St. John's Law Review

Volume 68
Number 3 *Volume 68, Summer 1994, Number 3*

Article 10

SCPA § 1407: New York Court of Appeals Rules That Contract to Make Will Irrevocable is Unenforceable Against Survivor When Will is Presumed Revoked

Neil V. Carbone

SCPA § 1407: New York Court of Appeals rules that contract to make will irrevocable is unenforceable against survivor when will is presumed revoked

The New York Statute of Wills contains strict requirements that must be adhered to when executing a valid will,[1] altering or amending a will,[2] and even revoking a will.[3] When interpreting the statute, a court, which must strictly comply with the statute,

---

[1] *See* EPTL § 3-2.1 (McKinney 1981 & Supp. 1995) (containing formal requirements for execution and attestation of wills); § 3-2.2 (providing requirements for executing valid nuncupative (oral) or holographic (handwritten) wills). There are three essential elements of an attested (or formal or witnessed) will: its terms must be in writing, it must bear the testator's signature, and two witnesses must attest the signature of the testator. EPTL § 3-2.1; *see* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 2 (1987). In contrast, holographic wills, recognized only in limited circumstances in New York, *see* EPTL § 3-2.2, require no witnesses and, therefore, demand significantly less formality than standard wills. Langbein, *supra*, at 3. The formalities required to execute a will, which are derived from English statutes such as the Wills Acts of 1837, are intended to assure the implementation of a decedent's testamentary plan by requiring permanent evidence of the substance of his or her wishes. *Id.* The Wills Act requirements serve to "provide evidence of the genuineness of the instrument," to "caution the testator about the seriousness and finality of his act," and to protect the testator from those who attempt to deceive or to coerce him into "making a disposition that does not represent his true intentions." *Id.* The "greatest blessing" of the Wills Act is the "safe harbor" it creates, because by complying with its requirements the testator assures routine probate of his or her estate in all but exceptional cases. *Id.* at 4. *See generally* John B. Rees, Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613 (1960); John B. Rees, Jr., *American Wills Statutes: II*, 46 VA. L. REV. 856 (1960) (discussing will statutes of various states).

[2] *See* EPTL §§ 3-4.1 to 3-4.6 (McKinney 1981 & Supp. 1995) (relating to amendment of wills).

[3] *Id.* (providing manner in which will may be revoked). The same formal requirements must be met to effect a written revocation of a will as are required to create a will. *See id.* § 3-4.1(a)(1). According to Langbein, the rationale seems to be that if formalities are necessary to make a valid will, formalities should be required to revoke a will. *See* Langbein, *supra* note 1, at 29 n.133. In addition, a will may be revoked by a physical act, such as "[a]n act of burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction." EPTL § 3-4.1(a)(2). Some commentators believe that the formalities of written revocation should be relaxed due to the apparent inconsistency between the strict formalities required for revocation by writing and the absence of strict formalities required for revocation by physical act. *See* Langbein, *supra* note 1, at 29 n.133; *see also* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 563 (1990) ("Allowing physical revocation in private is difficult to reconcile with requiring written revocation to meet all the wills act [sic] formalities.").

will set aside an individual's plan for the disposition of assets after his or her death if the statutory requirements are not met.[4] Some testators enter into contractual agreements to avoid this possibility and to ensure that their wishes will be enforced even without

---

There are various ways by which a will may be altered or revoked by operation of law. *See* EPTL §§ 5-1.1 and 5-1.1-A (providing for alteration by assertion of surviving spouse's right of election); § 5-1.3 (describing alteration by marriage after execution of will); § 5-1.4 (mandating alteration as effect of divorce or annulment); § 5-3.2 (providing for alteration by birth of child); *see also* Ellerson v. Westcott, 148 N.Y. 149, 154, 42 N.E. 540, 542 (1896) (preventing individual from enjoying "fruits of iniquity"); Riggs v. Palmer, 115 N.Y. 506, 514, 22 N.E. 188, 191 (1889) (common law doctrine providing that killer may not benefit from murdering testator to receive inheritance); *In re* Katz's Will, 78 Misc. 2d 790, 791-92, 358 N.Y.S.2d 616, 618 (Sur. Ct. Schoharie County 1974) (imposing constructive trust on wrongdoer in favor of beneficiaries where wrongdoer destroyed will to preserve his inheritance under prior will); *cf.* EPTL § 4-1.6 (providing for divestiture of interest in joint tenancy upon conviction for murder of other joint tenant).

