Revocation, Revival, Amendments, and Will Contests (GA)

A Lexis Practice Advisor® Practice Note by Morgan Wood Bembry, Wood & Bembry LLC

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This practice note covers the methods of revoking, reviving, and altering a will in Georgia. The note discusses revocation by subsequent will or other writing, revocation by physical action, revocation by change in marital status or the addition of children, and revocation of joint and mutual wills. The note explains the circumstances under which a prior will may be revived, amendment of a will, and republication by codicil. The practice note also covers grounds for will contests in Georgia, such as lack of due execution or testamentary capacity, undue influence, fraud, misrepresentation, and mistake. Finally, the note includes a brief discussion of the interpretation and construction of wills by Georgia courts.

For further discussion and information on the purposes of a will, see Purposes and Uses of a Will (GA). For in-depth coverage of the requirements for creating and drafting a will, see Requisites, Instrumentation, and Will Provisions (GA).

Revoking, Reviving, and Amending a Will

Revocation

Because a will does not take effect until the testator's death, a will may be amended or revoked at any time prior to the testator passing away. Ga. Code Ann. § 53-4-2; Ga. Code Ann. § 53-4-40. Revocation of a will may be express or implied. Express revocation is by a writing or an action of the testator that explicitly revokes the will. An implied revocation occurs if a later-executed will is inconsistent with the earlier will but does not expressly revoke it. Ga. Code Ann. § 53-4-42(c). As the testator's intent is key in matters relating to a will, in all cases of revocation, the testator must intend to revoke the will. See Ga. Code Ann. § 53-4-41.

Revocation by Subsequent Will or Other Written Instrument

A will may be expressly revoked by a later-executed will, and such revocation is effective immediately. Ga. Code Ann. § 53-4-42(b). Another subsequent written instrument that is executed, subscribed, and attested with the same formalities as a will, even if it is not specifically intended to be a will, may also expressly revoke an earlier will and become effective immediately. Ga. Code Ann. § 53-4-43; Ga. Code Ann. § 53-4-42(b).

Even if a subsequent will does not expressly revoke an earlier will, it can have the effect of revoking all or part of an earlier will. Ga. Code Ann. § 53-4-42(c). The implication is that the terms of the later will that are inconsistent with the terms of the earlier will supersede and revoke the earlier, inconsistent terms. Any terms in the earlier will that can stand consistently with the subsequent will remain unaffected. See Ga. Code Ann. § 53-4-47. Be aware, however, that a revocation implied in this manner does not take effect immediately. It only becomes effective if and when the subsequent inconsistent will itself becomes effective—that is, if it is the testator's most recent valid, unrevoked will when the testator dies. Otherwise, the implied revocation is incomplete and does not take effect. Ga. Code Ann. § 53-4-42(c).

Always be mindful of how ambiguity can impact your client's intentions. To avoid any lack of clarity, misunderstanding, or litigation concerning the testator's intent, you should endeavor to provide clear and precise language for a client who is executing a testamentary instrument but has had a previous will. The subsequent document should make explicit the testator's intention to revoke the prior will(s) or a portion thereof, and, if only revoking a portion, to leave the unrevoked portions of the prior will unchanged and in effect.

Revocation by Physical Action

A will may be revoked if the testator destroys or obliterates the will with the intent to revoke it. The revocation may also be accomplished if the testator directs another person to complete the destruction or obliteration. Ga. Code Ann. § 53-4-44. Destroying a will generally means tearing it up, burning it, or taking some other action to ruin the physical document. Obliterating means crossing out or writing on some portion of a will while the document itself remains intact overall. See Lovell v. Anderson, 533 S.E.2d 65, 66–67 (Ga. 2000); Carter v. First United Methodist Church of Albany, 271 S.E.2d 493, 496 (Ga. 1980). Any obliteration must be made to the original will and not to a duplicate non-original copy. Morrison v. Morrison, 655 S.E.2d 571, 575 (Ga. 2008).

Even if the testator's intent to destroy the will is present, a destruction or obliteration that is not actually completed does not constitute a revocation, whether or not someone besides the testator put a stop to the act. See Payne v. Payne, 100 S.E.2d 450, 452 (Ga. 1957); Byrd v. Riggs, 70 S.E.2d 755, 756 (Ga. 1952); McIntyre v. McIntyre, 47 S.E. 501, 503 (Ga. 1904). A presumption that the testator intended to revoke the will is made if a material portion of the will is obliterated or cancelled, but the presumption can be overcome by a preponderance of the evidence. Ga. Code Ann. § 53-4-44. See also Lovell v. Anderson, 533 S.E.2d 65, 66–67 (Ga. 2000).

