistency in applying the doctrine. It has been expanded by the courts to situations far beyond its initial application.

Scholars have suggested that the term be abandoned. The objective of this article is to show that, not only has the suggestion that the term be abandoned not gained momentum, but confirms the conclusion that misapplication of the doctrine has led to confusion. It offers a Flow Chart in an effort to help eliminate the doctrine's misapplication.

II. WHAT IS DEPENDENT RELATIVE REVOCATION?

> This doctrine [of Dependent Relative Revocation ("DRR")] has been stated and reiterated by many courts since it was first expounded in 1717, but stated simply it means that where testator makes a new will revoking a former valid one, and it later appears that the new one is invalid, the old will may be re-established on the ground that the revocation was dependent upon the validity of the new one, testator preferring the old will to intestacy.[1]

The origins of the doctrine seem to go back to the early 1716 English case of *Onions v. Tyrer*.[2] Professor Warren, in his important article, *Dependent Relative Revocation*,[3] attributes the origin of the term to "Mr. Powell, who in 1788 gave currency to the phrase."[4] Professor Warren proposes the term be abandoned[5]

---

1. Stewart v. Johnson, 194 So. 869, 870 (Fla. 1940) (citing DANIEL H. REDFEARN, A PRACTICAL TREATISE ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 121-22, § 89 (1933)). *See also* Wehrheim v. Golden Pond Assisted Living Facility, 905 So. 2d 1002, 1007 (Fla. Dist. Ct. App. 2005). Professor Gerry W. Beyer describes it as a *Romeo and Juliet* revocation: "Romeo's intent to kill himself was conditioned on Juliet being dead." He would not have killed himself had he known Juliet had only taken a potion to simulate death. GERRY W. BEYER, WILLS, TRUSTS AND ESTATES: EXAMPLES & EXPLANATIONS 155, ' 8.6.2 (2d ed. 2002), Professor deFuria describes the doctrine as a legal tool "to protect the testator . . . from his own folly." Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 201 (1989).

2. 23 Eng. Rep. 1085 (Ch.).

3. Joseph Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 337 (1920).

4. *Id.* at 337.

> This principle, that the effect of the obliteration, cancelling, [etc.,] depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of; namely, *that* of dependent relative revocations, in which the act of cancelling, [etc.,] being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not.

because it is "loose and misleading,"[6] tending to treat "different subjects under a single principle."[7] His conclusion was that the "panacea of a sonorous phrase . . . has tended only to obscure the common law" and lead to confusion.[8]

A historical approach and background of the doctrine show its original intent.

III. BACKGROUND

In *Onions v. Tyrer*,[9] the testator properly executed a first will, and four years later made another that expressly revoked the first.[10] The testator's wife, at his direction, tore up the first will.[11] The court held that the second will could not revoke the first because it was not properly executed.[12] The Court further held that, although he canceled the first will by having it torn up, he only intended to do so, not by tearing it up, but by the later will.[13] The Lord Chancellor held that the tearing up might be a good revocation at law, but said, "it ought to be relieved against, and the will set up again in equity, under the head of accident . . . ."[14] In other words, the testator made a mistake which equity may correct. The defendants in *Ford v. de Pontes*[15] explained the decision:

> [tearing up the first will] was done from an opinion that the second will had actually revoked the first, which induced the testator to tear that as of no use; therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it.[16]

JOHN JOSEPH POWELL, AN ESSAY UPON THE LEARNING OF DEVISES, FROM THEIR INCEPTION BY WRITING, TO THEIR CONSUMMATION BY THE DEATH OF THE DEVISOR 637 (1806).

5. It is submitted that Professor Atkinson agrees:

> Instead of this fiction of conditional revocation, it is more realistic to treat the problem as one of mistake, holding the revocation absolute or void in accordance with which position the individual testator would probably have preferred.

THOMAS E. ATKINSON, LAW OF WILLS 452, § 88 (2d ed. 1953).

6. Warren, *supra* note 3, at 338.

7. *Id. See also* WILLIAM HERBERT PAGE, 2 PAGE ON THE LAW OF WILLS 482, §21.57 (Anderson Publishing Co. 2003) (1901) ("This term has been criticized for the very reason that it enables these topics to be grouped together.") (citation omitted).

8. Warren, *supra* note 3, at 357.

9. *Onions*, 23 Eng. Rep. at 1085.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Onions*, 23 Eng. Rep. at 1085.

15. (1861) 54 Eng. Rep. 1012 (Rolls Ct.)).

16. *Id.* at 1018.

In *Ford*, the court followed one of the holdings in the *Onions* case in a different context. The testatrix executed a will devising real estate to Mr. de Pontes.[17] She later executed deeds of the real estate to him.[18] It was argued that the deeds were void because they were executed in consideration of future cohabitation between persons who were incapable of contracting a legal marriage.[19] The court held that the deeds, regardless of whether they were invalid as being *turpis contractus*,[20] did not revoke the will.[21] The applicable Wills Act required that wills be revoked in a certain manner and the deeds were not so executed.[22] The court followed *Onions* in that an improperly executed instrument cannot revoke a properly executed will.

It is uncontroverted that an effective revocation of a will must consist of an act done co-existent with the intent to revoke. Absent that "marriage," there is no revocation. In *Baucum v. Harper*[23], the court found the following instruction was not error: "Joint operation of act and intention is necessary to revoke a will. The destroying of a will without intention to revoke it would not revoke the will, neither would the intention to destroy a will without actually doing so revoke the will; there must be both."[24]

IV. WHEN DRR SHOULD NOT BE AN ISSUE

One must remember that DRR does not apply to correcting a mistake as to the contents of the will,[25] nor to correcting an omission of a provision not in a will. Historically, courts would not correct such a mistake or omission,[26] although Professor Langbein points out that "[l]eading modern authority in a

---

17. *Ford*, 54 Eng. Rep. at 1012.

18. *Id.*

19. *Id.* at 1012-13. She was validly married in England but divorced in Scotland, the divorce being declared invalid after her death. *Id.* at 1013.

20 "An immoral or iniquitous contract." BLACK'S LAW DICTIONARY 1517 (6th ed. 1990).

21. *Ford*, 54 Eng. Rep. at 1021.

22. *Id.* at 1020 (A[B]y this section of the Act, . . . a will can only be revoked by marriage, by express declaration in writing, or by burning, [etc.].@).

23. 168 S.E. 27 (Ga. 1933).

