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DEPENDENT RELATIVE REVOCATION: PRESUMPTION OR PROBABILITY?

Richard F. Storror*

Author' Synopsis: A primary goal of the law of wills is to carry out the testator's intent. However, when a testator dies leaving a succession of wills or having expressed to an attorney his or her plan to execute a new will, ascertaining the testator's intent can be difficult. The problem is especially challenging when a court attempts to rationalize the testator's intent with the principle of law that disallows correcting wills. This Article explores how courts have used the doctrine of dependent relative revocation to determine which testamentary scheme should be admitted to be probate. The application of this doctrine has unfortunately become untidy and unpredictable, due in part to the failure of courts to position their use of dependent relative revocation within the traditional framework of will interpretation. This Article explains the advantages of adopting a two-step interpretive process for applying the doctrine.

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I. INTRODUCTION

An excellent premise for an epic family drama: a succession of wills that surface after a testator's death. Such wills can pose perplexing legal questions that defy easy answers. Cases like these invariably require that a court determine which testamentary scheme should be carried out. This determination entails a consideration of revocation and related doctrines, including—when appropriate—the doctrine of dependent relative revocation (DRR). As discussed below, there is no simple definition of this doctrine, but the dominant theory posits that an action that appears to constitute a perfectly valid revocation of a will should be denied legal effect because of the circumstances surrounding its performance.¹ The doctrine is invoked to carry out the testator's intent, but its use is a departure from the principle that the law does not permit the correction of

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¹ See BLACK'S LAW DICTIONARY 437 (6th ed. 1990).

mistakes in wills.² Perhaps for this reason, courts disfavor DRR in the law of wills and apply it “with caution” in only the most deserving cases.³

The origin of DRR remains nebulous. How, after all, did it become a settled legal doctrine that a perfectly valid revocation (or what appears to be) is nonetheless conditional, equivocal, and ineffective? Unlike some of the other principles of the law of wills,⁴ the doctrine has not been codified.⁵ It thus remains the prerogative of the judiciary to shape and apply this doctrine. Courts on numerous occasions have stated that DRR raises a presumption of the probable intention of a reasonable testator.⁶ This jurisprudence suggests that DRR is a rule of construction that courts use when extrinsic evidence fails to resolve ambiguities in the will. But the tendency of other courts has been in a decidedly different direction.⁷ On many occasions, courts have invoked DRR clumsily and unconfidently in interpreting a succession of wills no matter the lack of connection between the wills.⁸ At other times, courts have applied DRR directly to the facts as if the doctrine were a rule of law instead of an interpretive device.⁹ A continuing lack of precision in applying DRR to individual cases has resulted in a body of jurisprudence that lacks coherence.

This Article reflects on the reason why DRR exists in the law of wills and provides guidance for how to apply it in individual cases. The discussion reveals that what is most lacking in our theory of and approach to DRR is an understanding of how it functions as an interpretive tool. Most courts simply invoke and apply DRR as a legal principle, neglecting the fuller and more convincing analysis that would emerge from treating DRR as an interpretive device best used in two stages. The first stage would ask whether the circumstances surrounding the revocation render the intent to revoke ambiguous. The second would examine the probable intent of a reasonable testator to revoke or not to revoke in those circumstances. In this way, the analysis in DRR cases would not appear conclusory (as it so often does) and the attempts of lower courts to understand and employ this doctrine would not be so haphazard. DRR would no longer wrongly be thought of as a presumption but instead as a method of will interpretation. Applying DRR in two stages would also permit the courts to reconnect with the policy behind the doctrine and to realize how comfortably it fits within the larger context of will interpretation.

This Article consists of three analytical parts. Part II examines the doctrinal underpinnings of DRR, positioning it within the context of the law of revocation and revival. This part theorizes why DRR exists in the law of wills despite the strong currents in that body of law against correcting the mistakes testators make. Part III examines the substantive imprecision that plagues discussions of DRR and the artificial distinctions among fact patterns that commentators have used in their attempts to clarify the doctrine. Part IV breaks new ground by advocating that commentators begin to think less about how to define DRR and more about how to apply it with greater consistency and coherence. This approach requires, as explained more fully below,

² See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 455 (1953). The inroads made into this bedrock principle are important, albeit few. See, e.g., UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 215 (2013).

³ Crosby v. Alton Ochsner Med. Found., 276 So. 2d 661, 677 (Miss. 1973) (Sugg, J., dissenting); Nevada v. Palm (*In re Estate of Melton*), 272 P.3d 668, 679 (Nev. 2012) (quoting *In re Patten’s Estate*, 587 P.2d 1307, 1309 (Mont. 1978)); *In re McCaffrey’s Estate*, 20 N.Y.S.2d 178, 183 (Sur. Ct. 1940).

⁴ See Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1071 (2006).

⁵ *But see* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 statutory note 1 (1999) (noting partial codification of the doctrine in Oklahoma). Statutory commentary suggests that a portion of Alabama’s pretermitted child statute is “an adaptation of the concept referred to as dependent relative revocation” because the provision grants a living child an intestate share of the testator’s estate when the testator executes the will under the mistaken belief that the child is dead. ALA. CODE § 43-8-91 cmt. (LexisNexis 1975).

⁶ See *infra* Part II.A.2.

⁷ See, e.g., *In re Will of Sharp*, 852 N.Y.S.2d 713, 717 (Sur. Ct. 2008), *rev’d sub nom. In re Estate of Sharp*, 889 N.Y.S.2d 323, 325 (App. Div. 2009).

⁸ See *id.*

⁹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 reporter’s note 1 (quoting Joseph Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 344–46 (1920)) (noting “older” DRR cases in which the court applied the doctrine “automatically”).

conceptualizing DRR not as a rule of law but as an interpretive tool that needs to be used in accordance with well-settled will-interpretation methods.

Before proceeding further, the author wishes to express that this Article’s analysis of DRR purposefully avoids using a categorization of fact patterns. Other commentators have used this framework,¹⁰ and the result is the unfortunate misimpression that the method used in applying DRR changes depending upon the form the revocation assumes and whether the alternative disposition is a validly executed will. However, this Article does discuss these categorizations in Part III.A as an aid to understanding the contexts in which mistaken revocation arises. Also, to avoid the confusion that can result from the assumption that DRR arises only in cases that involve two or more wills, the author uses the term “will” only when the instrument has been validly executed. When the instrument has not, the author refers to a “rough draft for future changes,” as one court has put it,¹¹ or simply calls the writing a document or draft.

II. DOCTRINAL UNDERPINNINGS

Despite the reforms proposed in the Uniform Probate Code and the Restatement (Third) of Property (Restatement), the law remains hesitant to reform wills to correct mistakes. In most jurisdictions, common law limits the permissible correction of testamentary errors to a few instances: misdescriptions of property or beneficiaries, mistakes brought about through fraud, and DRR. Critics of the law’s hesitation to correct testamentary mistakes note the convention’s inconsistency with the principle that the testator’s intent is paramount. Nonetheless, no one seriously disputes that wills often fail to express testators’ “true” intentions, and that in correcting mistakes, a court will sometimes simply substitute what it believes the testator should have written. In this way, a court may run as roughshod over a testator’s wishes as the forger who sets out to defraud him. For this reason, it may be a long time before the law is ready to embrace a broader set of tools for reforming wills than currently exists.

DRR, otherwise known as conditional revocation or ineffective revocation, is one of very few mistake-correcting doctrines in the law of wills. The doctrine holds that a revocation is legally invalid if a testator has made some sort of mistake in performing it—specifically a mistake either related to her motivation for revoking the will or related to what she desires that revocation to accomplish. The theory behind the doctrine is that a revocation performed under these circumstances is “bereft of intent” to revoke.¹² The effect of a successful application of the doctrine is to open the way for probate of the revoked will.¹³ DRR thus prevents mistaken revocations from destroying a testator’s carefully crafted estate plan.

DRR has been defined in various ways—perhaps most frequently by citing Page:

The gist of the doctrine 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.¹⁴

This definition explains the label *dependent relative revocation*. The revocation in question is so related to the validity of the new instrument that the revocation is dependent upon it.¹⁵ A different definition, this one from Professor Jesse Dukeminier, proceeds as follows: “If the testator purports to revoke his will upon a mistaken assumption of law or fact, the revocation is ineffective if the testator would not have revoked his will had he

¹⁰ See, e.g., ATKINSON, *supra* note 2, at 452–63; George E. Palmer, *Dependent Relative Revocation and its Relation to Relief for Mistake*, 69 MICH. L. REV. 989 (1971); Warren, *supra* note 9.

¹¹ Mothershed v. Lyles (*In re Estate of Lyles*), 615 So. 2d 1186, 1189 (Miss. 1993).

¹² BLACK’S LAW DICTIONARY, *supra* note 1.

¹³ See *id.*

¹⁴ La Croix v. Senecal (*In re Dupre’s Estate*), 99 A.2d 115, 117 (Conn. 1953) (citing 1 WILLIAM H. PAGE, A TREATISE ON THE LAW OF WILLS § 478 (3d ed. 1941)).

¹⁵ See DePaul v. Irwin (*In re Estate of Anderson*), 65 Cal. Rptr. 2d 307, 312 (Ct. App. 1997).

known the truth.”¹⁶ This definition does not refer to a new will or an alternative scheme of disposition, but simply calls into question the testator’s intent to revoke if he has performed the revocation while laboring under some erroneous understanding of either the law or facts. If we synthesize these definitions, we see that DRR cases are of two types: one involving a new will or an intent to make one and another involving the testator’s misapprehension of the law or a fact material to the revocation. The Restatement, acknowledging this dual definition, recognizes that DRR applies when a testator revokes his or her will “in connection with an attempt to achieve a dispositive objective that fails”¹⁷ and also when he or she does so “because of a false assumption of law” or fact.¹⁸ Courts tend to apply the doctrine only if (1) an alternative testamentary scheme fails, or (2) the mistake is set forth in the writing that revoked the will and the mistake is beyond the testator’s knowledge.