Partial revocation by act is not permitted in New York. A partial revocation must be in writing and executed with the same formalities as a will. *See* Lovell v. Quitman, 88 N.Y. 377, 382 (1882) ("The mischief intended to be prevented by the observance of formalities would reappear if the instrument could be altered in a less formal way."); *see also In re* Estate of Collins, 117 Misc. 2d 669, 675, 678, 458 N.Y.S.2d 987, 991-93 (Sur. Ct. Cattaraugus County 1982) (admitting will to probate as originally executed, not as amended by handwriting and interlineations attempting to change bequests). There must be a concurrence of the physical act and the intent to revoke the entire will. *Id.* at 674, 458 N.Y.S.2d at 991.

[4] *See* Langbein, *supra* note 1, at 3-4; *see also In re* Estate of Agar, 88 A.D.2d 882, 452 N.Y.S.2d 597 (1st Dep't 1982) (holding that will was not to be admitted to probate since it had been executed without witness formalities of EPTL § 3-2.1, which were designed to prevent fraud), *aff'd*, 59 N.Y.2d 798, 451 N.E.2d 499, 464 N.Y.S.2d 752 (1983); *In re* Estate of Zaharis, 91 A.D.2d 737, 738, 457 N.Y.S.2d 995, 997 (3d Dep't 1982) (concluding that requirements of EPTL § 3-2.1 not met where testator's signature did not appear at physical and natural end of instrument), *aff'd*, 59 N.Y.2d 629, 449 N.E.2d 1273, 463 N.Y.S.2d 195 (1983); *In re* Estate of Griffin, 81 A.D.2d 735, 736, 439 N.Y.S.2d 492, 493 (3d Dep't 1981) (holding that where will was unstapled at execution, only signed last page, which contained no dispositive provisions, could be probated); *In re* Mulligan's Will, 40 A.D.2d 136, 139, 338 N.Y.S.2d 253, 256 (3d Dep't 1972) (holding that attempted revocation by signed endorsement stating that "foregoing will is rendered void" was ineffective because witness requirements of EPTL § 3-4.1 were not met); *In re* Estate of Charitou, 156 Misc. 2d 952, 956, 595 N.Y.S.2d 308, 311 (Sur. Ct. Bronx County 1993) (holding that physical act of cancellation upon photocopy of will did not effect revocation by physical act under EPTL § 3-4.1(a)(2)(A)); *In re* Will of Mergenthaler, 123 Misc. 2d 809, 811, 474 N.Y.S.2d 253, 254 (Sur. Ct. Nassau County 1984) (holding that residuary estate, provided for on last page, pass by intestacy where testatrix signed next to last page of will due to stapling error at attorney's office). *But see In re* Snide, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 658, 437 N.Y.S.2d 63, 64-65 (1981) (holding that will could be admitted to probate even though husband and wife each signed other's will due to "genuine mistake" and limiting holding to this "very unusual case").

the formality of a will.[5] Frequently, however, the testator's intentions become frustrated.[6] Recently, in *In re Cohen*,[7] the New York Court of Appeals held that a contractual agreement could not be specifically enforced against a surviving spouse to uphold the provisions of a reciprocal will when the will of the deceased spouse was presumed revoked during his lifetime.[8]

In *Cohen*, Harry and Rae Cohen, an elderly and childless couple, created mirror image wills[9] providing that upon their deaths their property would be distributed equally to their respective families.[10] To ensure that the distributive plan would be carried out, the couple executed and physically annexed a memorandum agreement to the will.[11] The agreement provided that the mirror image wills would be permanently reciprocal so that either spouse could only change his or her will with the consent of the other spouse. The agreement further provided that the surviving spouse's will could not be altered after the death of the first to die.[12] In addition, the agreement made the

---

[5] *See* Glass v. Battista, 43 N.Y.2d 620, 625, 374 N.E.2d 116, 118, 403 N.Y.S.2d 204, 207 (1978) (noting in dictum that "[a]n express contract, apart from the joint will [would] dispel all confusion, and ensure achievement of the desired result"); Rich v. Mottek, 11 N.Y.2d 90, 94, 181 N.E.2d 445, 447, 226 N.Y.S.2d 428, 431 (1962) (noting that existence of joint will may not in and of itself establish contractual agreement). Contracts to make a will are also entered into to prevent a testator from changing his or her will even though it may be the testator's desire to do so. *See infra* note 38; *see also* EPTL § 13-2.1 (McKinney 1981 & Supp. 1995) (mandating that contract to make testamentary disposition be in writing and subscribed by party to be charged).