24. *Id.* at 29 (quoting lower court, opinion unavailable); *see also* ATKINSON, *supra* note 5, at 421, § 84 ("An oral attempt to revoke a will is inoperative however unquestionable the intent may be, unless attended by the requisite statutory manifestations," i.e., an act.) (citation omitted); *id.* at 441, § 86 ("The testator's physical acts which comply with the statute do not by themselves constitute a revocation. In addition there must be an intention to revoke."); Cheese v. Lovejoy, (1876) 2 P.D. 251, 253 (1876-1877) ("All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying . . . .") (quoting lower court, testimony of Dr. Deane, opinion unavailable)

25. Estate of Barker v. Broughton, 448 So. 2d 28 (Fla. Dist. Ct. App. 1984) (DRR did not apply to revive a prior will where second will was validly executed, expressly revoked prior wills but omitted a residuary clause).

26. *See* Roland Gray, *Striking Words Out of a Will*, 26 HARV. L. REV. 212 (1913).

number of American states has now reversed the strict compliance and no reformation rules."[27]

DRR does not apply when the second will cannot be probated and the first will has not been physically revoked. The first will stands unrevoked and is the valid, probatable instrument. Thus it would appear that the manner of revocation of the first instrument is important. Merely having a second ineffective will should not bring DRR, into play.

For example, in *First Union National Bank of Florida v. Estate of Mizell*,[28] Mr. Mizell properly executed his will in 1978.[29] In 1991, after contracting AIDS, his health began to deteriorate.[30] In 1993, he executed a will but did not tear up or destroy the first one.[31] The trial court held that the 1993 will was "procured through undue influence,"[32] that Mizell was incompetent at the time, and that the 1978 will was revoked by the express revocation clause in the 1993 will.[33] The appeals court reversed, holding the 1978 will was not revoked by the 1993 will, even though it contained a clause expressly revoking the 1978 will.[34] Since the 1993 will was invalid because of Mizell's incompetency, it could not revoke the 1978 will.[35] DRR was not discussed—the 1978 will had not been torn up.[36]

V. APPLICATION OF DRR

Professor Warren distinguishes Conditional Revocations and Revocations by Mistake. Condition is defined as a "[p]rovision making effect of [a] legal instrument contingent upon an uncertain event."[37] In other words, an event must happen before the instrument is effective. In the case of a true conditional revocation, DRR would not be applicable whether or not the condition occurs. If the condition occurs, the first will is effectively revoked;

---

27. John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The* Restatement of Wills *Delivers New Tools (and New Duties) to Probate Lawyers*, PROB. & PROP., Jan./Feb. 2004, at 29. *See, e.g.*, Erickson v. Erickson, 716 A.2d 92, 98 & n.10 (Conn. 1998) (will may be corrected for a mistake where the scrivener's error and its effect on the testator's intent are established by clear and convincing evidence) (adopting dissent from Connecticut Junior Republic v. Sharon Hosp., 448 A.2d 190, 199-202 (Conn. 1982) (Peters, J., dissenting). This does not mean that the court will not accept parol evidence as to an ambiguous term in the will.

28. 807 So. 2d 78 (Fla. Dist. Ct. App. 2001).

29. *Id.* at 79.

30. *Id.*

31. *Id.*

32. *Id.*

33. *First Union National* Bank, 807 So. 2d 79.

34. *Id.* at 80.

35. *Id.* The court said the 1978 will could be offered for probate but its validity could be contested in further proceedings. *Id.* at 80.

36. Nor would DRR apply where the testator accidentally destroys his will believing he is destroying some other document—the necessary intent to destroy is clearly lacking. Professor Warren calls this a "Conditional Revocation by Act to the Document" and states that the document is not affected. Warren, *supra* note 3, at 338-39.

37. BLACK'S LAW DICTIONARY 293 (6th ed. 1990).

if it does not, the first will remains valid and DRR would not be applicable.[38] In *Bradish v. McClellan*,[39] the testator executed two wills, about fourteen months apart, "the latter of which contained . . . charitable bequests."[40] Shortly after executing the second, he executed a third writing purporting to be a codicil.[41] It provided that if the testator died within three calendar months of executing the second will, the first should go into effect, otherwise the second would be his will.[42] The testator died within ten days of executing the second will.[43] The court said, "[a]s he died before [the designated date] the [second writing] did not take effect as a will."[44]

A true condition is also illustrated in *In re De Coster's Will*.[45] There, the testatrix executed a will leaving one-fourth of her estate to her son.[46] She later prepared a handwritten codicil changing that bequest and substituted her daughters for her son.[47] In that codicil the testatrix stated that the changes would be effective if she died before the codicil "was properly drawn by an attorney."[48] The court said that the effectiveness of the handwritten codicil:

> should be construed as meaning [that] until such superseding instrument [is] drawn by an attorney [, it] should become effective as a legally valid substitute for the presently executed document. . . . The [handwritten codicil] is clearly a conditional instrument, the effectiveness of which for any purpose would terminate upon the taking effect of the contemplated subsequent codicil prepared by an attorney.[49]

On the other hand, a mistake "exists when a person, under some erroneous conviction of law or fact, does . . . some act which, but for the erroneous conviction, he would not have done . . . ."[50] Revocation by mistake can occur where the first instrument is physically revoked, it being the intent of the testator to have the second instrument be the valid will. Revocation can also

---

38. "The intention is not to revoke absolutely but only in case that some future event happens. There should be no difficulty about this sort of provision. The revocation operates if the condition is fulfilled, but not if the contrary should prove to be the case." ATKINSON, *supra* note 5, at 452-53, §88. (citation omitted).

39. 100 Pa. 607 (Pa. 1882).

40. *Id.* at 607.

41. *Id.* at 608.

42. *Id.*

43. *Id.*

44. *Bradish*, 100 Pa. at 612.

45. 270 N.Y.S. 244 (N.Y. Sup. Ct. 1934).

46. *Id.* at 245.

47. *Id.* at 246.

48. *Id.*

49. *Id.* at 246-47.

50. BLACK'S LAW DICTIONARY 1001 (6th ed. 1990).

occur in the reverse case where the testator revokes a valid second will intending to revive the first will.[51]

Onions v. Tyrer[52] is the classic example of the situation where the second instrument attempts to entirely revoke the first but is not valid. There, the first will was properly executed but physically revoked.[53] The court held that the first will, although it was revoked by having been torn up under the mistaken belief the second was valid, was revived.[54]

Estate of Alburn v. Henkey[55] is the classic example of the reverse case. Decedent executed a will in Milwaukee, Wisconsin, (the Milwaukee will) in 1955 leaving nothing to her next of kin.[56] In 1959 she moved to Kankakee, Illinois, and executed another will (the Kankakee will) in which the only next-of-kin named was her brother, who was given less than one-tenth of his intestate share.[57] She returned to Milwaukee in 1960 and tore up her Kankakee will stating that she "got rid of it."[58] There was testimony that after the pieces were disposed of, she wanted the 1955 Milwaukee will "to stand."[59] The trial court applied DRR to revive the 1959 Kankakee will and admitted it to probate.[60] The Wisconsin Supreme Court cited the trial judge's strong convictions that the decedent did not want to die intestate, she knew a copy of the Wisconsin will was on file with her attorney, she stated that she wanted the Milwaukee will "to stand," and she took no steps after the destruction of the Kankakee will to make a new will.[61]

In the same circumstances, the court in *Powell v. Powell*[62] did not revive the first will, but revived the second one. The original will gave testator's property to his grandson.[63] The later will gave it to his nephew.[64] After a falling out with his nephew, the testator destroyed the second will under the mistaken belief that the first one would be revived.[65] When the testator died, the grandson offered the first will for probate, contending that DRR was applicable.[66] The grandson argued that DRR was founded on the desire to carry out the testator's intention and that an intestacy would more nearly carry

---

51. "In most cases it is a revocation caused by mistake of law. This result has frequently been explained by the fiction of a condition." PAGE, *supra* note 7, at 479, §21.57.