A partial revocation by physical act is not permissible; either the entire will is revoked, or no portion of the will is revoked. Because Section 53-4-44 of the Georgia Code does not authorize a partial revocation by destruction or obliteration, the intent the statute requires is the intent to revoke the entire will. A testator with the intent to revoke only a portion obviously does not meet this requirement. If a material portion of the will is obliterated or cancelled, the presumption arises that the testator intended to revoke the entire will. If it is not shown by a preponderance of the evidence that the testator intended to revoke only a portion of the will, then the entire will is revoked by the physical act. If it is shown by a preponderance of the evidence that the testator intended to revoke only the specific portions of the will that were obliterated but leave the remainder of the will intact, no revocation has occurred. If the testator did not intend to revoke the entire will and it can be shown by evidence what the obliterated portions were, then the will is probated as it existed without the obliterations. See Hartz v. Sobel, 71 S.E. 995, 995–96 (Ga. 1911) (exploring in thorough detail the law on revocation of wills dating back to the English statute of frauds under Charles II). See also Peterson v. Harrell, 690 S.E.2d 151, 153 (Ga. 2010); Morris v. Bullock, 194 S.E. 201, 206 (Ga. 1937). A revocation by physical act will be recognized even if there are duplicate originals outstanding. King v. Bennett, 110 S.E.2d 772, 773 (Ga., 1959). See also Horton v. Burch, 471 S.E.2d 879, 881 (Ga. 1996).

If the original of a testator's will cannot be located, a presumption arises that the testator intended to destroy and thus revoke it. Ga. Code Ann. § 53-4-46(a). In the absence of the original will, a copy may be provided but must be proved by a preponderance of the evidence to be a true copy of the original will, and the presumption that the testator intended to revoke the original must be overcome by a preponderance of the evidence. Ga. Code Ann. § 53-4-46(b). See also Tudor v. Bradford, 709 S.E.2d 235, 236–38 (Ga. 2011).

In short, an obliteration of a portion of a will, without destroying the entire document, can easily lead to disagreement and litigation over the testator's intent. You should strongly advise your client to avoid making extraneous marks on their will and to seek your advice if he or she wishes to make changes or revocations. This will help to avoid an expensive final result that may not carry out the testator's actual intent.

Revocation by Change in Marital Status or Addition of Children

A testator may experience major life changes but fail to update his or her will accordingly. When a testator marries or has children subsequent to the execution of a will, the law protects the rights of the new spouse or child unless the testator clearly expresses an intent to the contrary. If the will contains no provision in contemplation of a future spouse or child, the testator's will is not revoked entirely but is revoked to the extent needed to provide the new spouse or child with the share of the estate he or she would have received had the testator died intestate. Ga. Code Ann. § 53-4-48. For further discussion of this issue, see Requisites, Instrumentation, and Will Provisions (GA) — Basic Will Provisions.

If a testator and his or her spouse go through a final divorce or an annulment after the testator's will is executed, unless the will provides otherwise, the former spouse will be treated

as having predeceased the testator, and any testamentary gift to the former spouse will only vest in his or her descendants that are also descendants of the testator. Ga. Code Ann. § 53-4-49. See also Honeycutt v. Honeycutt, 663 S.E.2d 232, 235 (Ga. 2008). The spouses' subsequent remarriage will revive those portions of the will as they were written, unless the testator revoked or amended the will at some point after the divorce or annulment. Ga. Code Ann. § 53-4-49.

Joint and Mutual Wills

A joint will signed by two or more testators and disposing of the property of each testator may be probated as each testator's will. Ga. Code Ann. § 53-4-31(a). Mutual wills are wills by multiple testators that make reciprocal devises of each testator's property. Ga. Code Ann. § 53-4-31(b). See Davis v. Parris, 710 S.E.2d 757, 758–61 (Ga. 2011); Hodges v. Callaway, 621 S.E.2d 428, 430–32 (Ga. 2005). Executing a joint or mutual will does not signify that any testator promises not to revoke or amend the will. Ga. Code Ann. § 53-4-32. Rather, such a promise, or a promise to make a will, a certain bequest, or not to make a will, must be memorialized in a written agreement. Ga. Code Ann. § 53-4-30. In the absence of a written agreement, each testator is free to revoke a joint or mutual will at any time before the testator's death, and the revocation of one testator's joint or mutual will does not revoke the joint or mutual will of any other testator. Ga. Code Ann. § 53-4-33. For further discussion of revocation, see 5 Southeast Transaction Guide § 82.03.