[6] *See In re* Estate of Clark, 54 Misc. 2d 1015, 284 N.Y.S.2d 244 (Sur. Ct. Kings County 1967) (stating that testator's intention will not control if contrary to statute or public policy); *see, e.g.*, Morris v. Morris, 272 N.Y. 110, 5 N.E.2d 56 (1936) (invalidating will provision which provided for income accumulation for trust creator because it violated New York law); *cf. In re* Day, 10 A.D.2d 220, 198 N.Y.S.2d 760 (1st Dep't 1960) (deeming grandchild adopted after donor's death as beneficiary because trust did not distinguish between natural and adopted grandchildren and to do otherwise would be contrary to public policy to treat persons within same stirpital division equally).

[7] 83 N.Y.2d 148, 629 N.E.2d 1356, 608 N.Y.S.2d 398 (1994).

[8] *Id.* at 155, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401.

[9] *Id.* at 151, 629 N.E.2d at 1357-58, 608 N.Y.S.2d at 399-400. The wills provided for the outright bequest of all personal belongings and effects to the surviving spouse, a credit shelter trust (income to spouse for life, remainder distributed equally to husband's and wife's respective relatives in various percentages upon the survivor's death), with the residue of the estate passing outright to the spouse. *Id.*

[10] *Id.*

[11] *Id.* at 152, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400.

[12] *In re* Cohen, No. 523/87, slip op. at 2 (Sur. Ct. Kings County Jan. 18, 1991), *modified*, 187 A.D.2d 584, 590 N.Y.S.2d 127 (2d Dep't 1992), *rev'd*, 83 N.Y.2d 148, 629

beneficiaries of the wills third-party beneficiaries of the contract.[13]

Mr. Cohen died in December 1986, survived by Mrs. Cohen, without issue.[14] Mrs. Cohen claimed that despite a diligent search, she was unable to locate Mr. Cohen's will.[15] Rather than offering the will for probate, Mrs. Cohen applied for and was granted letters of administration, proceeding as though Mr. Cohen had died intestate.[16] As the sole distributee in intestacy, Mrs. Cohen stood to inherit the decedent's entire net estate.[17] Joel Goldberg, Harry Cohen's nephew, was nominated co-executor and co-trustee under the will in addition to being named as a beneficiary.[18] Mr. Goldberg commenced a proceeding to revoke the letters of administration and to probate a conformed copy of the will.[19] In the alternative, he sought to enforce the memorandum agreement.[20] At trial, the Acting Surrogate, Judge Stanley Ostrau, determined the issue to be "whether the will ha[d] been revoked and if so whether its terms could nevertheless be enforced as a contract."[21]

Mrs. Cohen contended that she and her husband had expressly revoked both the wills and the agreement approximately one month before Mr. Cohen's death.[22] The statutory presump-

---

N.E.2d 1356, 608 N.Y.S.2d 398 (1994). The fourth paragraph of the agreement provided:

> Neither party to this agreement may hereafter revoke, alter or change his or her Will by codicil, destruction or revision without the written assent thereto of the other, and any attempt to effectuate any such unassented revocation, alteration or change shall not be effective as against the claims of the legatees named in the instrument so affected unless the purported revocation, alteration or change be assented to in writing by both parties hereto.

Id.

13 *Cohen*, 83 N.Y.2d at 152, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*; *see* EPTL § 4-1.1(a)(2) (stating that entire intestate estate goes to surviving spouse when decedent leaves no surviving issue).

18 *Cohen*, 83 N.Y.2d at 152, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400.

19 *Id.*

20 *Id.*

21 *In re* Cohen, No. 523/87, slip op. at 3 (Sur. Ct. Kings County Jan. 18, 1991), *modified*, 187 A.D.2d 584, 590 N.Y.S.2d 127 (2d Dep't 1992), *rev'd*, 83 N.Y.2d 148, 629 N.E.2d 1356, 608 N.Y.S.2d 398 (1994).