52. 23 Eng. Rep. 1085.

53. *Id.* at 1085.

54. *Id.*

55. 118 N.W.2d 919 (Wis. 1963).

56. *Id.* at 921.

57. *Id.* at 922.

58. *Id.* at 921.

59. *Id.*

60. *Estate of Alburn*, 118 N.W.2d at 920.

61. *Id.* at 923. The court held: "We are constrained to conclude that the [facts] . . . are sufficient evidence to support the finding that she destroyed the Kankakee will under the mistaken belief that the Milwaukee will would control the disposition of her estate."

62. (1866) 1 L.R.P. & D. 209 (P.).

63. *Id.* at 210.

64. *Id.*

65. *Id.* at 210-11.

66. *Id.* at 211.

that out.[67] The court disagreed and revived the second will.[68] In applying DRR, the court said the "'animus revocandi' had only a conditional existence, the condition being the validity of the paper intended to be substituted . . . ."[69] Since the condition, of reviving the first will did not occur, there was no revocation. As a result, the property went to the nephew, clearly an unintended result.[70]

Sometimes a statute prevents the application of DRR. Despite the same circumstances as *Powell v. Powell*, a New York statute stood in the way of the court's application of DRR to revive the first will in *In re McCaffrey's Estate*.[71] The statute[72] provided that if a testator revokes a second will, the first will not be revived unless it appeared from the terms of the revocation that he intended to revive the first will[73] or unless the first will is republished.[74] The testator validly executed a will on June 20, 1938, and a second will, revoking the first one, on December 20, 1938.[75] When found after the death of the testator, the second page of the second will was entirely "obliterated" by ink markings, and at its end the testator had written that "any copy or duplicate is hereby annulled and cancelled—that a Will dated June 20, 1938 may now be restored to full force and effect."[76] The court construed the statute strictly and said, "[t]he history of our statutes, the decisions and our public policy exclude the existence of the doctrine of dependent relative revocation as a rule of law in this State."[77] The court also found there was no indication as to when the notation was made and said, and in effect, it could not determine that the testator's intent to revive the first will appeared at the time of the revocation.[78]

Arkansas had a similar statute. In *Larrick v. Larrick*,[79] the testator destroyed his 1978 will shortly before he died suddenly in June 1979, and before having the opportunity to sign a new one.[80] There was evidence that he was planning to make a new will, even before he destroyed the 1978 will.[81] The Probate Court applied DRR and revived the 1978 will.[82] Although the appellate court

---

67. *Powell*, 1 L.R.P. & D. at 211.
68. *Id.* at 213.
69. *Id.* at 212.
70. *Id.* at 213.
71. 20 N.Y.S.2d 178 (N.Y. Sur. Ct. 1940).
72. N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 1966).
73. *Id.* at § 3-4.6(b)(2). This appears to be a slight variation of UNIFORM PROBATE CODE § 2-509 (amended 1993) ("Revival of a Revoked Will").
74. *Id.* at § 3-4.6(b)(3).
75. *In re McCaffrey's Estate*, 20 N.Y.S.2d at 180.
76. *Id.* at 181.
77. *Id.* at 189.
78. *Id.* at 184. The author suggests that the result of this case should be questioned because the intent of the testator was evident.
79. 607 S.W.2d 92 (Ark. Ct. App. 1980).
80. *Id.* at 93.
81. *Id.*
82. *Id.* at 94.

discussed DRR, it reversed the Probate Court based on an Arkansas statute, which provided that a revoked will can only be revived by re-execution or by execution of another will incorporating the old will by reference.[83]

VI. DRR GOING ASTRAY

Because of the distinction between condition and mistake, it is critical to categorize the facts correctly.[84] Although DRR should be confined to cases of revocations by mistake, courts have construed the doctrine expansively and applied it where it was not appropriate.

In *In re Kaufman's Estate*[85], the testator, while domiciled in New York, executed a will in 1940.[86] He moved to California and executed a will there in 1941.[87] The wills were identical except for a change to a California executor.[88] The testator wrote on the 1940 will, "revoked by reason of change of residence and difficulty [for the executor] to come to California and qualify."[89] The 1941 will was admitted to probate.[90] However, because the testator died within 30 days of executing his new will, it was ineffective by operation of law under California statutes.[91] Nevertheless, Justice Traynor applied DRR to revive the 1940 will.[92]

In *Kirkeby v. Covenant House*,[93] the testatrix executed a will in 1989 placing her estate in a trust.[94] After disposing of the income, the corpus was to be distributed to a named charity.[95] In 1992, she revised some of the provisions of the 1989 will, drafted a handwritten codicil, which, inter alia, named a different beneficiary.[96] The codicil was not properly executed, and a month later, the testatrix again decided to change her will.[97] She marked through certain provisions of the will and codicil, added others and asked a neighbor to

---

83. *Larrick*, 607 S.W.2d at 95. This will not be the result in states that have adopted the Uniform Probate Code, which provides for revival if the testator, by contemporary or subsequent declarations, intends the prior will to take effect as executed. UNIF. PROBATE CODE § 2-509(a).

84. *See, e.g.*, *Powell*, 1 L.R.P. & D. at 212 ("It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied."); PAGE, *supra* note 7, at 479-80, § 21.57 ("Nothing but confusion can result from explaining mistake as a condition; just as nothing but confusion can result from explaining breach of a covenant, impossibility, and the like, as a condition.").

85. 155 P.2d 831 (Cal. 1945).

86. *Id.* at 832.

87. *Id.*

88. *Id.*

89. *Id.* at 833.

90. *In re Kaufman's Estate*, 155 P.2d at 832.

91. *Id.* at 833.

92. *Id.* at 835.

93. 970 P.2d 241 (Or. Ct. App. 1998).

94. *Id.* at 242.

95. *Id.*

96. *Id.* at 242-43.