Revival

If a will or other written instrument that expressly revoked or amended an earlier will is itself revoked, the status of the earlier will depends on the extent of the revocation of the earlier will and the method of revocation of the will now being revoked. The following scenarios are addressed by Section 53-4-45:

- **Earlier will was revoked in its entirety by a will that is now being revoked by a subsequent will or other written instrument.** Earlier will remains revoked unless the latest instrument indicates that the earlier will intends it to be revived. Ga. Code Ann. § 53-4-45(a).
- **Earlier will was revoked in its entirety by a will that is now being revoked by a physical act.** Earlier will remains revoked unless it appears from the circumstances of the revocation or from the testator's contemporaneous or subsequent statements that the testator intended to revive the earlier will. Ga. Code Ann. § 53-4-45(b).
- **Earlier will was revoked or amended in part by a will that is now being revoked by a subsequent will or other written instrument.** The revoked or amended part of the earlier will is revived to the extent that it appears from the latest instrument that the testator intended it to be. Ga. Code Ann. § 53-4-45(c).
- **Earlier will was revoked in its entirety by a will that is now being revoked by a physical act.** The revoked or amended part of the earlier will is revived unless it appears from the circumstances of the revocation or from the testator's contemporaneous or subsequent statements that the testator did not intend to revive the revoked or amended part of the earlier will. Ga. Code Ann. § 53-4-45(d).

In any of these situations, if the earlier will is not revived, it can be republished in whole or in part by a writing signed by the testator and executed with the same formalities as a will. Ga. Code Ann. § 53-4-45(e). Any other revoked will may be republished in the same manner. Ga. Code Ann. § 53-4-50. See also Dyess v. Brewton, 669 S.E.2d 145, 147 (Ga. 2008).

Amendment by Codicil

A codicil is an amendment to or a republication of a will. Ga. Code Ann. § 53-1-2(4). A codicil should both specifically reference the will being amended or republished, and clearly state that the unchanged provisions of the will are being reaffirmed by the codicil. See Honeycutt v. Honeycutt, 663 S.E.2d 232, 235 (Ga. 2008). The republication by codicil of an earlier will can cure any issues of testamentary capacity or execution errors, as the due execution of a codicil making clear reference to an earlier will amounts to a ratification and republication of the terms of the earlier will. See Foster v. Tanner, 144 S.E.2d 775, 776 (Ga. 1965); Pope v. Pope., 22 S.E. 245, 250 (Ga. 1894).

Formal Requirements

In Georgia, a codicil must be executed by the testator and attested and subscribed by witnesses with the same formalities as a will. Ga. Code Ann. § 53-4-20(c). These formalities are:

- Signature by the testator –or–
- Signature by another individual in the testator's presence and at his or her express direction –and–
- Signature by two competent attesting witnesses over the age of 14

Ga. Code Ann. § 53-4-20.

For an in-depth discussion of the requirements to create a valid will, see Requisites, Instrumentation, and Will Provisions (GA) — Instrumentation.

Since the term "will" includes all codicils to the will under Section 53-1-2(17), the rules of interpretation and construction of wills are equally applicable to codicils. For a discussion of will construction, see Interpretation and Construction of Wills below.

Grounds for Will Contests

If an interested party has reason to believe that a will should not be admitted to probate, the person—known as the caveator—files a caveat to the will. The grounds upon which a caveat is usually based include the following:

- Lack of due execution and/or testamentary capacity
- Undue influence
- Fraud or misrepresentation
- Mistake

See, e.g., McDaniel v. McDaniel, 707 S.E.2d 60, 64 (Ga. 2011). A caveat for lack of due execution or lack of testamentary capacity refers to an issue with the formalities of the will execution or the testator's mental state at the time. A caveat for undue influence, fraud, misrepresentation, or mistake implicates the testator's freedom of volition in the creation and execution of the will. The requirements of testamentary capacity, freedom of volition, and due execution are discussed at length in Requisites, Instrumentation, and Will Provisions (GA) — Statutory Requirements.

Only an interested person has standing to file a caveat to a will. An interested person includes:

- A legatee
- A devisee
- A creditor of the decedent
- A purchaser from an heir of the decedent
- An administrator appointed for the decedent prior to the discovery of the will –and–
- An individual making a claim under an earlier will of the testator

Ga. Code Ann. § 53-5-2.