Courts do a good job of discouraging the use of DRR; the law is clear that DRR is disfavored.¹⁹ Courts may be wary of the doctrine because utilizing DRR requires the admission of extrinsic evidence even when the words of the will are plain, and such admission is seemingly contrary to well-established principles of will interpretation.²⁰ In other words, courts disfavor DRR not because conditionality of revocation is rare, but because such conditionality is rarely expressed.²¹ Additionally, DRR’s mistake-correcting effects run counter to the administrative efficiency the courts achieve by refusing to correct mistakes in wills.²² For these reasons, courts have said variously that DRR must be narrowly applied or at least, applied with caution.²³ Courts have also imposed various limitations on the scope of the doctrine—sometimes refusing to employ it “unless the two instruments reflect a very similar dispositive scheme,”²⁴ or rejecting it when the will itself does not recite the mistake of fact under which the testator was laboring. Other courts look for evidence that the revocation is part of “one scheme” to prepare a new will, and at least one court has rejected DRR when the testator had not made a rough draft of his testamentary preferences or visited an attorney.²⁵

The law does not make perfectly clear whether DRR is a primary presumption, a presumption used to negate competing presumptions, or a canon of construction that establishes the probable intent behind a revocation. The Restatement describes DRR as rendering the revocation “presumptively ineffective.”²⁶ Other cases recognize presumptions relating to revocations before proceeding to a discussion of DRR²⁷ and using it to rebut those presumptions.²⁸ Still other cases describe DRR as “a rule of presumed intention,”²⁹ or even more confusingly, a

¹⁶ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 295 (8th ed. 2009).

¹⁷ RESTATEMENT (THIRD) OF PROP.: *WILLS AND OTHER DONATIVE TRANSFERS* § 4.3(a)(1) (1999).

¹⁸ *Id.* § 4.3(a)(2).

¹⁹ See *In re Estate of Fidazzo*, No. 65-06-526, 2007 Pa. Dist. & Cnty. Dec. LEXIS 153, at *4 (C.P. Ct. Westmoreland Cnty. June 28, 2007).

²⁰ See *Kroll v. Nehmer*, 705 A.2d 716, 718 (Md. 1998); Note, *Reinstatement of Wills Under Doctrine of Dependent Relative Revocation*, 50 YALE L.J. 518, 523 (1941) [herein-after *Reinstatement of Wills*].

²¹ JESSE DUKEMINIER ET AL., *TEACHER’S MANUAL: WILLS, TRUSTS, AND ESTATES* 4–50 (8th ed. 2009) (“Usually, the condition will not even occur to the testator.”).

²² See *Palmer*, *supra* note 10, at 990 (“It rests upon an analysis that, with few exceptions, is found nowhere else in the law relating to mistake in underlying assumptions.”).

²³ See *Nevada v. Palm* (*In re Estate of Melton*), 272 P.3d 668, 679 (Nev. 2012) (citing *In re Patten’s Estate*, 587 P.2d 1307, 1309 (Mont. 1978)); *Kroll*, 705 A.2d at 718 (“great care and caution”).

²⁴ *In re Estate of Melton*, 272 P.3d at 678 (citing *Kroll*, 705 A.2d at 722–23).

²⁵ See *Mincey v. Deckle*, 662 S.E.2d 126, 127–28 (Ga. 2008) (rejecting DRR because “it appears that [the] Decedent revoked the 1998 Will before he even visited an estate planning attorney about creating a new will”); *Schneider v. Harrington*, 71 N.E.2d 242, 244 (Mass. 1947) (stating that DRR is applicable when changes are a part of “one transaction”).

²⁶ RESTATEMENT (THIRD) OF PROP.: *WILLS AND OTHER DONATIVE TRANSFERS* § 4.3(a) (1999); see also *La Croix v. Senecal* (*In re Dupre’s Estate*), 99 A.2d 115 (Conn. 1953); *Churchill v. Alessio*, 719 A.2d 913, 916 (Conn. App. Ct. 1998); *Kroll*, 705 A.2d at 720 (citing A.G.S., Annotation, *Effect of Testator’s Attempted Physical Alteration of Will After Execution*, 62 A.L.R. 1367, 1409 (1929)).

²⁷ See *Mincey*, 662 S.E.2d at 127 (“[T]here is a presumption of revocation in this case because the original will was never found.”); *In re Estate of Pierce*, No. 60117, 1998 Va. Cir. LEXIS 398, at *3 (Cir. Ct. of Fairfax Cnty. Dec. 30, 1998) (“Moreover, there is the unrebutted presumption that the testator marked these pages with the intent to revoke.”).

²⁸ See *Dan v. Dan*, 288 P.3d 480 (Alaska 2012); *In re Estate of Pierce*, 1998 Va. Cir. LEXIS 398, at *3.

²⁹ *Carter v. First United Methodist Church of Albany*, 271 S.E.2d 493, 497 (Ga. 1980) (quoting VERNER F. CHAFFIN, *STUDIES IN THE GEORGIA LAW OF DECEDENT’S ESTATES AND FUTURE INTERESTS* 184, 186 (1978)).

“concept of presumed probable intent.”³⁰ Another describes DRR as “a rule of testamentary construction.”³¹ Part IV will explore this confusion about how DRR functions analytically with the goal of establishing an approach to DRR that is more in keeping with traditional will-interpretation principles.

The policy behind DRR is to help effectuate the testator’s intent. Indeed, Professor Emeritus George Palmer calls this policy “the sole justification” for the existence of the doctrine.³² Effectuating the testator’s intent does not explain why, though, the law permits the correction of mistaken revocations but refuses to correct other mistakes that testators make in their wills. If DRR is an exception to the principle that courts do not correct mistakes in wills, one justification for the doctrine may be that the courts use it to correct what they view as innocent mistakes for which an estate plan should not suffer. The cases and the commentary, however, are unilluminating on this point—the author posits a theory about the policy behind DRR later in this Article.

A. Revocation

DRR involves, as its name suggests, revocation—the act of destroying or replacing a will. Determining whether a testator has or has not revoked his will is critical to establishing the testator’s testamentary plan.³³ A claim of revocation may be brought at various stages of a probate proceeding. A challenger may use the claim to refute a will’s admission to probate in the first instance³⁴ or, once the will is admitted to probate, the court may consider the claim of revocation in a proceeding to construe the will.³⁵

Revocation is achieved by a physical act done to the will or by a sub-sequent will that alters the will entirely or in part. An act, no matter how destructive, is not a revocation without revocatory intent.³⁶ This qualification means that the testator’s accidental destruction of his will, or acts not committed by the testator (or at his direction) are not revocations at all. Moreover, a writing procured through undue influence or fraud, or executed by a testator lacking testamentary capacity has no revocatory effect on prior testamentary instruments even if it contains a clause expressly revoking all prior wills or provisions that are inconsistent with clauses in prior wills.³⁷

1. Time of Legal Effect

One characteristic of revocations that differs from dispositive provisions in wills is that (in some jurisdictions at least) revocations take legal effect the moment the testator performs the physical act or validly executes a subsequent instrument.³⁸ Notwithstanding this general principle, the revocation will not take effect if the subsequent instrument is for some reason invalid (for example, for lack of testamentary capacity or undue influence), or if the revocation itself is somehow faulty. Dispositive provisions, by contrast, are not legally effective until the testator dies—they are ambulatory.³⁹ Because a will is ambulatory, if the testator discovers the

³⁰ *In re Estate of Redford*, No. 09-01714, 2011 N.J. Super. Unpub. LEXIS 1371, at *21 (Ch. Div. May 9, 2011).

³¹ *Estate of Luongo*, 823 A.2d 942, 957 (Pa. Super. Ct. 2003) (citing *In re Estate of Holt*, 174 A.2d 874, 877 (Pa. 1961)).

³² Palmer, *supra* note 10, at 997.

³³ *See Crosby v. Alton Ochsner Med. Found.*, 276 So. 2d 661, 667 (Miss. 1973) (discussing the case of *Hairston v. Hairston*, 30 Miss. 276 (1855)).

³⁴ *See, e.g., Redman-Tafoya v. Armijo*, 126 P.3d 1200, 1211 (N.M. Ct. App. 2005); *In re Will of Dehn*, 347 N.Y.S.2d 821, 823 (Sur. Ct. 1973); *In re Estate of Rohrbaugh*, Nos. FI 2002-68397, CL 2009-16701, 2011 WL 3891498, at *5 (Va. Cir. Ct. Mar. 31, 2011).

³⁵ *See, e.g., Pegram v. Pegram (In re Estate of Pegram)*, 189 S.W.3d 227, 230 (Tenn. Ct. App. 2005); *Bailey v. Warren*, 319 S.W.3d 185 (Tex. App. 2010) (revocation by operation of law).

³⁶ *See Roberts v. Fisher*, 105 N.E.2d 595, 599 (Ind. 1952).

³⁷ *See In re Estate of Redford*, No. 09-01714, 2011 N.J. Super. Unpub. LEXIS 1371, at *25 (Ch. Div. May 9, 2011) (“In order for the revocatory clause in the 2005 Will to be effective, obviously the court would need to be satisfied that it was the Decedent’s desire, untainted by undue influence, to revoke the 1997 Will.”); *Wood v. Bettis (In re Estate of Cooper)*, 880 P.2d 961, 962 (Or. Ct. App. 1994).