22 *See* Brief for Respondent-Respondent and Cross-Appellant at 10, *In re* Cohen, 83 N.Y.2d 148, 629 N.E.2d 1356, 608 N.Y.S.2d 398 (1994) (invoking Dead Man's Statute to bar Mrs. Cohen from testifying about revocation); *see also* CPLR 4519 (McKinney 1992). Her evidence consisted of the testimony of her nephew, who was also the

tion of revocation, however, which arises when a will known to be in the possession of the testator cannot be found after a diligent search, permits a court to disregard this evidence.[23] This presumption is inapplicable when positive proof is presented.[24] Be-

---

decedent's physician for years, and the nephew's wife. Brief for Respondent-Respondent and Cross-Appellant at 10. The couple testified that approximately one month before his death, Mr. Cohen called the nephew to come examine him because he felt ill. *Id.* at 10-11. He expressed his concern to all present that he was not happy with the provisions of the will. *Id.* Among his concerns were the exclusion of one person, the fees payable to the trustee, and the lack of competency of the nominated trustee. *Id.* at 11. The decedent allegedly wrote "cancelled" across the face of the document and signed his name. *Id.* Mrs. Cohen followed suit with her will. *Id.* at 11. Feeling somewhat better, Mr. Cohen and his nephew engaged in a game of chess, during which Mr. Cohen paused to tear up the revoked documents and dispose of them in the incinerator. *Id.* at 12. It is submitted that this evidence, if found credible, would have been sufficient to find that the wills were expressly revoked. The evidence showed two witnesses, a writing signed by two testators, and even destruction of the documents with the spoken intent to revoke. *Cf.* EPTL § 3-4.1 (McKinney 1981 & Supp. 1994) (indicating manners in which wills may be revoked). Furthermore, the Cohens' agreement included a right of each to revoke with the assent of the other. *Cohen*, 83 N.Y.2d at 155, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401.

[23] *See In re* Will of Fox, 9 N.Y.2d 400, 405-06, 174 N.E.2d 499, 502-03, 214 N.Y.S.2d 405, 410 (1961); *In re* Will of Kennedy, 167 N.Y. 163, 168-69, 60 N.E. 442, 443 (1901). When a will in the possession or control of the testator cannot be found after the testator's death, it is presumed destroyed *animo revocandi* (with intent to revoke). *Id.*; *see also* SCPA § 1407 (McKinney 1981 & Supp. 1995). It provides in part:

> A lost or destroyed will may be admitted to probate only if
> 1. It is established that the will has not been revoked, and
> 2. Execution of the will is proved in the manner required for the probate of an existing will, and
> 3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by one [witness and] a copy or draft of the will proved to be true and complete.

Id.; *see In re* Will of Staiger, 243 N.Y. 468, 471, 154 N.E. 312, 313 (1927) (stating that presumption of revocation is invoked when will known to have been in testator's possession cannot be found after testator's death); *In re* Estate of Fogarty, 155 Misc. 727, 728, 281 N.Y.S. 577, 578-79 (Sur. Ct. Suffolk County 1935); *see also Kennedy*, at 167 N.Y. at 168, 60 N.E. at 443 (1901) (noting presumption that "an instrument shown to have been executed continues in existence" does not apply to "an ambulatory instrument" such as a will); ATKINSON, HANDBOOK OF THE LAW OF WILLS 441-42 (2d ed. 1953) (noting that most states have presumption of revocation when dealing with lost or destroyed wills).

[24] *See Fox*, 9 N.Y.2d at 407-08, 174 N.E.2d at 504, 214 N.Y.S.2d at 412 (1961) (noting purpose of Surrogate's Court Act § 143 (now SCPA § 1407) is to require proponent to prove that testator had not revoked, lost or destroyed will). The presumption of revocation is rebuttable. *Id.* The presumption is overcome if the proponent presents satisfactory proof that the will was in existence at time of the decedent's death or was fraudulently destroyed during his lifetime. *Id.* In *Fox*, the presumption of revocation was rebutted by proof that the decedent was not responsible for the destruction of the will since it was destroyed in a bombing raid. *Id.* at 403, 174 N.E.2d at 501, 214 N.Y.S.2d at 407; *see In re* Will of Bly, 281 A.D. 769, 770, 118 N.Y.S.2d 340, 340-41 (2d

cause no proof of fraudulent destruction was presented, the will was deemed revoked.[25]