An interested person may also include others who would be injured by the probate of a will or would benefit from the will not being probated. The determination of who has standing to file a caveat has been determined on a case by case basis. Melican v. Parker, 657 S.E.2d 234, 236 (Ga. 2008). For example, if a testator had three siblings who were his heirs had he died intestate, but his will splits the estate between only two of the siblings, the excluded sibling has standing to challenge the will because he stands to benefit if the will is deemed invalid.

Lack of Due Execution; Testamentary Capacity

A lack of due execution might mean, for example, that the testator did not sign the will in the presence of the witnesses or acknowledge his or her signature to the witnesses, that the witnesses did not sign the will in the presence of the testator, or that the testator did not have knowledge of the will's contents. A lack of testamentary capacity might involve, for instance, a testator who was incapable of understanding what he or she was signing or the effect that it would have.

The initial burden of making a prima facie case of proper execution and testamentary capacity falls to the propounder of the will—that is, the person petitioning to probate the will. See, e.g., Bulloch v. Worth, 130 S.E.2d 502, 503 (Ga. 1963). The presence of an attestation clause stating the essential facts of the execution, plus the actual signatures of the testator and the witnesses, gives rise to a presumption that the will was executed as required by law. Underwood v. Thurman, 36 S.E. 788, 790–91 (Ga. 1900). Even if no attestation clause is present, if the witness fails to recall the events surrounding a will's execution but the witnesses' signatures are proved, there is a presumption that the will was executed properly. Glenn v. Mann, 214 S.E.2d 911, 915–16 (Ga. 1975). A will's self-proving affidavit or the witnesses' written interrogatories are sufficient to establish that the testator had testamentary capacity. Singelman v. Singelmann, 548 S.E.2d 343, 345–46 (Ga. 2001). The caveator then has the burden of showing that a genuine issue of material fact remains as to the testator's capacity or proper execution. Strong v. Holden, 697 S.E.2d 189, 191 (Ga. 2010). See also 5 Southeast Transaction Guide § 82.03.

Undue Influence

In cases where the wishes or intentions of an alternate party are substituted for those of the testator, undue influence is at play. Ga. Code Ann. § 53-4-12. Undue influence contemplates the exertion of pressure by another person at the time of the execution or publication of a will such that there is a lack of free will on the part of the testator.

To invalidate a will for undue influence, the caveator must show that the influence operating on the testator at the time when the will was executed amounted to fear, force, over-persuasion, or coercion that went far enough so as to destroy the free will of the testator and substitute the influencer's wishes for the testator's. Crawford v. Crawford, 128 S.E.2d 53, 54 (1962). The influencer must attempt to influence the testator with specific regard to the testator's will. A mere opportunity to influence the testator is insufficient to validate the will. Quarterman v. Quarterman, 493 S.E.2d 146, 147 (Ga. 1997).

A rebuttable presumption of undue influence arises if an influencer who is not the natural object of the testator's

bounty had a confidential relationship with the testator and the influencer obtains a substantial benefit under the will. Hudson v. Abercrombie, 338 S.E.2d 667, 668 (Ga. 1986). The presumption also arises if the influencer and the testator had a confidential relationship, with the influencer occupying a dominant position and the beneficiary being of weak mentality. A confidential relationship is one in which one party is situated as to exercise a controlling influence over the wishes, conduct, and interest of the other person. White v. Regions Bank, 561 S.E.2d 806, 808 (Ga. 2002).

If a presumption of undue influence arises, the burden shifts to the propounder to present evidence to rebut it. Be aware, however, that the caveator retains the ultimate burden of persuasion on the issue. Horton v. Hendrix, 662 S.E.2d 227, 231 (Ga. App. 2008).

Fraud or Misrepresentation

A fraudulent practice or misrepresentation that deceives the testator and that the testator relies on in making or signing a will can be sufficient to invalidate the will. See Slade v. Slade, 118 S.E. 645, 650 (Ga. 1923). The following is an example of fraud: A testator wanted to leave her estate equally to her three children but has lost touch with the third child and does not know his whereabouts. The other two children know the third child is alive but tell the testator that the third child is deceased in order to get a larger share of the estate. As a result, the testator leaves her estate only to the two children she believes are still alive, when otherwise she would have left her estate to all three children.

A person bringing a caveat for fraudulent misrepresentation must show both that the testator relied on the misrepresentation and that the testator was actually deceived. Evidence only of the opportunity and motive for fraud is not enough; the caveator must present evidence of specific facts supporting the claim of fraud. Ga. Code Ann. § 9-11-9(b).