³⁸ *See Garrett v. Powers (In re Estate of Garrett)*, No. D038435, 2002 WL 1288765, at *7 (Cal. Ct. App. June 12, 2002) (“[T]he Second Will’s revocation of the First Will was effective immediately on Pierce’s execution of the Second Will.”); *Shephard v. Gebo (In re Krukenberg)*, 361 P.2d 537, 540 (Nev. 1961) (“[A] codicil valid when made which expressly revokes a provision of a will unconditionally, takes effect as of the date of its execution”); *In re Will of Lake*, 560 N.Y.S.2d 966, 967 (Sur. Ct. 1990) (“The revocation is said to be consummated at the moment of execution of the codicil.”).

³⁹ *See 79 AM. JUR. 2d Wills* § 144 (2013).

flaw rendering her will either totally or partially invalid, she has the opportunity to execute the will properly before she dies. Revocations, however, are not ambulatory and as such cannot be undone so easily.⁴⁰

The practical import of a revocation's immediate effect is perhaps most evident in "antirevival" states. A will in such a jurisdiction, once revoked by a subsequent will or its inconsistent provisions, is not revived by simply revoking the subsequent will.⁴¹ In fact, if at the testator's death a testamentary disposition is invalid for some reason not related to the validity of the will as a whole,⁴² the disposition has nonetheless already revoked prior inconsistent will provisions.⁴³ Even the presence of invalid dispositive or appointive provisions in a will does not undermine the effectiveness of the revocation.⁴⁴ In other words, "the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit."⁴⁵ Ordinarily, property that is the subject of an ineffective testamentary provision is distributed via the will's residuary clause or by intestacy.⁴⁶

The fact that wills are ambulatory but revocations are not in some states may be one reason why the law does not favor the correction of mistakes in wills, but does allow the curing of mistaken revocations through the application of DRR. A testator is free to replace her will, if she wishes, during her lifetime, but once she revokes her will the potential damage to her estate plan is more difficult to undo. DRR provides an important safeguard protecting improvident testators who are drawn to tinker with their wills or who seek the advice of unskilled legal counsel.

2. Presumptions

Certain presumptions that exist in the interpretation of wills bear on the applicability of DRR. One of these presumptions is that a testator has revoked his will by physical act if the will was in his possession immediately before his death, but then after his death cannot be found.⁴⁷ This presumption should (and does) act as an impediment to applying DRR, because the disappearance of a will can make it difficult to show that the will's revocation was performed with the desire to replace it. Even if DRR is applicable in such cases, proving the contents of a will that is no longer in existence is not always possible.⁴⁸

A second important presumption is that when a testator has performed a revocatory act on a will, he did so with the intent to revoke it.⁴⁹ This presumption is a precise example of how evidence of surrounding

⁴⁰ See *Riggins v. Floyd*, 189 S.W.3d 147, 149 (Ky. Ct. App. 2005).

⁴¹ See *In re Estate of Garrett*, 2002 WL 1288765, at *7 ("The fact that [the testator] subsequently revoked the Second Will does not show that it or its revocation of the First Will never became effective . . ."); *In re Will of Lake*, 560 N.Y.S.2d at 967 (Sur. Ct. 1990) ("The subsequent revocation of the codicil does not revive those provisions of the will which had been revoked by the execution of the codicil.")

⁴² A dispositive provision might be inoperative for any number of reasons such as the rule against perpetuities, lapse, voidness, the existence of a pretermitted child, the effect of a spouse's election against the will, or the incapacity of the beneficiary to take the property. See generally *DUKEMINIER*, *supra* note 16.

⁴³ See *In re Estate of Holt*, 174 A.2d 874, 877 (Pa. 1961) ("[W]here the revoking instrument is in itself valid and operative but the subsequent disposition fails for some extrinsic reason such as the incapacity of the devisee to take, the revocation nevertheless remains effective.")

⁴⁴ See *Woodfield v. Woodfield* (*In re Estate of Woodfield*), 968 So. 2d 421, 430 (Miss. 2007). *But see* Frank L. Schiavo, *Dependent Relative Revocation Has Gone Astray: It Should Return to its Roots*, 13 *WIDENER L. REV.* 73, 84 (2006) (suggesting that an alternative analysis in a DRR matter is a holding that an invalid provision in a subsequent will does not revoke a valid provision in a prior will).

⁴⁵ *Tupper v. Tupper*, (1855) 69 Eng. Rep. 627, 628; see also *Burcham v. Kamoraski* (*In re Lubbe*), 142 So. 2d 130 (Fla. Dist. Ct. App. 1962), *overruled on other grounds* *Flagship First Nat'l Bank of Ormond Beach v. Morris* (*In re Johnson*), 359 So. 2d 425 (Fla. 1978); *Crawford v. Crawford* (*In re Crawford*), 82 So. 2d 823, 826 (Miss. 1955); *In re Melville's Estate*, 91 A. 679, 681 (Pa. 1914).

⁴⁶ See UNIF. PROBATE CODE § 2-604(a) (amended 2010), 8 U.L.A. 260 (Supp. 2013) (discussing failed devises other than a residuary devise); 97 C.J.S. *Wills* 2108 (2013) (discussing failed residuary devises).

⁴⁷ See *Stretz v. Baldwin* (*In re Staiger's Will*), 154 N.E. 312, 312 (N.Y. 1926); *In re Estate of Huang*, 811 N.Y.S.2d 885, 885 (Sur. Ct. 2005).

⁴⁸ See generally A.M. Swarthout, Annotation, *Proof of Contents in Establishment of Lost Will*, 126 A.L.R. 1139 (1940). See also *Dan v. Dan*, 288 P.3d 480, 483 (Alaska 2012) (requiring the execution and contents of a lost will to be proven by clear and convincing evidence).

⁴⁹ See *In re Estate of Pierce*, No. 60117, 1998 Va. Cir. LEXIS 398, at *3 (Cir. Ct. of Fairfax Cnty. Dec. 30, 1998).

circumstances can raise doubt about the testator's actual intent.⁵⁰ Because it will be impossible, in most cases, to know the true revocatory intent of the testator in these circumstances, using DRR appropriately resolves the ambiguity by assessing the testator's probable intention with reference to what the typical testator would do under such circumstances.

A third important presumption in the interpretation of wills is the one against intestacy. When a testator dies with a validly executed will, courts presume that he desired not to die intestate with regard to any portion of his estate⁵¹ unless the terms of the will itself plainly show that he did so intend.⁵² Even though language in some judicial opinions suggests a general distaste for intestacy,⁵³ this presumption applies only when the testator has executed a will and has demonstrated at least a minimum resolve not to die intestate.⁵⁴ The presumption, too, is triggered only when a will is susceptible to more than one construction.⁵⁵ Courts most often use the presumption to resolve ambiguous dispositive provisions that may result in partial intestacy.⁵⁶

Sometimes courts state that the presumption against intestacy is an important consideration in a DRR case.⁵⁷ Indeed, in some DRR cases the presumption against intestacy—so central in other contexts—appears to overwhelm the court's analysis. Courts may rely heavily on this presumption in the DRR context because concluding that a revocation should be ignored based on the presumption against intestacy is easier than a more searching evaluation of whether the evidence shows that the testator revoked a will with the desire to substitute a new will either immediately or in the future.⁵⁸

A student of wills law has good reason to question the use of the presumption against intestacy in DRR cases. When the evidence shows that a testator revoked his will in ambiguous circumstances, invalidating the revocation with DRR requires more than simply invoking the presumption against intestacy.⁵⁹ For DRR to apply at all, courts need evidence supporting an inference that the testator's probable intent was not to revoke her will unless a replacement will was effective.⁶⁰ Raising such an inference requires more specific evidence than does the presumption that a testator did not wish to die intestate.⁶¹ Thus, if DRR has become a relevant consideration, it is because the evidence in the case points to either a lack of intent to revoke under the circumstances or a *preference* for intestacy.⁶² Therefore, if a court has firm grounding for applying DRR in a given case, the analysis of the facts has already proceeded beyond the point where the presumption against intestacy would remain relevant: "The law's preference for a testate disposition is always subordinate to the

⁵⁰ See *In re Makofsky*, 120 So. 2d 277, 279 (La. Ct. App. 1960) (suggesting that proving that the testator accidentally destroyed his will is possible "if the necessary proof is available," but noting that this case lacked proof because according to witness testimony, the testator tore his will to pieces with the intent to destroy); *In re Burke's Will*, 91 N.Y.S.2d 636, 637 (Sur. Ct. 1949) (admitting to probate a will destroyed by an intoxicated testator).

⁵¹ See *Anthony v. Evangelical Lutheran Church (In re Estate of Anthony)*, 121 N.W.2d 772, 779 (Minn. 1963).

⁵² See *Bowman v. Brown*, 149 A.2d 56, 60 (Pa. 1959).

⁵³ See *Kroll v. Nehmer*, 705 A.2d 716, 720 (Md. 1998); *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982) ("[T]he law favors testacy over intestacy."). The court in *Estate of Teubert* referred to how permitting holographic wills, because of the wills' minimal execution requirements, assists laypersons in executing their own wills. See *id.*

⁵⁴ See *In re Hill's Will*, 255 N.Y.S.2d 898 (Sur. Ct. 1965).

⁵⁵ See *In re Gregory's Estate*, 70 So. 2d 903, 907 (Fla. 1954).