97. *Kirkeby*, 970 P.2d at 243.

type it.[98] When it was done, she signed it, and afterwards had it notarized.[99] Additionally, witnesses signed at different times.[100] The testatrix died in the fall of 1992.[101] The trial court determined that the 1992 will and codicil were improperly executed, but that the testatrix did not die intestate.[102] The court applied the doctrine of DRR and the existing 1989 will remained valid and was admitted to probate: "Under the doctrine of dependent relative revocation, a court can probate a will that was revoked by a testator through the execution of a subsequent will where that subsequent will is later declared invalid."[103]

Curiously, no party disputed the application of the doctrine. While the holding of *Onions* is not applicable (because the 1989 will was not torn up), there can be no quarrel with the result, which would be the same if the doctrine were not applied, i.e., an improperly executed will (or codicil) cannot revoke a prior properly executed will.

In *Churchill v. Allessio*,[104] the testatrix's 1984 will was rejected by the jury for a variety of possible reasons: the signature was not hers, she did not have the capacity to make a will, or she lacked intent because she operated under duress.[105] Another document, dated in 1967, was found, purporting to be testatrix's earlier will.[106] The jury found that although the 1967 will was signed, it was revoked by the 1984 will, but should be "accepted" under the doctrine of DRR.[107] The Appellate Court agreed to the doctrine's expansion to a case in which the earlier will was not destroyed:

> "The gist of the doctrine [of dependent relative revocation] is that if a testator cancels or destroys a will with a present intention of making a new one immediately and as a substitute and the new will is not made or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy, and the old one will be admitted to probate in the absence of evidence overcoming the presumption."[108]

Georgia, as well, expanded the doctrine in *Warner v. Reynolds*.[109] It was agreed that Ms. Warner's 1990 will was not properly executed or witnessed.[110] However, her son, left out of both wills, contended that a 1984 will had been revoked by the 1990 will leaving his mother intestate and allowing him to

---

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Kirkeby*, 970 P.2d at 243.
103. *Id.* at 243 n.5.
104. 719 A.2d 913 (Conn. App. Ct. 1998).
105. *Id.* at 917.
106. *Id.* at 916.
107. *Id.*
108. *Id.* at 916 (alterations in original) (citations omitted).
109. 546 S.E.2d 520 (Ga. 2001).
110. *Warner*, 546 S.E.2d at 521 (citations omitted).

inherit.[111] The trier of fact found that the 1984 will was the valid, non-revoked will of Ms. Warner.[112] The Georgia Supreme Court agreed:

> [I]f it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. . . . The doctrine of dependent relative revocation is one of presumed intent, and it remains the intent of the testatrix that is the crucial issue.[113]

In all the above cases, the same result could have been accomplished by applying the first holding of *Onions* in that the second will could not revoke the first because it was not properly executed, rather than by applying DRR. Judge Traynor could have relied on *Onions* in the *Kauffman* case and come to the same result. The result in *Kirkeby* would have been the same if the court simply said that the 1992 will, because it was invalid, could not have revoked the 1989 will. Likewise, the result in *Churchill* would have been the same since the 1967 will could not have been revoked by the 1984 will since it was inoperative. *Warner* is another example. There was no reason to apply DRR when the 1990 will could not have been revoked by the ineffective 1984 will.

In the situations described above, it is apparent that DRR was not applicable because the earlier will was not revoked by an act—it was still physically intact. To apply DRR in such cases goes beyond *Onions* and illustrates the liberal application of the doctrine. Even though the outcomes in the cases would have been the same, it is just as important for the correct legal theory to be applied. Unless the correct legal theory is applied, the analysis is faulty.

Courts have even expanded *Onions* to apply to partial revocations.[114] The 1873 English case of *In the Goods of McCabe*[115] is an example. The testatrix provided a legacy to her niece, Edith Galsworthy rather than to testatrix's sister, Louisa.[116] At the time, Edith's mother, Louisa, was seriously ill, thus the desire to name Edith as a legatee.[117] When Louisa recovered, the testatrix "probably erased or attempted to erase" Edith's name from the will and substituted Louisa's name, though the substitution was not valid.[118] The court applied DRR and allowed probate of the will with Edith's name restored.[119] The court said:

---

111. *Id.*
112. *Id.*
113. *Id.* at 522 (citations omitted).
114. Some state statutes only allow partial revocation of wills by an instrument executed with the formalities of a will; partial revocations by other acts are not recognized. *See, e.g.*, FLA. STAT. §§ 732.505-506 (2005),
115. (1873) 3 L.R.P. & D. 94 (P.).
116. *Id.* at 95.
117. *Id.*
118. *Id.*
119. *McCabe*, 3 L.R.P. & D. at 97.

> I cannot have a doubt that she would not have obliterated the name of that member of her family of the name of Galsworthy, which originally stood in the will, if she had not believed that she could validly substitute the name of her sister; and if this be so, the doctrine of dependent relative revocation is applicable.[120]

In *In re Estate of Jones*,[121] the residuary clause of testator's 1969 will violated the rule against perpetuities and was held invalid.[122] The residuary legatees of a valid 1965 will petitioned to substitute them for the stricken residuary legatees of the valid 1969 will.[123] The appellate court discussed the applicability of DRR and held that the residuary clause of the 1965 will could be probated with the valid provisions of the 1969 will under the doctrine of DRR.[124] Even though prior Florida decisions "found it difficult to envision a factual situation other than a codicil failure where a specific gift failure would result in revival or preservation of an earlier disposition,"[125] the court found the prerequisites of DRR clearly existed.[126] However, given that courts disconnect provisions of a will, the same result could have been accomplished by holding that 1969's invalid residuary clause could not revoke 1965's valid residuary clause, obviating against application of DRR.[127] As pointed out earlier, application of the proper legal theory is important.

That decision runs contrary to the 1855 case of *Tupper v. Tupper*.[128] There, the testator, a priest, made charitable bequests.[129] In a later properly executed codicil, he revoked several of the charitable bequests and substituted other charities who could not take.[130] The court ruled that although the substituted beneficiaries could not take, the revocation was effective because the codicil was properly executed.[131] The court refused to "speculate on whom [the testator] might wish to confer the benefit" and distinguished *Onions*:

---

120. *Id.*

121. 352 So. 2d 1182 (Fla. Dist. Ct. App. 1977).

122. *Id.* at 1184.

123. *Id.*

124. *Id.*

125. *Id.* at 1186.

126. *Jones*, 352 So.2d at 1185 (explaining those prerequisites as being: "1. The intent of the testator not to die intestate. 2. The intent of the testator that the revocation is conditionally qualified on the validity of the new disposition. Stated another way: the testator prefers the prior disposition if the new one fails for any reason.").

127. South Carolina applied DRR in the same situation and allowed the revival of a charitable gift in an earlier will when a change was made via codicil, which change violated the rule against perpetuities. *See* Charleston Library Soc'y v. Citizens & S. Nat'l Bank, 20 S.E.2d 623, 626-27 (S.C. 1942).