Mistake

Unlike in a contract situation where a mistake of fact or law can render a contract unenforceable, a mistake of fact (if not attributable to a fraudulent misrepresentation) generally will not invalidate a will or any portion of it. Shore v. Malloy, 472 S.E.2d 303, 304–05 (Ga. 1996). A mistake attributable to the testator's error in judgment after investigation, or from the testator's failure to make an investigation to determine the truth of a matter, is not enough to defeat the testator's freely executed will. Yancey v. Hall, 458 S.E.2d 121, 124–25 (Ga. 1995).

Prior to the 1998 revision to the Probate Code, Georgia made an exception to this rule in the event that a testator was mistaken about the existence or conduct of an heir and invalidated the will as to that heir. The Revised Probate Code of 1998 now contains an exception in the case of a testator who fails to provide for a child whom the testator mistakenly believes is deceased. Ga. Code Ann. § 53-4-58.

Interpretation and Construction of Wills

On occasion, a court will find itself in need of assistance in construing the language of a particular will. Other times, a will may fail to provide for the consequences of an unintended or unconsidered circumstance. In general, the court will endeavor to give effect to any clear and convincing intention of the testator so long as it is consistent with the rule of law. The court may change and adapt the language of the will to achieve the testator's intended purpose. Ga. Code Ann. § 53-4-55.

Georgia case law provides some guiding principles to aid the court in interpreting and construing the meaning of a will. These principles include:

- Every will is unique (sui generis).
- The intent of the testator is of paramount importance.
- The intent of the testator is to be discerned from consideration of the will as a whole and the facts and circumstances under which it was executed.
- It is presumed that the testator intended to dispose of the entire estate and not to die intestate as to any part of it.

Norton v. Ga. R. Bank & Tr., 322 S.E.2d 870 (Ga. 1984).

The court will look first to the four corners of the will itself to glean the testator's intent. The entire will should be taken together and each part given operation. A general intention will prevail over a particular intention found in only a part of the will. If the words of the will are plain and unambiguous, then those words must control, even if there is evidence that their meaning does not match the testator's actual intention. See, e.g., See v. Mitchell, 700 S.E.2d 338, 339–40 (Ga. 2010); Hall v. Beecher, 168 S.E.2d 581, 583–84 (Ga. 1969). Only when the will itself does not resolve the question is the court permitted to apply principles of construction and consider parole evidence of the testator's circumstances around the time when the will was executed to explain the ambiguities and discern the testator's intent. Dyess v. Brewton, 669 S.E.2d 145, 147 (Ga. 2008). Proof of the circumstances at

the time involving the testator, the testator's family, his or her property, and any legatees will be admissible to help the court construe the will and the testator's intentions. In addition, parole evidence in the form of declarations made by the testator will be admitted despite being hearsay evidence. The construction of latent ambiguity through parole evidence is always in service of determining the intentions of the testator and the discovery of the real meaning of his or her will. Legare v. Legare, 490 S.E.2d 369, 372 (Ga. 1997).

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Wills, trusts, and estate planning drew Morgan's attention before her career even began, as the practice could give her the opportunity to use her analytical and writing skills to help people on a very personal level. Now, Morgan serves clients needing assistance with both estate planning and estate administration. She works with clients young and old to develop their first estate plans or interpret and rework wills or trusts that they have had in place for years. Morgan also assists survivors who are navigating the probate process or administering a trust for a loved one, doing what she can to make a difficult time a little bit easier.

Morgan's practice also focuses on advising business owners and entrepreneurs, guiding them through the legal issues that arise in the everyday life of a business. Working with her father, William B. Wood, since early 2013 has enabled her to gain the benefit of his years of experience and build her knowledge of business and transactional law. Intellectual property experience from her time at a boutique IP firm in Atlanta proved to be a valuable addition to the practice, allowing Wood & Bembry to add trademark and copyright protection work to the core business services the firm offers to its clients.

Morgan was selected to the 2016, 2017, 2018, and 2019 Georgia Rising Stars lists. Wood & Bembry LLC was voted a top firm in the Business Law Advisors category of Best of Gwinnett in 2016, 2017, and 2018. Morgan is a member of the Georgia Association for Women Lawyers, serving on its Foundation Board from 2013 to 2019 and as Foundation Board President for 2017-2018.

Born and raised a Bulldog, Morgan received her J.D. from the University of Georgia School of Law, where she graduated *cum laude* in 2011 and served as managing editor of the Georgia Law Review. During law school, Morgan interned with the Athens-Clarke County Probate Court and with the Georgia Governor's Office of Consumer Affairs. Prior to law school, Morgan worked in marketing and communications for a large Atlanta law firm. She earned her A.B.J., *cum laude*, with honors, from the University of Georgia, majoring in public relations.