⁵⁶ See, e.g., *Basile v. Aldrich (In re Estate of Aldrich)*, 70 So. 3d 683 (Fla. Ct. App. 2011); *In re Tweedie's Will*, 48 N.W.2d 657, 659 (Minn. 1951); *In re Estate of Herceg*, 747 N.Y.S.2d 901, 903 (Sur. Ct. 2002).

⁵⁷ See, e.g., *Kroll*, 705 A.2d at 720 (remarking that DRR comes into play when "the effect of not disregarding the revocation is for the decedent's estate, or some part of it, to pass intestate"); *Anthony v. Evangelical Lutheran Church (In re Estate of Anthony)*, 121 N.W.2d 772, 779 (Minn. 1963); *In re Estate of Sharp*, 889 N.Y.S.2d 323, 325 (App. Div. 2009) ("[DRR] is, thus, 'a rule of interpretation of intention . . . [that] 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.'" (quoting *In re Macomber's Will*, 87 N.Y.S.2d 308, 312 (App. Div. 1949))).

⁵⁸ See, e.g., *In re Will of Sharp*, 852 N.Y.S.2d 713, 717 (Sur. Ct. 2008), *rev'd sub nom. In re Estate of Sharp*, 889 N.Y.S.2d at 325.

⁵⁹ For an example of evidence that courts have considered in their application of DRR, see *Kroll*, 705 A.2d at 722.

⁶⁰ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. c, illus. 5.

⁶¹ See *id.*

⁶² See *Reinstatement of Wills*, *supra* note 20, at 521 ("[DRR] should be applied to nullify revocations only where the evidence affirmatively indicates that the deceased would prefer reinstatement of the revoked will to intestacy.").

intention of the testator”⁶³ Automatically applying the presumption against intestacy could cause courts to ignore, for example, that in some cases a testator who revokes a will because he wishes to make a new one may never get around to finalizing the new one.⁶⁴ Raising the presumption against intestacy in such a case would negate the testator’s intention to be without a will until a new one is drawn.⁶⁵ Furthermore, a court should never use a presumption disfavoring intestacy to bolster a flimsy body of evidence and to tip the scales in favor of DRR.⁶⁶ As one court stated, “[t]he doctrine can only apply where there is a clear intent of the testator that the revocation of the old will is made conditional on the validity of the new one Evidence of this intent cannot be left to speculation, supposition, conjecture or possibility.”⁶⁷ As a final consideration, because DRR aims to resolve a revocation shown to be ambiguous by the surrounding circumstances, the presumption against intestacy is not needed to carry out that task in a DRR case. Simply put, the presumption against intestacy has little to offer to a court’s analysis of DRR when the circumstances of the matter have not put that doctrine in play.

None of the foregoing is meant to suggest that the presumption against intestacy is never relevant to revocation. If a case contains no evidence supporting DRR and is for that reason not susceptible to the more searching assessment of intent the doctrine requires, and if the revocation was some-how ambiguous (for example, when a clause in a will distributing only a portion of a testator’s estate does not make sufficiently plain that the testator is revoking all prior wills), then the court could appropriately invoke the presumption against intestacy to determine that the second will revoked the prior will only to the extent of inconsistent provisions.

B. Revival

Mistaken revocations can have disastrous intent-defeating effects upon an estate plan. Although a will’s dispositive provisions are ambulatory and can therefore be changed at any time before death, a will’s revocatory effect upon previous wills is immediate. Many testators do not realize this distinction and some have revoked their most recent will in the belief that doing so revives an earlier will. Thus, DRR is sometimes associated with the doctrine of revival.

There is no doctrine in the law of wills that suggests that a will, once revoked by physical act, can be revived by somehow undoing, cancelling, or reversing the revocation.⁶⁸ Once the revocation has taken effect, a physical act revocation—absent DRR—cannot be made to disappear so easily. Some disharmony exists in the law of wills on the question of whether the revocation of an instrument that revokes a prior disposition revives the revoked disposition. The Supreme Court of Minnesota has articulated four different jurisdictional

⁶³ *Kroll*, 705 A.2d at 720.

⁶⁴ *See, e.g.*, *Roberts v. Fisher*, 105 N.E.2d 595, 600 (Ind. 1952).

⁶⁵ *See Mincey v. Deckle*, 662 S.E.2d 126, 127–28 (Ga. 2008); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. c, illus. 5 (1999); *Palmer, supra* note 10, at 997 (discussing *In re Emernecker’s Estate*, 67 A. 701 (Pa. 1907)).

⁶⁶ *See, e.g.*, *In re Will of Sharp*, 852 N.Y.S.2d 713, 717 (Sur. Ct. 2008) (“[T]here is an alternative available to intestacy.”), *rev’d sub nom. In re Estate of Sharp*, 889 N.Y.S.2d 323, 325 (App. Div. 2009); *In re Will of Collins*, 458 N.Y.S.2d 987, 993 (Sur. Ct. 1982).

⁶⁷ *Nevada v. Palm (In re Estate of Melton)*, 272 P.3d 668, 678 (Nev. 2012) (quoting 95 C.J.S. *Wills* § 412 (2011)); *see also In re Patten’s Estate*, 587 P.2d 1307, 1309 (Mont. 1978); *In re Estate of Pierce*, No. 60117, 1998 Va. Cir. LEXIS 398, at *3–4 (Cir. Ct. of Fairfax Cnty. Dec. 30, 1998) (quoting 95 C.J.S. *Wills* § 267 (2011)) (“Dependent relative revocation can ‘only apply where there is a clear intent of the testator that the revocation of the old will is made conditional’”).

⁶⁸ The Restatement rejects this proposition by allowing a testator to “reverse” a physical act revocation by performing another act such as taping a torn will back together or writing “disregard the cross-outs” on a will containing cancellations. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.2 cmt. b, illus. 8 (1999). The Reporter’s Note for this section does not cite any cases in support of its illustrations and the author’s research failed to uncover any. *See Evans v. May*, 923 S.W.2d 712, 713 (Tex. App. 1996) (holding that a will torn by a third party that was not subsequently taped backed together was not properly revoked); *see also In re Swanson*, 58 So.1030 (La. 1912). *But see Taylor v. Cummings (In re Estate of Riner)*, 207 N.E.2d 487, 488–89 (Ill. App. Ct. 1965) (holding that a will torn by a testator and subsequently taped back together by a third party was properly revoked); *but cf. Briscoe v. Allison*, 290 S.W.2d 864, 866 (Tenn. 1956) (holding that revocation is unclear when the torn will is scotch-taped together by an unknown party). Even if a testator requests that the torn will be pasted back together or if she does the pasting herself, at least one court has reasoned that a revival has not occurred. *See In re Makofsky*, 120 So. 2d 277, 280 (La. Ct. App. 1960) (“Even if he himself had pasted the pieces together we doubt that by that act he could have breathed life into a dead document.”).

approaches to this question,⁶⁹ so a testator's lack of awareness of the law of the state where she revoked her second will or happened to be domiciled at her death should not be surprising. The Restatement states that revival occurs if the testator revokes the revoking will "by [an] act intending to revive the previously revoked will[,]"⁷⁰ or by a writing whose terms "indicate an intent to revive the earlier will."⁷¹ The Uniform Probate Code agrees, using slightly different language.⁷² A minority of states, however, embrace the rule of antirevival and declare that a previously revoked will remains revoked unless the will is re-executed or republished.⁷³ Of course, if a revocation is conditional and the condition upon which the revocation hinges does not occur, the revocation does not take effect. This outcome is not the same thing as saying the first will is revived; to the contrary, the will simply has not been revoked to begin with.

In practical terms, a testator who revokes her second will because she prefers her first will is probably thinking less in terms of revival and believes instead that revocations are ambulatory—that the second will can simply be done away with by getting rid of that instrument. One could hardly fault a testator for believing that tearing a new will to pieces would leave her with her old will: in many jurisdictions, this is precisely the result. Even in antirevival jurisdictions, there are bound to be cases when evidence simply does not come to the surface that a testator had a second will that he later revoked. In these jurisdictions, some cases doubtlessly involve testators who believed that the destruction of a subsequent will revived a prior will.⁷⁴ But a common mistake is to suggest that DRR is an exception to the rule of nonrevival.⁷⁵ Revival and DRR are distinct theories. On the one hand, revival is the reinstatement of a previously revoked will—triggered only if there has been a revocation.⁷⁶ On the other hand, DRR calls into question whether a revocation has occurred at all by allowing a court to declare what appears to be a revocation legally invalid due to the testator's lack of revocatory intent in the circumstances presented.⁷⁷ To suggest that the legal effect of DRR is to reverse a revocation would require a valid, unconditional revocation to begin with, which is precisely what the doctrine of DRR does not recognize.⁷⁸ Nonetheless, courts and commentators continue to characterize DRR as a tool for reviving a revoked will.⁷⁹

⁶⁹ See *Tibbetts v. Garrett (In re Tibbetts' Estate)*, 189 N.W. 401, 401 (Minn. 1922) (finding that the testator burned her second will "for the purpose of . . . leaving her first will in force").

⁷⁰ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.2(a)(iii).

⁷¹ *Id.* § 4.2(a)(iv); see also *id.* § 4.2(a)(ii).

⁷² See UNIF. PROBATE CODE § 2-509(a) (amended 2010), 8 U.L.A. 226–27 (2013).

⁷³ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 2012).

⁷⁴ See, e.g., *Ruedisili v. Henkey (In re Alburn's Estate)*, 118 N.W.2d 919 (Wis. 1963) (finding that the testator destroyed her second will so that her first will would stand); *In re Estate of Sharp*, 889 N.Y.S.2d 323, 325 (App. Div. 2009) (noting the lack of any evidence that the testator wanted to revive her will).