128. (1855) 69 Eng. Rep. 627 (V.C. Ct.).

129. *Id.* at 627.

130. *Id.*

131. *Tupper*, 69 Eng. Rep. at 628-29.

> [I]t may be said that it was the intention of the testator that the instrument should operate in an entire and not in a mutilated form; while in the other cases, where the testator [as here] has made certain gifts, which are invalid in law, the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit.[132]

To the same effect is *Crosby v. Alton Ochsner Medical Foundation*.[133] The testator validly executed a will on January 20, 1971, leaving a bequest to a charity.[134] After the will was executed, he directed that his September 11, 1970 will be destroyed.[135] All the provisions in both wills were virtually identical.[136] However, the bequest to the charity in the second will violated the state's Mortmain Statute because the testator died within 90 days after executing the January 20, 1971 will.[137] The foundation contended the provision as to the bequest to it in the 1970 will could be revived under DRR.[138] The Chancery Court applied DRR to revive the charitable bequest under the 1970 will principally because the provisions in both wills were virtually identical.[139] The Supreme Court agreed that the charitable bequest in the 1971 will was void but reversed on the issue of reviving the charitable bequest under the 1970 will, holding it to be of no effect:

> It is clear from what was said in [a prior] case that the doctrine of dependent relative revocation cannot be employed to revive a will that has been expressly revoked by the testator when the revocation is expressed in a subsequent will . . . it is conclusive of the testator's intent and evidence to show to the contrary is not admissible.[140]

In so holding, the court cited its earlier decision of *Hairston v. Hairston*[141] and did not take the suggestion to overrule it. In *Hairston*, the testator executed a will in 1841 naming plaintiffs as beneficiaries.[142] In 1852 he executed a second will naming a slave girl as principal beneficiary.[143] The next day, he executed a third will naming the slave girl as beneficiary of his entire estate and died several hours later.[144] The plaintiffs contended that their legacy under the 1841 will should be revived under DRR.[145] The court refused to do so, saying that even though the slave could not inherit under either of the 1852 wills, the

---

132. *Id.*
133. 276 So. 2d 661 (Miss. 1973).
134. *Id.* at 662.
135. *Id.* at 663.
136. *Id.*
137. *Crosby*, 276 So. 2d, at 662.
138. *Id.* at 663.
139. *Id.*
140. *Id.* at 669.
141. 30 Miss. 276 (1855); the later Pennsylvania case of *Price v. Maxwell*, 28 Pa. 23 (1857) is to the same effect.
142. *Hairston*, 30 Miss. at 277.
143. *Id.*
144. *Hairston*, 30 Miss. at 277.
145. *Id.*

1841 will was inoperative because it was expressly revoked.[146] The Court noted: "a will containing the express revocation clause and duly executed according to the statute, though prevented from taking effect for some matter dehors of the will . . . is a revocation of a former will."[147]

Maryland's decision in *Arrowsmith v. Mercantile-Safe Deposit and Trust Co.*[148] also agrees with the principal of *Tupper*. Decedent was donee of a power of appointment under his mother's 1953 irrevocable deed of trust.[149] He validly exercised the power in a 1966 will.[150] He expressly revoked that will in a validly executed 1976 will, exercising the power of appointment.[151] He then expressly revoked the 1976 will in a validly executed 1982 will, again exercising the power of appointment.[152] The testator died in 1983 and the 1982 will was probated.[153] The trustee of the 1953 trust was concerned that the exercise of the power in the 1982 will violated the rule against perpetuities and petitioned the court for instructions.[154] The lower court agreed, and as a result, eighty percent of the 1953 corpus was invalidly appointed.[155] The assets were ordered to be distributed to the takers in default under the 1953 trust.[156] It held that DRR did not apply to revive the appointment made under the 1966 will.[157] "[T]he doctrine's underlying theory of conditional revocation limits the relief which a court can grant."[158] In order to apply the doctrine, the court would first have to find that the testator preferred the 1976 exercise over the 1982 exercise, so that the 1976 will was never unconditionally revoked—but the 1976 exercise suffered the same invalidity as the 1982 will. To cure that defect, the court would have to find that the testator preferred the 1966 exercise over the 1976 exercise, requiring the 1966 will to be probated in its entirety. This the court would not do.[159] Instead, the court found that the "substantial differences between the wills prevent ruling that the 1966 will was only conditionally revoked by the 1982 will, even if it were conditionally revoked by the 1976 will."[160] It is clear that Maryland, through *Arrowsmith*,

---

146. *See id.* at 301.
147. *Crosby*, 276 So. 2d at 668.
148. 545 A.2d 674 (Md. 1988).
149. *Id.* at 675.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Arrowsmith*, 545 A.2d at 676.
155. *Id.* at 677.
156. *Id.*
157. *Id.* at 675.
158. *Id.* at 681.
159. *Id.* at 682 ("It is not the judicial function to select some provisions from column A and some provisions from column B in order to put together a valid will."); *id.* at 680 ("Plucking the perpetuities saving clause from the 1966 will and inserting it in the 1982 will is inconsistent with the theoretical justification for the doctrine.").
160. *Arrowsmith*, 545 A.2d at 683.

does not reject the application of DRR even though "[n]o reported Maryland appellate decision has ever applied it."[161]

DRR has even been applied where there was no second instrument at all. In *In re Raisbeck's Will*,[162] the testator, an attorney, contemplating making a new will, made penciled alterations of his 1897 will,[163] which would give rise to a presumption of revocation. However, because the new will had not been drawn, the will as originally written was probated when he died in 1905, using the doctrine of DRR.[164] The court said it was a

> custom in [the legal] profession, unwise as it may be, to indicate upon the old instrument the changes that are to be made in the new, while the old instrument is still in force . . . . We have unquestionably a presumption that the testator desired to make a new will . . . . It is clear that [the testator] did not intend to die intestate. . . . we can see in the mind of the testator an intention to hold to the old will until the new one was an accomplished fact. The circumstances would seem to justify the application of the rule of dependent relative revocation. . . .[165]

In *Dixon v. Solicitor of the Treasury*,[166] there was also no second instrument, but the time span between the revocation and the attempt to make a new will was shorter.[167] The testator executed a will in 1894.[168] A few days before his death in 1904, he went to his solicitor to make a new will.[169] The testator gave the solicitor instructions, his sole purpose being to increase a certain legacy.[170] The testator, despite the remonstrance of his solicitor, cut off his signature on the 1894 will, believing such cancellation was a necessary step preliminary to making a new one.[171] The new will was prepared, using the old one as a model, but the testator died shortly thereafter before the new will was executed.[172] In instructing the jury, the court said:

> It is obvious that the testator intended to make a new will, and did not intend that the Crown should take his property. He sent for his solicitor to take his instructions for a new will. The testator there and then cut out his own

---

161. *Id*. at 679. In favorably citing other cases, the court would apparently apply it in an appropriate case. *See id.* at 679-81 (citing *In re Kaufman's Estate*, 155 P.2d at 834; *Charleston Library Soc'y*, 20 S.E.2d at 625; Blackford v. Anderson, 286 N.W. 735, 746 (Iowa 1939); *In re* Bernard's Settlement, (1916) 1 A.C. 552, 561). As of early 1998, Maryland had still not applied the doctrine. *See Kroll*, *infra* note 180.