Dep't 1953) (holding that proof that testator did not have possession of will or access thereto after will has been delivered to third person can overcome presumption of revocation); *In re* Estate of McCain, N.Y. L.J., Aug. 16, 1989, at 23, col. 6 (Sur. Ct. Westchester County) (concluding that presumption rebutted where decedent was killed by her son after disinheriting him by will which court surmised son destroyed); *In re* Estate of Herbert, 89 Misc. 2d 340, 342, 391 N.Y.S.2d 351, 352 (Sur. Ct. Nassau County 1977) (concluding that presumption is rebutted where testator retained copy of will together with executed codicil in same envelope until his death); *In re* Estate of Rush, 38 Misc. 2d 45, 46-47, 235 N.Y.S.2d 528, 529 (Sur. Ct. N.Y. County 1962) (holding presumption of revocation is overcome where decedent acts in manner inconsistent with revocation, *i.e.*, searching for will just prior to death); 3 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 29.156 (1961) (stating that to rebut presumption, proponent must prove will was not destroyed with intent to revoke).

It has been stated that the "primary motive of the originators [of the statute] has disappeared in obscurity." 1 JONES, COMMENTARIES ON EVIDENCE § 125 (2d ed. 1926). The value of this statute has been much debated. *See* 9 WIGMORE, EVIDENCE § 2523 (b), at 576-77 (Chadbourn rev. 1981) (referring to statutory presumption as "misguided" because, in case of lost will, one naturally cannot prove will's continued existence at testator's death); Lindgren, *supra* note 3, at 563 (arguing that statute "doesn't make sense" in light of strict requirements for written revocation). Lindgren examines the problem as follows:

> Even though [an] attempted revocation [is] completely clear, the court [will not] give it effect [if not done as statutorily prescribed]. But if in ambiguous circumstances the will has been found ripped in half or not found at all, the court would have presumed that the will was revoked. When we clearly know what the testator's wish was, we ignore it. When we do not know what the testator wanted, we revoke.

Id.; see also Alvin E. Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283, 294-95 (1945) (noting significant evidentiary problems regarding proof of "concealment, destruction and mutilation by interested persons"); W.W. Ferrier, Jr., *Wills: Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions*, 32 CAL. L. REV. 221, 222 (1944) (observing that statute may facilitate fraudulent circumvention of valid will due to difficulty in proving fraudulent destruction to rebut presumption of revocation).

[25] *Cohen*, 83 N.Y.2d at 153, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400. Courts have held that the burden lies with the proponent of the will to overcome the presumption of revocation of a lost or destroyed will. *See, e.g.*, Collyer v. Collyer, 110 N.Y. 481, 18 N.E. 110 (1888). This may not be accomplished by showing that another person merely had the opportunity to destroy the document. *Id.; see also In re* Will of Staiger, 243 N.Y. 468, 471, 154 N.E. 312, 313 (1927) (holding that actual fraudulent destruction must be shown; mere opportunity, coupled with suspicion, is insufficient for probate of lost or destroyed will not shown to be in existence at testator's death); *In re* Will of Barnes, 70 A.D. 523, 525, 75 N.Y.S. 373, 375 (4th Dep't 1902); *In re* Thorpe's Will, 141 N.Y.S.2d 30, 32 (Sur. Ct. Queens County 1955) (stating that proponent must exclude every possibility of decedent destroying will himself); *In re* Beckerle's Will, 46 N.Y.S.2d 271 (Sur. Ct. Queens County 1943) (holding that it is not sufficient to show that person who would benefit by intestacy had opportunity to destroy will); *In re* Estate of Karcher, 172 Misc. 947, 949, 16 N.Y.S.2d 577, 579 (Sur. Ct. Bronx County 1939) (holding that proof that husband had opportunity to destroy spouse's will was insufficient); *In re* Will of Ascheim, 75 Misc. 434, 435, 135 N.Y.S. 515, 516 (Sur. Ct.