⁷⁵ See *Crosby v. Alton Ochsner Med. Found.*, 276 So. 2d 661, 663 (Miss. 1973); *Nevada v. Palm (In re Estate of Melton)*, 272 P.3d 668, 679 (Nev. 2012) ("[A] vital precept of the doctrine of [DRR] is that it does not revive a revoked will . . ."); *What is the Doctrine of "Dependent Relative Revocation?"* (Oct. 4, 2010), <http://theprobate.net/blog/what-is-the-doctrine-of-dependent-relative-revocation/>.

⁷⁶ See *In re Estate of Melton*, 272 P.2d at 679.

⁷⁷ See *id.*; *Reinstatement of Wills*, *supra* note 20, at 524 ("Doctrinally, however the situation can be distinguished from a case of revival: revival . . . involves the restoration of the first will and dependent relative revocation the restoration of the second will.").

⁷⁸ See *Palmer*, *supra* note 10, at 990 ("[T]he conclusion is reached that there was no revocation for lack of the requisite intent.").

⁷⁹ See, e.g., *In re Estate of Gregory*, No. C067902, 2013 Cal. App. Unpub. LEXIS 746, at *10 (Jan. 30, 2013); *Churchill v. Allesio*, 719 A.2d 913, 915 (Conn. App. Ct. 1998) (describing a judgment that rendered a will "revoked . . . and then revived under the doctrine of [DRR]"); *Oliva v. Oliva (In re Estate of Oliva)*, 880 N.E.2d 1223, 1225 (Ind. Ct. App. 2008) ("The trial court found that this will could be revived by the doctrine of [DRR] . . ."); *Children's Home Soc'y of Fla. v. Pratt (In re Estate of Pratt)*, 88 So. 2d 499, 501 (Fla. 1956) ("[T]he prior disposition is revived . . ."); *In re Estate of Perrault*, No. A09-1103, 2010 Minn. App. Unpub. LEXIS 483, at *6 (Ct. App. May 25, 2010) ("The district court determined that . . . [the] decedent's 1992 will was revived through the doctrine of [DRR]."); *Carpenter v. Cosby (In re Estate of Carpenter)*, 34 So. 3d 1230, 1235 (Miss. Ct. App. 2010) (quoting *Mothershed v. Howell (In re Estate of Lyles)*), 615 So. 2d 1186, 1190 (Miss. 1993) ("[T]he prior disposition is revived . . ."); *In re Estate of Sharp*, 852 N.Y.S.2d 713, 717 (Sur. Ct. 2008) ("[DRR] can apply to revive the 1974 will . . ."), *rev'd sub nom. In re Estate of Sharp*, 889 N.Y.S.2d 323; *Schiavo*, *supra* note 44, at 96 (suggesting that DRR be known as the "Doctrine of Retroactive Revival").

III. SUBSTANTIVE IMPRECISION

DRR, recognized in almost every state,⁸⁰ is a doctrine of testamentary construction that allows courts to undo or ignore mistaken revocations. When a testator revokes a will based on his or her mistaken belief that a newer will is valid or a previous will can be revived, the revocation is given no effect if the evidence also shows that the testator would have preferred the revoked will to intestacy.⁸¹ The typical case involves two instruments. A testator, contemplating changes to his or her will, might draft a new testamentary plan and tear up or make marks of cancellation across the old one.⁸² The new will may even be fully executed and contain a clause revoking all previous wills⁸³ but is not entirely valid for some reason; perhaps it fails for lack of due execution or contains void bequests.⁸⁴ A less common scenario finds the testator destroying his or her most recent will with the belief that the revocation will revive his or her previous will.⁸⁵ As long as the revocation and the mistake about the validity of the preferred disposition so relate to each other that they form a single transaction, the doctrine treats the revocation as conditional on that validity. In this way, the doctrine strives to temper rigid formalism and to promote testamentary intent.

Most courts agree that DRR is a matter of the testator's intention and is a question of fact for the court.⁸⁶ Beyond this, DRR is plagued with definitional variation. In one case, DRR is a doctrine of presumed intention of what a testator would have done had he or she known that the new disposition that he or she was attempting to execute would be invalid.⁸⁷ In another case, DRR is a doctrine of mistake. In yet another, DRR is a doctrine in service of "the law's preference for a testate disposition."⁸⁸ In one case, the doctrine is used to "undo an otherwise sufficient revocation,"⁸⁹ but in another it revives a revoked will.⁹⁰ One seemingly common thread linking the decisions is that courts should apply DRR sparingly because it does not comport with the tenet that probate courts should not be in the business of correcting mistakes in wills.⁹¹

A. Three Types of Revocation

At the very least, we know that DRR does not apply unless there is what to the naked eye appears to be an unconditional revocation.⁹² Beyond this circumstance, harmonizing the various iterations of the doctrine reveals that it can apply to one of three distinct types of revocation. The classic definition of DRR involves a mistaken revocation. A mistaken revocation is an actual revocation, but is performed due to the testator's misapprehension of either essential facts or the law. Hence, underlying a mistaken revocation is the assumption that if the testator had known the truth he would not have revoked his will.

The second type is an impliedly conditional revocation. Here, the testator has revoked his will but the revocation is made contingent, albeit not explicitly, on the existence of a particular set of affairs—the

⁸⁰ Compare *Smith v. Shaw*, 60 So. 2d 865, 866 (La. 1952) ("Under our system of law there is no such doctrine as 'Dependent Relative Revocation' . . ."), with ALA. CODE § 43-8-91 cmt. (1991) ("The concept of dependent relative revocation probably is part of the common law of Alabama . . .").

⁸¹ See *Kroll v. Nehmer*, 705 A.2d 716, 722 (Md. 1998).

⁸² See *Carter v. First United Methodist Church of Albany*, 271 S.E.2d 493 (Ga. 1980).

⁸³ See *Second Church of Christ v. Kaufman (In re Kaufman's Estate)*, 155 P.2d 831 (Cal. 1945); *Linkins v. Protestant Episcopal Cathedral Found.*, 187 F.2d 357 (D.C. Cir. 1951).

⁸⁴ When a specific gift fails in a later (and otherwise valid) will as opposed to the total failure of a new will, some jurisdictions require that the testamentary intent be apparent from language contained in the valid (probated) will. See, e.g., *In re Estate of Pratt*, 88 So. 2d at 501–04.

⁸⁵ See *Ruedisili v. Henkey (In re Alburn's Estate)*, 118 N.W.2d 919 (Wis. 1963).

⁸⁶ See, e.g., *DeWald v. Whittenburg (In re Estate of Carroll)*, 925 P.2d 903, 906 (Okla. Civ. App. 1996).

⁸⁷ See *Kroll v. Nehmer*, 705 A.2d 716, 723 (Md. 1998).

⁸⁸ *Id.* at 720.

⁸⁹ *Nevada v. Palm (In re Estate of Melton)*, 272 P.3d 668, 678 (Nev. 2012) (quoting BLACK'S LAW DICTIONARY 503 (9th ed. 2009)).

⁹⁰ See *Carpenter v. Cosby (In re Estate of Carpenter)*, 34 So. 3d 1230, 1236–37 (Miss. Ct. App. 2010).

⁹¹ See *In re Estate of Melton*, 272 P.3d at 679 (citing *In re Patten's Estate*, 587 P.2d 1307, 1309 (Mont. 1978)).

⁹² See, e.g., *In re Estate of Laura*, 690 A.2d 1011, 1014 (N.H. 1997).

continued effectiveness of a new will, for example. Revocations made *expressly* conditional are rare and are not the subject of DRR. Instead, the theory is that DRR renders a mistaken revocation impliedly conditional on the efficacy of the dispositive scheme the testator was attempting to achieve.

A third type of revocation to which DRR may apply is an ineffective revocation. Here, the revocation has simply not taken effect, perhaps contrary to the testator's wish or perhaps because the attempt to revoke was performed by someone without testamentary capacity or due to the undue influence of another.⁹³ In the three subsections that follow, each type of revocation is examined in further detail, bringing into focus the insight that the way a revocation is characterized in a DRR case will determine whether the court will conclude that a revocation has not taken place⁹⁴ or, instead, that a revocation has taken place but should be ignored or cancelled, thus reviving the revoked testamentary plan.⁹⁵ Finding decisions that define DRR with reference to two types of revocation—as in the case just described—is not uncommon; courts will adjudge a mistaken revocation as impliedly conditional or ineffective because of the testator's misunderstanding.⁹⁶ Commentators are apt to do the same.⁹⁷ As will become clear, much confusion has resulted from the overuse in the decisions and treatises of the belief that DRR can transform a revocation into a nonrevocation. The resulting definitional imprecision of DRR has rendered the doctrine more malleable and unpredictable than our legal system should countenance.

1. Conditional Revocation

One type of revocation discussed and considered in DRR cases is a revocation that is conditional. The theory is that the testator's mistaken revocation is impliedly conditional,⁹⁸ and because the condition has not occurred, neither has the revocation.⁹⁹ These impliedly conditional revocations with which DRR is concerned are distinguishable from expressly conditional revocations, which are rare¹⁰⁰ and which bear little relationship to DRR. Professor Thomas Atkinson recognized this distinction, writing:

Occasionally a revocation clause, by its terms is dependent on a condition. 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.¹⁰¹

Professor Joseph Warren, too, recognized that revocatory acts may be conditional by admitting parol testimony of the testator's intent in an attempt to set the revocation in its "proper light."¹⁰² Once determined to

⁹³ See, e.g., *Kemmerer v. Kemmerer*, 139 N.E.2d 84 (Ohio Ct. App. 1956) (incapacity); 79 AM. JUR. 2D *Wills* § 469 (2013) (describing a "letter not intended as an immediate exercise of the testator's power to revoke").