162. 101 N.Y.S. 967 (N.Y. Sur. Ct. 1906).

163. *Id.* There was no indication as to whether the alterations were made at one time or over a period of years.

164. *Id.* at 969.

165. *Id*. at 969-70.

166. (1905), *reprinted in* 2 B.R.C. 534 (P. 1912).

167. *Id.* at 535.

168. *Id.* at 534.

169. *Id.*

170. *Id.* at 535.

171. *Dixon*, 2 B.R.C. at 535.

172. *Dixon*, 2 B.R.C. at 535.

> signature with a pair of scissors. It was just one of those stupid acts without which this court might almost cease to exist. There is no doubt that the testator did what he did because he was making a new will. . . . it follows that he would not have cut out his signature if he had thought that it would have the effect of making him die intestate.[173]

The jury found the testator did not intend to revoke the will by cutting out his signature, and that his intent was for the revocation to be conditional on his executing a new will.[174] Thus without mentioning the doctrine directly, the court effectively instructed the jury on the theory of DRR.

VII. "INTENT" OF DRR

It can be seen from the cases beginning with *Onions* that the application of DRR is not a mere mechanical act. The historic intent was paramount there and has remained so. "[H]e did it only upon a supposition that he had made a latter [valid] will . . . ."[175] The court viewed the revocation as evidence of a presumed intent, implied from the circumstances.[176] That the testator's intent remains a paramount factor is confirmed in *In re Kaufman's Estate.*[177] As Justice Traynor stated: "[t]he doctrine is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative."[178]

This presumed intent[179] is expressed in various ways. *Kroll v. Nehmer*[180] articulates that the testator would have preferred the revoked will if, by its non-revival, his estate would have passed by intestacy.[181] Again, in *Arrowsmith*:

> If a later will which expressly revokes earlier wills itself fails in whole or in part, the doctrine requires a court to decide whether the decedent would have preferred the prior will to the result under the later will, which may be partial invalidity or intestacy.[182]

---

173. *Id.* at 537-38.

174. *Id.* at 538.

175. *Onions*, 23 Eng. Rep. at 1085.

176. When there is actual evidence that reveals testator-s intent, the presumption is rebutted and DRR is not applicable. *In re* Estate of Laura, 690 A.2d 1011, 1014 (N.H. 1997).

177. *In re Kaufman's Estate*, 155 P.2d at 834-35.

178. *Id.* at 833.

179. The presumption is a rebuttable one. "The application of this doctrine would give rise to a rebuttable presumption that the testator would have preferred to revive his earlier charitable bequests rather than let the property go by intestacy." *In re* Estate of Pratt, 88 So. 2d 499, 501 (Fla. 1956).

180. 705 A.2d 716 (Md. 1998).

181. *Id.* at 720.

182. *Arrowsmith*, 545 A.2d at 681.

The court in *In re Macomber's Will* formulated it as follows: "[t]he rule seeks to avoid intestacy where a will has once been duly executed and the acts of the testator in relation to its revocation seem conditional or equivocal."[183] And in *In re Estate of Pratt*, the court noted that: "[t]he application of this doctrine would give rise to the rebuttable presumption that the testator would have preferred to revive his earlier charitable bequests rather than let the property go by intestacy."[184]

Finally, as Professor Warren observed: "[t]he inquiry should always be: What would the testator have desired had he been informed of the true situation?"[185] "[T]he revocation is ineffective if the testator would not have revoked his will had he known the truth."[186]

Pratt has language to the same effect:

> [I]f the testator by codicil, revokes a portion of a prior testamentary instrument and makes a substituted disposition under a mistake of fact or of law with the result that the later disposition is invalid, the prior disposition is revived on the theory that had the testator not been mistaken in his belief he would not have revoked the original gift.[187]

VIII. HOW IS INTENT DETERMINED?

It is one thing to say that intent controls but another to discover that intent. Courts have said over and over that, in their search for the testator's intent to avoid intestacy, all the surrounding circumstances are considered.[188] *Kroll* recites some of the factors:

> the manner in which the existing will was revoked, whether a new will was actually made and, if so, how contemporaneous the revocation and the making of the new will were, parol evidence regarding the testator's intentions, and the differences and similarities between the old and new wills.[189]

The similarity of the provisions seem to carry the most weight in determining the testator's intent to avoid intestacy.[190] Some examples will confirm this.

In *In re Kaufman's Estate*, the provisions in the two wills were identical except for the change of executors which was necessitated by the testator's move

---

183. 87 N.Y.S. 2d 308, 312 (N.Y. App. Div. 1949).

184. 88 So. 2d at 501.

185. Warren, *supra* note 3, at 345.

186. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 259 (7th ed. 2005).

187. *Pratt*, 88 So. 2d at 501.

188. In its search, "the court must confine its inquiry to the testamentary documents before it without resort to extrinsic evidence." *Wehrheim*, 905 So. 2d at 1008.

189. *Kroll*, 705 A.2d at 722 (citations omitted).

190. As early as *Onions v. Tyrer*, this was a factor: "and both wills, as to the main, were much to the same effect, and with little variation as to the disposition of the real estate." *Onions*, 23 Eng. Rep. at 1085.

from New York to California.[191] Justice Traynor said, "[w]hen a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new."[192] He applied DRR because the provisions were virtually identical.[193]

In *Hauck v. Seright*,[194] the similarity of the provisions in the testatrix's October 27, 1992 will and her October 30, 1992 will were similar enough to allow the revoked October 27 will to be revived under DRR.[195] The jury found that the testatrix "was not free from undue influence . . . when she executed her October 30, 1992 will."[196] The Montana Supreme Court found that the wills differed only as to the relative shares to be received by the plaintiff and defendant[197] and that the lower court did not err by applying DRR to revive the October 27 will.[198]

Wehrheim is to the same effect:

> If the later revoked will is sufficiently similar to the prior will, then the courts can more easily indulge the presumption that the testator intended the revocation of the former will to be conditional on the validity of the later will and that the testator prefers the provisions of the former will over intestacy.[199]

Professor Hirsch agrees with the emphasis given by courts to similarities in wills as a way of establishing intent: "courts . . . have deemed the revocation of the prior will conditional upon the effectiveness of the new will, if the prior will comes closer to the testator's desired estate plan than would intestate distribution."[200]

On the other hand, courts will not presume an intent to avoid intestacy where the provisions in the wills are not similar. In *Arrowsmith*, the court did not apply DRR because "substantial differences between the wills prevent [a] ruling that the 1966 will was only conditionally revoked by the 1982 will, even if it were conditionally revoked by the 1976 will."[201] The differences were

---

191. 155 P.2d at 834.