The Acting Surrogate then considered the enforceability of the memorandum agreement.[26] Judge Ostrau recognized that, contrary to that which occurs when a will cannot be found, no presumption of revocation arises when an original contract cannot be found.[27] Further, Judge Ostrau rejected testimony regarding revocation of the agreement.[28] The Judge, therefore, held that the contract was enforceable[29] and ordered that the estate be disposed of in accordance with the testator's will.[30]

N.Y. County 1912) ("Fraud[,] of all the tortious acts provable in civil court[,] must be made out with technical precision, as the procedural law safeguards persons against mere constructive wrongdoing."). *But see In re* Wintjen's Will, 101 N.Y.S.2d 606, 608 (Sur. Ct. Kings County 1950) (concluding that presumption of revocation was overcome where decedent's son expressed disappointment with terms of mother's will to executor, had opportunity to destroy will, and subsequently told executor he could not locate will).

In *Cohen*, the proponent claimed that Mrs. Cohen's behavior following her husband's death was inconsistent with her claim of express revocation. *Cohen*, No. 523/87, slip op. at 4. Specifically, Mrs. Cohen never told the proponent that the will and agreement had been destroyed, even after the proponent inquired of the will's whereabouts. *Id.* The proponent alleged that Mrs. Cohen helped him search for the will, checked in the vault for it, and told her niece that she was looking for it. *Id.* The court held that the proponent failed to exclude every possibility of destruction by the testator, however, and therefore did not rebut the presumption of revocation. *Id.* at 6.

It is submitted that this case may have had a different outcome had the proponent appealed the Acting Surrogate's finding that the presumption of revocation had not been overcome. As the New York Court of Appeals noted in *Cohen*, "[t]hat finding is not contested and is, therefore, conclusive on these cross appeals." *Cohen*, 83 N.Y.2d at 153, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400. Additionally, the New York Appellate Division has the power to determine whether particular factual findings were made correctly by the trier of fact and, in a nonjury trial, the power to make new factual findings. *See* Cohen v. Hallmark Cards, Inc. 45 N.Y.2d 493, 382 N.E.2d 1145, 410 N.Y.S.2d 282 (1978).

[26] *Cohen*, No. 523/87, slip op. at 6.

[27] *Id.* at 7; *accord In re* Estate of Schwartz, 94 Misc. 2d 1024, 405 N.Y.S.2d 920 (Sur. Ct. Queens County 1978), *aff'd* 68 A.D.2d 891, 413 N.Y.S.2d 1033 (2d Dep't 1979).

[28] *See Cohen*, 523/87 slip op. at 7-8. The Acting Surrogate found the testimony of Rae Cohen's nephew and his wife to be "totally insufficient to prove that the agreement was revoked, altered or in any manner changed," noting that the decedent was an "astute and tax conscious business man." *Id.* at 7. Judge Ostrau further opined that:

> It simply does not make any sense and it defies logic and credulity that the only concrete evidence of the revocation of the agreement would be destroyed by the decedent. A person of the decedent's background would certainly have kept the "cancelled" agreement if only to show compliance with paragraph "4" of the agreement.

Id. at 8.

[29] *Id.* at 7.

[30] *Id.* at 8. Judge Ostrau reasoned that "the fact that the will has been revoked or otherwise denied probate does not destroy the contractual obligations arising there-

Although the Appellate Division, Second Department, unanimously affirmed Judge Ostrau's finding that the presumption of revocation had not been overcome, the court divided on the enforceability of the memorandum agreement.[31] The majority held that the agreement was enforceable;[32] the creation of a constructive trust, however, was limited to property that did not pass outright to Rae Cohen under the will.[33] The dissent argued that the agreement could not be enforced at all because the will it proposed to enforce had been revoked.[34]

The New York Court of Appeals reversed, holding unanimously that enforcement of the memorandum agreement through the imposition of a constructive trust was dependent upon the existence of a valid will.[35] Writing for the court, Judge Levine quoted the dissent of the Second Department, which argued that enforcing the memorandum agreement would allow "the proponent of the will to do indirectly what cannot be done directly,"[36] — dispose of the estate in accordance with the provisions of the will.

---

from." *Id.* at 7 (citing Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S. 2d 428 (1962)). Specifically, the Acting Surrogate deemed Mrs. Cohen the "constructive trustee" of the entire estate for the benefit of the donees under the will since she had received the estate through intestacy proceedings. *Id.*; *see* Simonds v. Simonds, 45 N.Y.2d 233, 241, 380 N.E.2d 189, 193, 408 N.Y.S.2d 359, 363 (1978) (Cardozo, J.) ("A constructive trust is the formula through which the conscience of equity finds expression." (quoting Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919))). The *Simonds* court further explained that when the holder of property acquires it in a manner such that it is not rightfully his, "equity converts him into a trustee." *Id.*

31 *In re* Cohen, 187 A.D.2d 584, 587, 590 N.Y.S.2d 127, 129 (2d Dep't 1992), *rev'd*, 83 N.Y.2d 148, 629 N.E.2d 1356, 608 N.Y.S.2d 398 (1994).