⁹⁴ See, e.g., *In re Estate of Carpenter*, 34 So. 3d at 1235–36 (quoting *Crosby v. Alton Ochsner Med. Found.*, 276 So. 2d 661, 666 (Miss. 1973)) ("The basis for the doctrine of dependent relative revocation . . . is that there was never any revocation of the earlier instrument . . .").

⁹⁵ See, e.g., *id.* at 1235 (quoting *Mothershed v. Howell (In re Estate of Lyles)*, 615 So. 2d 1186, 1190 (Miss. 1993)) ("[T]he 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.").

⁹⁶ See *id.*

⁹⁷ See *Chappelle v. Williams (In re Dougan's Estate)*, 53 P.2d 511, 524 (Or. 1936) ("In an endeavor to give effect to the deceased's intent, the doctrine construes his mistaken belief into a conditional revocation."); ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 67 (4th ed. 2009) (stating that in a DRR case a court will "pretend" that mistaken revocation is actually a conditional revocation). *But see* *DUKEMINIER ET AL.*, *supra* note 16, at 295 (stating that in a DRR case a court equates a mistaken revocation with an act performed without revocatory intent).

⁹⁸ See *DePaul v. Irwin (In re Estate of Anderson)*, 65 Cal. Rptr. 2d 307, 312 (Ct. App. 1997).

⁹⁹ See, e.g., *Berghmans v. Museum of Flight (In re Bowers)*, 131 P.3d 916, 921 (Wash. Ct. App. 2006).

¹⁰⁰ See Atkinson, *supra* note 2, at 453 ("Few cases occur where there is actually a conditional frame of mind on the part of the testator in connection with a revocation.").

¹⁰¹ *Id.* at 452–53; see also *Shephard v. Gebo (In re Krukenberg)*, 361 P.2d 537, 540 (Nev. 1961) (citation omitted) (internal quotation marks omitted) ("[A] conditional revocation becomes effectual upon the happening of the condition."); 95 C.J.S. *Wills* § 412 (2013) ("[I]f the revocation is subject to a condition which is not fulfilled, the revocation does not take effect."); *Reinstatement of Wills*, *supra* note 20, at 521; Warren, *supra* note 9, at 339.

¹⁰² Warren, *supra* note 9, at 339.

be conditional, the revocation would not be ambiguous, and DRR would have no role to play in an analysis of its effectiveness.¹⁰³

Notably, the conditional revocation that relates to DRR is a complete fiction¹⁰⁴ and is arguably at doctrinal odds with DRR. Again, a testator in a DRR case does not make her revocation expressly conditional; nor does she construe it as conditional in her mind.¹⁰⁵ In addition, DRR is also premised on the assumption that had the testator known the truth, she would simply not have revoked her will, not revoked it conditionally.¹⁰⁶ Thus, the probable intent that DRR is concerned with illuminating is in fact not an intent to revoke conditionally.¹⁰⁷ Only if the testator had been aware that she *might* be making a mistake would she have elected to place conditions on her revocation.¹⁰⁸ But DRR does not ask what the hypothetical reasonable testator who realizes she does not have all of the necessary information would do; on the contrary, it asks what the testator who knows the truth would do.¹⁰⁹ Thus, it remains unclear whether the fiction of conditionality is at all useful in advancing an analysis of DRR or whether conditionality simply adds to the confusion about how this doctrine should operate.

The courts appear to understand the problem even though they at times speak in terms of conditionality. In DRR cases, courts have reasoned that the circumstances surrounding the revocation show that if the testator had known the truth, she would not have revoked her will. They do not conclude that the better-informed reasonable testator would have made her revocation conditional. Thus, the notion of conditional revocations renders the law of DRR needlessly cumbersome, weighing it down with a legal fiction that does not advance the analysis.

2. *Ineffective Revocation*

The second type of revocation often mentioned along with DRR is ineffective revocation. One distinction between an ineffective revocation and a conditional revocation is that an ineffective revocation is not a revocation at all, while a conditional revocation is a revocation under some circumstances but not under others.¹¹⁰ Thus, the term ineffective revocation sounds as if it bears some relation to DRR, but it too, poorly conveys what the successful application of DRR achieves.

Notably, the Restatement has adopted the term ineffective revocation as a substitute for DRR.¹¹¹ The term also appears in the previously cited definition from Dukeminier:

Simply put, the doctrine of dependent relative revocation (DRR) is this: If the testator purports to revoke his will upon a mistaken assumption of law or fact, the revocation is ineffective if the testator would not have revoked his will had he known the truth. The underlying theory is that the testator lacks true revocatory intent¹¹²

¹⁰³ Other commentators may rightly challenge this statement, but the author's sense is that a DRR case involving an expressly conditional revocation that was itself mistaken—a case we might describe as presenting “double conditionality”—is unlikely to ever occur.

¹⁰⁴ See *Chappelle v. Williams (In re Dougan's Estate)*, 53 P.2d 511, 524 (Or. 1936) (“[T]he doctrine construes his mistaken belief into a conditional revocation.”); Atkinson, *supra* note 2, at 454 (“feigned ground”).

¹⁰⁵ See *Kroll v. Nehmer*, 705 A.2d 716, 717 (Md. 1998). In the court's discussion of the doctrine, it remarked:

[I]n applying the doctrine, courts often speak in terms of a *conditional* revocation, regarding the revocation as conditioned on the existence of a set of facts or circumstances that the testator assumes to exist, when, in reality, the revocation is itself unconditional but is rather based on a mistaken frame of mind—a mistake of either fact or law.

Id.

¹⁰⁶ See *id.* at 720–22.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 721–22.

¹¹⁰ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. a (1999).

¹¹¹ See *id.*

¹¹² DUKEMINIER ET AL., *supra* note 16.

The problem with associating ineffective revocations with DRR is that ineffective revocation is broader in scope than DRR. Ineffective revocations include not only those performed without revocatory intent, but also those rendered invalid by other factors such as when a will is not properly executed, is procured through undue influence or fraud or is the product of testamentary incapacity.¹¹³ Such revocations are just as ineffective as those performed mistakenly, but they do not have very much to do with DRR. To label a revocation ineffective also suggests that there is a class of revocations in which the acts performed, albeit with intent to revoke, are not themselves legally sufficient on some technical ground (such as in a jurisdiction that does not recognize partial revocation by physical act or when the act is somehow inadequate) despite the testator's expressed intention to revoke. These revocations, albeit ineffective, would not be particularly good premises upon which to base a DRR analysis. The term ineffective revocation is simply too broad to be used to accurately describe DRR.

3. *Mistaken Revocation*

The law of wills has not been kind to testators who make mistakes.¹¹⁴ DRR is an exception to this general antipathy toward correcting testamentary errors. The classic DRR case involves a testator who revokes his will or part thereof by mistake or upon the mistaken belief that a different disposition will be effective, and the court disregards the revocation to allow the testator's property to pass according to the terms of the will rather than by intestacy.¹¹⁵ The most common set of facts within this paradigm finds the testator avidly tinkering with his validly executed will in such a manner that it appears to have been revoked via cancellation of its dispositive provisions.¹¹⁶ Thus, the executed will is found "marked up," sometimes with lines drawn through its dispositive provisions.¹¹⁷ These circumstances trigger the question whether the will was cancelled or obliterated with the intent to revoke the will or certain provisions.¹¹⁸ At the same time, the testator has not succeeded in making a new will that is legally effective in the way he apparently wishes.¹¹⁹ In one set of cases, the testator simply makes a set of notes of what dispositions the new will might contain—a "rough draft for future changes" as it was described in one case.¹²⁰ In a related set of cases, the testator in a jurisdiction that permits partial revocation by physical act lines out persons, property, or values in his will and makes handwritten substitutions. The lineouts are presumptively valid revocations, but the handwritten substitutions are nonprobable additions. In a third set of cases, the testator executes a new will, but for some reason the dispositive provisions in the new will are legally invalid.

a. *Cancellation and a Rough Draft for Future Changes*

The type of revocation that is most associated with DRR is cancellation.¹²¹ This association is because the classic case of DRR often involves a testator who tinkers with her old will while she is formulating her new one. In the classic case, the testator, wishing only to make minor changes to her estate plan, either lines out portions of her existing will and simultaneously makes substitutions of persons, property, or values on the will

¹¹³ See *Estate of Luongo*, 823 A.2d 942, 957 (Pa. Super. Ct. 2003) (noting that a will procured by undue influence "is inoperative, including the revocation provision").

¹¹⁴ A full discussion of mistakes in the law of wills is beyond the scope of this Article. Suffice it to say that in general the law does not allow for the correction of such mistakes. See *DUKEMINIER ET AL.*, *supra* note 16, at 342. Exceptions include cases of fraud, misdescription, and mistaken revocation. See *id.* The Uniform Probate Code embodies a "harmless error" standard that will forgive mistakes in execution under certain circumstances. UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 215 (2013).

¹¹⁵ See *DUKEMINIER ET AL.*, *supra* note 16, at 295.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ *Mothershed v. Howell (In re Estate of Lyles)*, 615 So. 2d 1186, 1188–89 (Miss. 1993).

¹¹⁹ See *id.*

¹²⁰ *Id.* at 1189.