192. *Id.*

193. *Id.*

194. 964 P.2d 749 (Mont. 1998). There is no indication in the case that the October 30 will contained an express clause revoking prior wills.

195. *Id.* at 754.

196. *Id.* at 752.

197. The plaintiff argued that, because the provisions were "strikingly dissimilar," DRR did not apply and therefore the earlier October 27 will was revoked. *Id.* at 754. The court commented there was no authority for this type of reverse application of the doctrine. *Id.*

198. *Id.* at 755.

199. 905 So. 2d at 1008; *see also In re Kaufman's Estate*, 155 P.2d at 833.

200. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 555 (2000) (citations omitted).

201. 545 A.2d at 683.

remarkable.[202] Comparing the provisions of the two wills, the court found that the 1966 will appointed $5,000 to each of the sixteen individuals, none of whom took under the 1982 will; the 1982 will appointed gifts to sixteen charities, only two of which were mentioned in the 1966 will; the 1966 will made no provision for the testator's wife, whereas the 1982 will appointed $10,000 per year to her; his 1966 will made no gifts to charities from his personal estate, whereas the 1982 will bequeathed twenty percent to charities; his 1982 will appointed two trustees instead of the one appointed in his 1966 will.[203]

The result in *Rosoff v. Harding*[204] was the same. There, the testatrix executed a power of attorney given to her by her brother.[205] The power was required to be exercised in a specific manner.[206] The brother died in 1982.[207] After he died, she executed a will in 1982 and exercised the power in accordance with its terms.[208] She properly executed a second will in 1991, which revoked the 1982 will, again, properly exercising the power.[209] Her third will was properly executed in 2000 but she did not properly exercise the power.[210] The court expressly did not apply DRR.[211] It found no indication that she would prefer its exercise over intestacy and that her entire estate planning scheme was substantially changed by the last will.[212]

Nor did the court apply DRR in *In re Estate of Tennant*.[213] There, the testatrix executed a will in February, 1972, leaving specific devises to several charities and the remainder in trust for scholarships at the local high school.[214] In 1981, she hired owners of a yard service, and over the next year she regarded their relationship as "more than that of employer and employee."[215] She executed a new will in August 1982 in favor of the owners of the yard service.[216] During 1981-1982, her health and mental state worsened.[217] When she died in January 1984, the 1982 will was offered for probate.[218] The court found it was void for undue influence but did not apply DRR to revive the 1972 will.[219] In order to apply DRR, the court said: "[A]n essential element of this doctrine is that the new will and the old will of the testator must reflect

---

202. *Id.*
203. *Id.* at 676.
204. 901 So. 2d 1006 (Fla. Dist. Ct. App. 2005).
205. *Id.* at 1007.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Rosoff*, 901 So. 2d 1007-08.
210. *Id.* at 1008.
211. *Id.* at 1010.
212. *Id.*
213. 714 P.2d 122 (Mont. 1985).
214. *Id.* at 123.
215. *Id.* at 124.
216. *Tennant*, 714 P.2d at 124.
217. *Id.*
218. *Id.*
219. *Id.* at 129.

essentially the same dispositive plan. In the instant case, Mae's new will and old will clearly do not reflect the same dispositive plan."[220] The court, in so ruling, found no evidence that the decedent would have preferred her property to be distributed under the old will rather than to be distributed under the intestacy statute, one of the requirements of DRR.[221] The opinion does not provide information as to her next of kin, except that she had no children and that her husband had predeceased her.[222] Without that information, it is difficult to say that the court was not correct.

Another important qualification of the rule is that DRR cannot be applied when the destruction of the first will is unconditional. In *Briscoe v. Allison*,[223] the testator tore his will into many parts at the breakfast table in the presence of his ex-wife and a nephew, saying "I am tearing my will up."[224] The pieces were left on the table and were taped together by his ex-wife.[225] Upon the testator's death shortly thereafter, the taped-together will was offered for probate.[226] The court did not apply DRR to revive it because "there [was] no evidence that the testator at the time he tore his will to pieces had in mind substituting a new will in its place."[227] There was some evidence that the testator, about ten months before his death, wanted to make changes to his will.[228] But the court said, "[j]ust how soon after this revocation he expected to execute one or the other of these wills, or some other will, no one can say. In these circumstances is it not more reasonable to conclude that he had abandoned the idea altogether?"[229]

The court was correct in *In re Estate of Greenwald* [230] when it did not apply DRR. The testator executed a will in 1973, then executed a second will in 1988 expressly revoking his prior will.[231] It was lost sometime after it was executed and before the time the testator died, and a copy was not admitted to probate. [232] The 1973 will could not be revived under the Iowa statute, but it was argued that it was revived under DRR, i.e., that the revocation of the 1973 will was conditioned on the 1988 will being effective.[233] The court disagreed, and said, "[t]here is no evidence of [the testatrix's] intent, at the time she wrote

220. *Id.* at 129-30.
221. *Tennant*, 714 P.2d at 129.
222. *Id.* at 123.
223. 290 S.W.2d 864 (Tenn. 1956).
224. *Id.* at 866.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 866-67.
229. *Briscoe*, 290 S.N.2d at 867.
230. 584 N.W.2d 294 (Iowa 1998).
231. *Greenward*, 584 N.W.2d at 294.
232. *Id.* at 295.
233. *Id*

her 1988 will, that the revocation was conditioned on any future contingencies. . . . The doctrine is inapplicable . . . ."[234]

The Pennsylvania Supreme Court did not apply the doctrine in *In re Emernecker's Estate*, despite stating: it "seems to be a hard case, but there is no remedy, without making the bad law which such cases are said to invite."[235] The testatrix properly executed a will in 1903 that left nothing to her children.[236] Her neighbors convinced her that, to be valid, she had to leave at least one dollar to disinherit her children.[237] Because she was "a person of little education and very susceptible to the influence of her friends and neighbors,"[238] she tore up and burned the will. She died about a week later before executing another will.[239] The court did not apply DRR, and agreed with the lower court that:

> "She was aware that, until this new will was executed, she was without any will at all, and the time of execution was left indefinite. Her friend was to call the 'first fine day' to go with her to have it drawn. This was merely the expression of an unwritten intention to do something in the future . . . ."[240]

As suggested earlier, there does not appear to be any consistency in applying DRR, which results in confusion. DRR has been applied when there is a true condition, to revive a second will, to revive a first will when it has not been destroyed, to revive a first will when the second will was ineffective and could not have revoked the first will, to partial revocations, and where there was no second will.