32 *Id.* at 586, 590 N.Y.S.2d at 129 ("We conclude that, although the decedent's will was found to be presumptively revoked, the contract is still enforceable in equity.").

33 *Id.* at 584-85, 587, 590 N.Y.S.2d at 127, 129. The majority noted that the Acting Surrogate had correctly created a constructive trust in the absence of the will because the purpose of the contract was to provide for that situation. *Id.* at 586, 590 N.Y.S.2d at 129.

34 *See id.* at 587, 590 N.Y.S.2d at 129 (Harwood & Balletta, jj., dissenting in part). Justices Harwood and Balletta dissented in part in a brief opinion. *See id.* While they concurred with the majority that the presumption of revocation had not been overcome, they believed that the "enforceability of the contract is dependent upon the existence of a valid and enforceable will." *Id.* at 587, 590 N.Y.S.2d at 129 (Harwood & Balletta, jj., dissenting in part).

35 *In re* Cohen, 83 N.Y.2d 148, 153, 629 N.E.2d 1356, 1358, 608 N.Y.S.2d 398, 400 (1994).

36 *Id.* at 153, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400 (quoting *Cohen*, 187 A.D.2d at 587, 590 N.Y.S.2d at 129).

In reversing, the court of appeals examined the precedents relied upon by the Second Department[37] and concluded that, in those cases, equity had been invoked to enforce an agreement carried out by the first to die, but subsequently breached by the survivor.[38] The courts interceded to prevent the unjust enrichment that resulted when the survivor "gain[ed] the benefits of the joint will and then . . . flout[ed] its provisions in violation of the promise made to the other."[39] The court of appeals reasoned that Mrs. Cohen did not reap any benefits from the agreement because the will was revoked by the decedent during his lifetime.[40] Thus, because Mrs. Cohen had not been unjustly enriched, there was no need for a constructive trust.[41]

It is submitted that *Cohen* was decided correctly in accordance with the law of New York. The outcome of case depended wholly upon whether the decedent's will was presumed revoked. The presumption took the "place of positive proof" of revocation.[42] The Acting Surrogate's determination that the presumption had not been overcome resulted in a finding of fact that was affirmed

---

[37] *See id.* at 153-54, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401 (citing Glass v. Battista, 43 N.Y.2d 620, 374 N.E.2d 116, 403 N.Y.S.2d 204 (1978); Rich v. Mottek 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962); Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915)).

[38] *Cohen*, 83 N.Y.2d at 154, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401. In the cases cited by the New York Appellate Division, the wills had not been revoked by the decedent prior to death; in each instance the surviving spouse had broken the agreement by "later executing a new will or making an inter vivos gift effectively nullifying a specific bequest of the will the parties made irrevocable." *Id.* The court reasoned that this would allow a spouse to "accept the benefits" of the decedent's will, and subsequently break the agreement by disposing of the estate in a manner other than that agreed upon. *Id.*

[39] *Cohen*, 83 N.Y.2d at 154, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401 (citing Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949)).

[40] *Id.* When spouses make mutual wills, absent an agreement to the contrary, either may revoke his or her will while both spouses are living, if notice is given to the other spouse. *See* Awramenko v. Awramenko, 19 Misc. 2d 877, 878, 192 N.Y.S.2d 15, 17 (Sup. Ct. Kings County 1959); Kingsbury v. Kingsbury, 120 Misc. 362, 366, 198 N.Y.S. 512, 515 (Sup. Ct. Kings County 1923).