¹²¹ One court even defined DRR with specific reference to cancellation: "This doctrine presumes that a testator—who has canceled an old will while making a new will which thereafter fails—would prefer the old will to intestacy." *In re Estate of Glennie*, 265 P.3d 654, 658 (Mont. 2011); see also *In re Macomber's Will*, 87 N.Y.S.2d 308, 310 (App. Div. 1949) (describing DRR as "cancel[ing] a will with a present intention to make a new testamentary disposition").

itself, or makes a set of notes on the way she prefers her testamentary plan to look on another sheet of paper. The notes are not probatable.¹²²

It may seem, to the observer who finds the cancelled will with the notes, that this testator may not have wanted to revoke her old will unless the new one was legally effective.¹²³ Further support for this story is found in the similarity between the existing will and the notes—the supposition being that a testator who radically changes her estate plan means to revoke her will unconditionally despite the fact that her new plans have not been rendered legally effective.¹²⁴

The facts of the classic case have been the backdrop for many DRR cases. And yet the testator within them does not seem to fit the description of one whose revocation is mistaken in any sense about the efficacy of an alternative disposition. A reasonable testator who already has a validly executed will does not believe that her notes are somehow probatable. She is not mistaken or under a misimpression that they are. The notes are simply the first step in the direction of carrying out a new estate plan. Thus, the theory of mistake that underlies DRR must be something more particular.

That something might become clearer by considering the lineouts and interlineations cases. The changes are certainly the work of an overzealous testator, eager to remap her estate plan. But are they mistakes? Not, of course, in jurisdictions where partial revocation by physical act is not permitted.¹²⁵ Even if a testator is mistaken about the legal validity of her lineouts in such a jurisdiction, there is simply no doctrine to help her. DRR has no application there because its utility is limited to ignoring a revocation and not substantiating one. However, if the lineouts either so completely obscure the underlying words that the words cannot be discerned¹²⁶ or are so spread across the face of the will that the words suggest a full cancellation of the will,¹²⁷ the presence of a rough draft for future changes might suggest a not-quite-settled revocatory intent or a streak of recklessness, but not a mistake about the efficacy of the rough draft.¹²⁸ Unless the testator revokes by physical act or by subsequent writing, DRR is simply irrelevant in the jurisdictions disallowing partial physical revocations. But whether or not DRR is applicable, describing the revocation as mistaken might not quite hit the mark if what is really meant is that what looks like a full and complete revocation on its face has not been carried out with the requisite revocatory intent.

Two cases serve to support this analysis. *Kroll v. Nehmer*,¹²⁹ is a good example of a case in which no revocation has taken place upon which to base an analysis of DRR.¹³⁰ Chronologically, there were two wills and two drafts¹³¹—although discerning from the facts just how rough the two drafts were is impossible.¹³² The drafts, however, were unwitnessed and thus incapable of being admitted to probate. At the time she drafted the third document, the testator, Margaret Binco, wrote “VOID” across the back of the second will.¹³³ A student of the law of wills can ascertain right away that Binco’s second will was not properly revoked and was admissible to probate. None of the definitions of DRR seem to relate to these facts. Astonishingly, however, the court’s decision fills eight pages of the regional reporter with a tortured discussion of DRR and

¹²² See *In re Will of Smith*, 528 A.2d 918 (N.J. 1987) (holding that a handwritten letter to the testator’s attorney was not a will but was meant to serve as the basis of a will). A set of notes might be probatable if the jurisdiction allows unattested wills wholly in the testator’s handwriting and the document evinces testamentary intent.

¹²³ See, e.g., *Kroll v. Nehmer*, 705 A.2d 716 (Md. 1998).

¹²⁴ See, e.g., *id.* at 723.

¹²⁵ See, e.g., ALA. CODE § 43-8-136 (2013).

¹²⁶ See *In re Estate of Menchel*, No. 263251, 819 N.Y.S.2d 211 (Sur. Ct. May 18, 2006).

¹²⁷ See *In re Will of Lavigne*, 428 N.Y.S.2d 762, 764 (App. Div. 1980).

¹²⁸ See *id.*

¹²⁹ 705 A.2d 716 (Md. 1998).

¹³⁰ See *id.* at 721.

¹³¹ See *id.* at 716.

¹³² See *id.* at 723.

¹³³ See *id.* at 716.

its relationship to the case.¹³⁴ The case simply reminds us that rough draft cases often provide infertile ground upon which to apply DRR.¹³⁵

In *Carter v. First United Methodist Church of Albany*,¹³⁶ by contrast, Mildred Tipton's first will was found with lines drawn through enough of its provisions to raise a presumption of complete revocation.¹³⁷ The first will was folded together with a rough draft, which outlined a different distributional scheme.¹³⁸ The issue was whether the presumption of absolute revocation raised by the markings on the will could be overcome.¹³⁹ The court rightly focused not on the testator's mistake, but on her lack of revocatory intent in lining out the provisions of her first will.¹⁴⁰ In other words, her actions did not reflect someone mistaken about the validity of her rough draft, but instead someone whose actions were one step ahead of her intentions, thus preventing the "[j]oint operation of act and intention" necessary for revocation.¹⁴¹

b. Partial Revocation by Physical Act and Attempted Amendment

Some jurisdictions do permit partial revocation by physical act. In these jurisdictions, acts that fall short of a cancellation of the entire will may nonetheless constitute partial cancellations of the will. The testator partially revoking his will in this manner often amends the revoked provisions with the addition of new persons, property, or values. If the will is not thereafter reexecuted, the amendments have no legal effect unless they satisfy the requirements of a holographic testamentary instrument in jurisdictions that recognize such instruments.¹⁴² Can DRR be employed under these circumstances? Two cases from Mississippi applied DRR but reached different outcomes based on the testator's presumed intent.

In *In re Estate of Carpenter*,¹⁴³ the testator had marked through portions of her will (rendering some illegible) and had made handwritten additions above the lineouts as if to amend the will.¹⁴⁴ The appellate court disagreed with the trial court that the testator had revoked the will in its entirety and had died intestate, and instead found the partial revocations valid but the additions invalid.¹⁴⁵ The court determined that the revocations were mistakenly premised upon the effectiveness of the additions, and thus that DRR would be employed to probate the will without the partial revocations.¹⁴⁶

In *In re Estate of Lyles*¹⁴⁷ the testator owned 140 acres of land. She originally devised forty acres to a friend and 100 acres to her niece.¹⁴⁸ Later, she crossed out the devise of forty acres and in the provision benefiting the niece substituted "140" for "100."¹⁴⁹ Because partial revocation by physical act is permitted in Mississippi, the lining out triggered the presumption of revocation.¹⁵⁰ But, like in *Carpenter*, the attempted amendment to the disposition of the acreage was not effective because it was not executed with will formalities.¹⁵¹ The court then considered whether it could employ DRR to characterize the revocations as

¹³⁴ See *id.* at 716–24.

¹³⁵ See *id.*

¹³⁶ 271 S.E.2d 493 (Ga. 1980).

¹³⁷ See *id.* at 496.

¹³⁸ See *id.* at 495.

¹³⁹ See *id.* at 496.

¹⁴⁰ See *id.* at 496–97.

¹⁴¹ *Id.* at 497 (quoting *McIntyre v. McIntyre*, 47 S.E. 501, 503 (Ga. 1904)).

¹⁴² See *Charleston Nat'l Bank v. Thru the Bible Radio Network*, 507 S.E.2d 708, 712 n.7 (W. Va. 1998) (citing *La Rue v. Lee*, 60 S.E. 388 (W. Va. 1908)).

¹⁴³ *Carpenter v. Crosby (In re Estate of Carpenter)*, 34 So. 3d 1230 (Miss. Ct. App. 2010).

¹⁴⁴ See *id.* at 1233.

¹⁴⁵ See *id.* at 1234.

¹⁴⁶ See *id.* at 1237.

¹⁴⁷ *Mothershed v. Howell (In re Estate of Lyles)*, 615 So. 2d 1186, 1188 (Miss. 1993).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 1189–90.

contingent on the effectiveness of the amendment. The court determined that the evidence suggested a desire to partially revoke the will even if the substituted acreage would not be an effective change.¹⁵² Because the testator was attempting to make a change in the distribution of her estate that mirrored the distribution in intestacy, the court found that the testator clearly preferred intestate distribution of all of the acreage to her niece rather than cancellation of the revocations and reinstatement of the original devises.¹⁵³

Although we are justified in assuming that a testator making a set of notes on a separate piece of paper may well know that the notes are not probatable, a testator altering language in his executed will may not know that those changes are not probatable. Moreover, in this kind of case, the actions taken are easier to characterize as constituting a single transaction in which the revocation is related to the attempted change.

c. A New Will that Fails

There was a time when the law limited DRR to cases involving revocation by physical act.¹⁵⁴ Today, the doctrine extends to cases in which a will revokes a prior will either by inconsistency or by an express revocation clause.¹⁵⁵ Although some jurisdictions reject DRR when a second will contains a plain-language revocation clause revoking all prior wills,¹⁵⁶ the great weight of authority in this country is to the contrary. The typical case involves a bequest in the revoking second will that the law renders of no effect. Thus, it becomes the task of the litigant raising DRR to show that the testator “intended such revocation [not] to become operative if the revocatory document could not otherwise dispose of his estate to prevent intestacy.”¹⁵⁷

Consider *La Croix v. Senecal*:¹⁵⁸ the testator, Celestine Dupre, revoked the residuary bequest of her will by means of a second will that contained identical dispositive provisions—one-half to her nephew, the other one-half to a friend.¹⁵⁹ The second will was executed, unnecessarily as it turns out, to clarify the name of her nephew.¹⁶⁰ Unfortunately, the second will was witnessed by the friend’s husband, rendering the residuary bequest to that friend invalid under the interested-witness statute.¹⁶¹ This fact pattern does indeed present the kind of mistake of law that DRR is concerned with. Courts often state in such cases that if the testator had known the truth she would not have revoked her will. Although the testator had assiduously sought legal advice and had made certain her will was properly executed, she had simply been unaware that the law would render her well-laid plans of no effect. The court applied DRR to nullify the revocation of the first will.¹⁶²

Although the case is an “easy,”¹⁶³ and “deserving,”¹⁶⁴ case for the application of DRR, *La Croix* nonetheless leaves the reader guessing what the proper method for applying DRR should be. Instead of discussing the ambiguity of the revocation, the court led with the doctrinal approach and immediately characterized the admittedly compelling circumstances as raising a presumption “that the testator preferred the old will to intestacy . . . in the absence of evidence overcoming the presumption.”¹⁶⁵ As a companion

¹⁵² See *id.* at 1190.