DRR has lost its way. With there being no consistency among the cases, what assistance can be developed to analyze the facts so that DRR is more easily understood and properly applied? What is important is that the proper legal theory be applied with the correct analysis to arrive at a "right" result.

IX. A COHERENT APPROACH TO DRR: A FLOW CHART

The approach begins with the assumption that there is a valid will. The next step considers whether the second instrument, with an express revocation clause, is probatable. If there are no defects in the second instrument, it is clear that the first will is revoked, and DRR would not be applicable even if the second will is later revoked.

In the event that there is a defect in the second instrument, it would not be probatable. The defect could be faulty execution, undue influence, duress, etc. Then, we face the question of what the testator did with the first will. If the first will is still in physical existence, it would not be revoked because an

---

234. *Id.* at 296.
235. 67 A. 701, 702 (Pa. 1907).
236. *Id.* at 701.
237. *Id.*
238. *Id.*
239. *Id.* at 702
240. *Emernecker*, 67 A. at 702 (quoting testimony from lower court).

invalid instrument cannot revoke a validly executed one. DRR would not be applicable, and the first will would be probated.

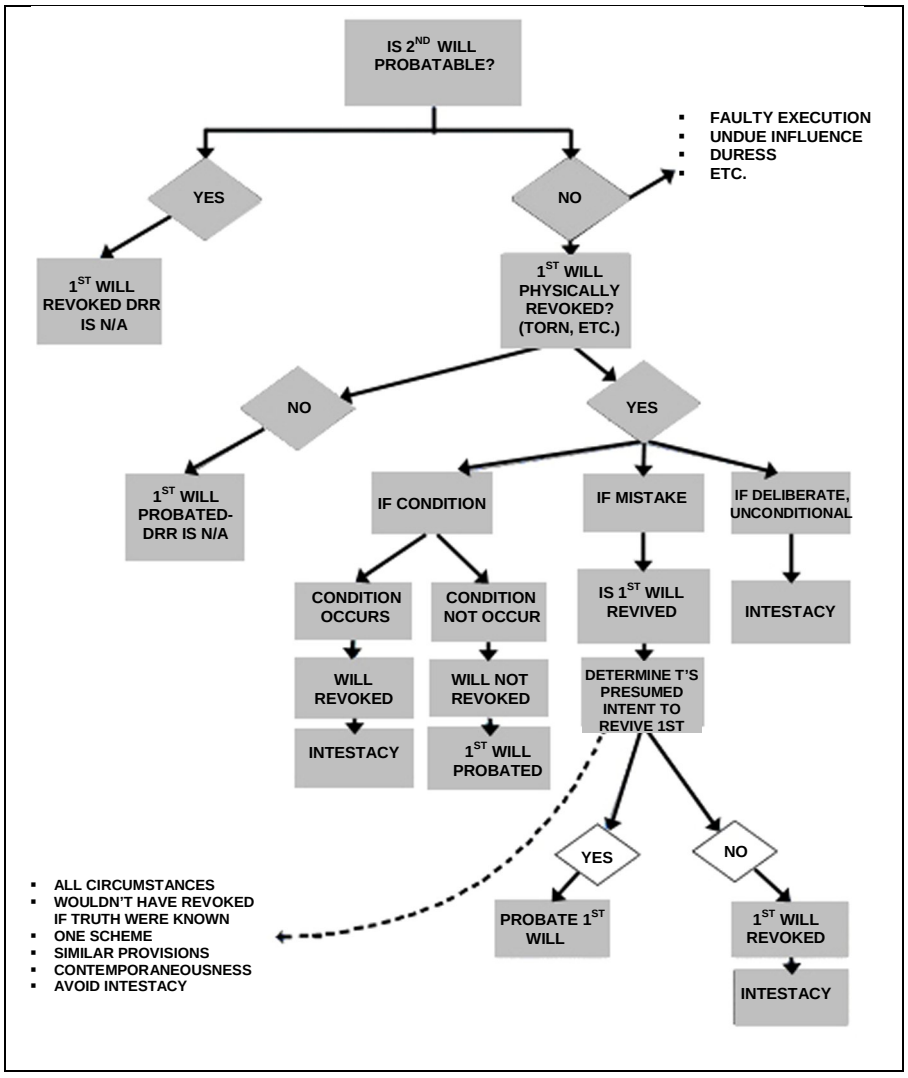
DRR would come into the discussion when the testator physically revokes the first will, i.e., he tears it up, he burns it, etc. At this point, there are three alternatives. First, if the testator did it deliberately without any intent of preparing a new one, the will remains revoked and the testator would die intestate. Secondly, if the testator conditioned the first will on the happening of a subsequent event, i.e., a true condition, regardless of whether the condition occurs, DRR would not be applicable. If the condition occurs, the first will is revoked and cannot be revived. If the condition does not occur, the first will is not revoked. In both cases, DRR would not apply.

Third, if the testator physically revoked the first will because he was mistaken as to a fact or a matter of law, DRR would apply. The question becomes, what was the testator's presumed intent in revoking the first will? Would he have revoked it had he known the truth? Was the destruction and execution of the new will contemporaneous? How close in time were those acts? Is there one scheme evident in the destruction of the first will and execution of the new will? How similar are the provisions in both wills? Would the testator have preferred intestacy over the first will?

In deciding these questions, all the facts and circumstances are considered. If the facts show the testator intended to revive the first will, it is probated; otherwise, it is not. In the event the testator does not execute a second will (perhaps because he died immediately after the will's destruction), one would proceed with the analysis by asking what the testator's presumed intent was.

The following Flow Chart is offered:

FLOW CHART
(assume valid first will and second will with express revocation clause)



X. CONCLUSION

The term DRR has been around for more than two hundred years and there is probably no inclination to restrict its use. Courts will probably not ever take Professor Warren's advice to do away with the appellation. And perhaps, courts will continue to expand the doctrine resulting in more confusion. The RESTATEMENT (THIRD) OF PROPERTY ' 4.3 (1998) renames DRR the Doctrine of Ineffective Revocation, but note that it is revocation that is still emphasized.[241] Perhaps a better appellation would be the Doctrine of Retroactive Revival, since it can be seen from the Flow Chart that the most important decision is whether the first will can be revived, [242] not whether its revocation can be rescinded. Hopefully, the Flow Chart will aid in the proper analysis of the issues and limit the doctrine's applicability to the proper situation.

241. RESTATEMENT (THIRD) OF PROPERTY § 4.3 (1998).

242. The importance of "revival" is evident from the time of the doctrine's origin in *Onions v. Tyrer* where the court said that the will, torn up by mistake, "will [be] set up again in equity." *Onions*, 23 Eng. Rep. at 1085.