[41] *Cohen*, 83 N.Y.2d at 154, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401. The court of appeals noted that in order for a constructive trust to be necessary, one must have been unjustly enriched by receiving the estate. *Id.*; *accord* Simonds v. Simonds, 45 N.Y.2d 233, 242, 380 N.E.2d 189, 194, 408 N.Y.S.2d 359, 364 (1978). In the absence of both the valid will and agreement, the decedent's entire estate rightfully passed to Mrs. Cohen in intestacy. *Cohen*, 83 N.Y.2d at 754-55, 629 N.E.2d at 1359, 608 N.Y.S. at 401. Therefore, she was not unjustly enriched, and there was no need to create a constructive trust. *Id.*

[42] *In re* Will of Staiger, 243 N.Y. 468, 472, 154 N.E. 312, 314 (1926).

by the Second Department and, therefore, was not reviewable by the court of appeals.

Prior to *Cohen*, the New York Court of Appeals had not addressed a case in which the first to die revoked a joint or reciprocal will covered by a contract that prohibited alteration of the executed wills.[43] In this case, Mr. Cohen's will was presumed revoked.[44] This revocation violated Mr. Cohen's agreement with his wife, under which each spouse had the right to revoke his or her will only with the other spouse's consent.[45] As a result of the presumed revocation, the court proceeded as if Mr. Cohen had died without a will. Mrs. Cohen did not, therefore, reap the benefits of the contractual agreement, but instead reaped the benefits of New York's law of intestacy.[46] Had Mr. Cohen not desired to exercise his legal right to revoke his will, he could have, at his discretion, deposited his will with his attorney[47] or with the Surrogate's court.[48]

If any party was aggrieved by Mr. Cohen's revocation, it was Mrs. Cohen. It is submitted that the proper party to specifically enforce the agreement would be Mrs. Cohen. By seeking letters of administration, however, she acceded to the revocation.[49] Inter-

---

[43] *See Cohen*, 83 N.Y.2d at 154, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401.

[44] *See Cohen*, 83 N.Y.2d at 153, 629 N.E.2d at 1358, 608 N.Y.S.2d at 400; *see also supra* notes 23 and 25, and accompanying text.

[45] *Cohen*, 83 N.Y.2d at 155, 629 N.E.2d at 1359-60, 608 N.Y.S.2d at 401.

[46] *See* EPTL § 4-1.1 (McKinney 1981 & Supp. 1995).

[47] *See, e.g.*, *In re* Suarez's Estate, 131 N.Y.S.2d 419, 421-22 (Sur. Ct. N.Y. County 1953) (holding that no presumption of revocation arises where will was not in testator's possession after execution), *aff'd sub nom.*, *In re* Will of Suarez, 283 A.D. 774, 128 N.Y.S.2d 594 (1st Dep't 1954). *But see In re* Estate of Gray, 143 A.D.2d 751, 533 N.Y.S.2d 459 (2d Dep't 1988) (holding that presumption not overcome where it is unclear whether decedent's will was actually in office of attorney who subsequently lost files), *appeal denied*, 74 N.Y.2d 602, 543 N.E.2d 746, 545 N.Y.S.2d 103 (1989).

[48] *See In re* Estate of Hughson, 97 Misc. 2d 427, 431, 411 N.Y.S.2d 839, 842 (Sur. Ct. Erie County 1978) (dictum) (noting that where decedent's attorney lost sole original copy of decedent's will, attorney should have filed will with court immediately after execution); *In re* Estate of Utegg, 91 Misc. 2d 21, 22, 396 N.Y.S.2d 992, 993 (Sur. Ct. Erie County 1977) (recognizing great advantage of using facilities of Surrogate's Court to file original will for safekeeping where fire in attorney's office destroyed will). It should be noted that depositing the will with the probate court in the county where the testator lives may lead to a problem in determining which court has jurisdiction to probate the will if the decedent moves out of the jurisdiction of the court during his lifetime. *See* HARRIS, FAMILY ESTATE PLANNING GUIDE § 343 (1982).

[49] *Cohen*, 83 N.Y.2d at 155, 629 N.E.2d at 1359, 608 N.Y.S.2d at 401.

estingly, the court left open the question as to what remedy would be available if she had not so acceded.[50]

In *Cohen*, the New York Court of Appeals correctly applied New York law in holding that when revocation of a will is effectuated by the first to die of a couple with reciprocal wills, no constructive trust may be applied to the decedent's estate in order to specifically enforce an accompanying agreement not to revoke the will.

Neil V. Carbone

[50] *Id.* The New York Court of Appeals also left open the question of what remedy would be available to a third-party beneficiary of the will had he or she claimed detrimental reliance on the agreement. *Id.*