¹⁵³ See *id.* at 1191.

¹⁵⁴ See *Anthony v. Evangelical Lutheran Church (In re Estate of Anthony)*, 121 N.W.2d 772, 779 (Minn. 1963).

¹⁵⁵ See *Carter v. First United Methodist Church of Albany*, 271 S.E.2d 493, 496 (Ga. 1980).

¹⁵⁶ See *Rosoff v. Harding*, 901 So. 2d 1006 (Fla. Dist. Ct. App. 2005); *Crosby v. Alton Ochsner Med. Found.*, 276 So. 2d 661, 669 (Miss. 1973); see also *Newman v. Newman*, 199 N.E.2d 904, 909 (Ohio Prob. Ct. 1964) (reporting “the death knell of dependent relative revocation in mortmain cases, at least where the later document expressly revokes all prior wills”).

¹⁵⁷ *In re Estate of Anthony*, 121 N.W.2d at 779.

¹⁵⁸ 99 A.2d 115 (Conn. 1953).

¹⁵⁹ See *id.* at 118.

¹⁶⁰ See *id.* at 119.

¹⁶¹ See *id.* at 117.

¹⁶² See *id.* at 118.

¹⁶³ *DUKEMINIER ET AL.*, *supra* note 16, at 297.

¹⁶⁴ *La Croix*, 99 A.2d at 118.

¹⁶⁵ *Id.* at 117.

definition, the court also cited to the “conditional revocation” language from *In re Macomber*.¹⁶⁶ Having leapt too far forward in the analysis to retreat, the court is left with no choice but to assert that “[t]here is no room for doubt,”¹⁶⁷ that it is “obvious[],”¹⁶⁸ and that “it is clear”¹⁶⁹ that the testator’s revocation was conditioned upon the efficacy of the second will.¹⁷⁰ In other words, readers are simply to take it at face value that DRR is properly applied in *La Croix*.

Consider also *In re Will of Sharp*.¹⁷¹ Juliana Sharp was the donee of a power of appointment created by her husband Walter in an *inter vivos* trust established for Juliana’s lifetime benefit.¹⁷² Juliana sought to exercise this power in favor of her estate in a succession of four wills executed in 1972, 1974, 1977, and 1979, as well as in an unexecuted document from 2001.¹⁷³ Juliana’s son and daughter, Lee and Honey, were the joint beneficiaries of the earlier wills, but Lee was the primary beneficiary of the 1979 will and the 2001 document.¹⁷⁴ Language in the 1972 and 1974 wills explained that the unequal treatment was justified by Honey’s status as the sole beneficiary of a different trust created by Walter.¹⁷⁵ It appeared for this reason that Juliana wished to benefit Lee more handsomely than Honey in her will.

Only photocopies of the 1977 and 1979 wills existed.¹⁷⁶ Those wills were presumed revoked by physical act, and because each will in the succession had expressly revoked the previous one,¹⁷⁷ Honey’s argument was simply that Juliana had died without a will.¹⁷⁸ Lee, however, argued that DRR applied, but did not specify which will was to be admitted under that theory.¹⁷⁹ The trial court agreed, comparing the facts with the ineffective-second-will cases and emphasizing the presumption against intestacy.¹⁸⁰ Because the 1974 will was still in existence, the trial court admitted it to probate.¹⁸¹

Note the forced nature of the analogy to the classic DRR paradigm in *Sharp*. Unlike in *La Croix*, in *Sharp* there were no facts suggesting that the revocation of any of Sharp’s previous wills had been related to the creation, not to mention the legal validity, of the 2001 document. Moreover, even assuming its application was appropriate, the doctrine should have served only to undo the revocation of the 1979 will and not the 1974 will, which had itself been revoked by the 1977 will.¹⁸² To probate the 1974 will under the doctrine of DRR would have required the court to consider a completely different issue: whether revocation of the 1974 will by the 1977 will was conditioned upon the 1977 will being effective. But this version of the facts is belied by the fact that Juliana later revoked the 1977 will itself with an express revocation clause in the 1979 will.¹⁸³ The connection between the 1974 will and the 2001 document was simply too attenuated for DRR to have applied. A more plausible explanation for Juliana’s succession of wills is that she had changed her mind about Lee being the sole beneficiary, but had not yet made up her mind regarding the percentage of her estate she wished to leave to Honey. Juliana’s uncertainty is evident in her changing wills and led her to die without having expressed (with finality the testamentary plan she wished to be carried out after her death).

¹⁶⁶ *See id.* at 117 (citing *In re Macomber’s Will* 87 N.Y.S.2d 308, 310 (App. Div. 1949)).

¹⁶⁷ *Id.* at 118.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ 852 N.Y.S.2d 713 (Sur. Ct. 2008), *rev’d sub nom. In re Estate of Sharp*, 889 N.Y.S.2d 323 (App. Div. 2009).

¹⁷² *See id.* at 714.

¹⁷³ *See id.* at 714–15 (denying probate to the 2001 document because it was not properly executed and witnessed).

¹⁷⁴ *See id.* at 715.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 714.

¹⁷⁷ *See In re Estate of Sharp*, 889 N.Y.S.2d at 324.

¹⁷⁸ *See In re Will of Sharp*, 852 N.Y.S.2d at 714.

¹⁷⁹ *See In re Estate of Sharp*, 889 N.Y.S.2d at 324.

¹⁸⁰ *See id.* at 325.

¹⁸¹ *See id.* at 326.

¹⁸² *See id.* at 324.

¹⁸³ *See id.*

On appeal, the court disapproved of admitting the 1974 will to probate, citing the lack of evidence to support DRR.¹⁸⁴ It saw nothing equivocal about Juliana’s actions; they demonstrated her intention with each new testamentary scheme to supersede the previous one.¹⁸⁵ The appellate court deemed the lower court’s use of DRR as threatening to render virtually every case of revocation with a prior will a case for DRR.¹⁸⁶ The criticism echoes the court in *Carter*, which lamented that “[s]ome of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive.”¹⁸⁷ In response to these criticisms, the following section develops an interpretive method that will eliminate some of the concerns about when DRR should be invoked and how it should be applied.

IV. AN INTERPRETIVE METHOD FOR DRR

A. Will Interpretation and Construction

The quest for testamentary intent is governed by a two-step process of evaluation made up of interpretation at stage one, and construction at stage two. The goal of interpretation is to “discover[] the meaning or the intention of the testator from permissible data.”¹⁸⁸ Permissible data consists of the plain language of the document and the circumstances surrounding the making of the will. This data is probably sufficient in most cases for the court to ascertain and carry out the intent of the testator. An ambiguity on the face of the will or revealed by attempts to apply the will’s terms to objects and persons in the real world may be resolved at this stage by the admission of extrinsic evidence. If this process fails to disclose the testator’s intent, construction of the will is the next step. Construction, in contrast to interpretation, is the process of attributing intention to the words used by the testator with the aid of rules of construction and constructional preferences. Thus, the quest is not for the actual intent of the testator, which has been abandoned as unknowable at this stage, but instead is for a conclusion about what a reasonable testator would have been intending under the circumstances presented.¹⁸⁹ Thus, whatever ambiguity surfaces at step one of the interpretive process, if unresolvable with evidence of the testator’s actual intent, can be resolved at step two of the process using suppositions about what the reasonable testator would intend.

The American Law Institute’s (ALI) Restatement (Third) of Property advocates jettisoning this framework and considering all evidence and presumptions relating to a testator’s intent at the same time.¹⁹⁰ This approach would have courts consider constructional preferences and rules of construction together with evidence of actual intent.¹⁹¹ The reason for this shift away from the traditional two-step approach to will interpretation is no doubt an effort to bring a testator’s intention into sharp focus so that a court may do its best to carry it out. In this respect, the Restatement’s approach may be intent-promoting. On the other hand, blurring the line between interpretation and construction may vest courts with excessive discretion that could be intent-defeating.¹⁹² In defense of its proposal, the ALI claims that courts have largely abandoned the two-step approach to will interpretation.¹⁹³ But not only is the Restatement’s new approach not the traditional approach; it also appears that courts are not yet prepared to adopt it.¹⁹⁴

¹⁸⁴ *See id.*

¹⁸⁵ *See id.* at 325.

¹⁸⁶ *See id.*

¹⁸⁷ *Carter v. First United Methodist Church of Albany*, 271 S.E.2d 493, 496 (Ga. 1980).

¹⁸⁸ ATKINSON, *supra* note 2, at 809.

¹⁸⁹ *See* Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 101–02 (2005).

¹⁹⁰ *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (1999).

¹⁹¹ *See id.*

¹⁹² *See* Storrow, *supra* note 189, at 102.

¹⁹³ *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c.

¹⁹⁴ *See* Michael D. Simon et al., *Will Construction in LITIGATION UNDER FLORIDA PROBATE CODE § 7.40* (9th ed. 2013), available at Westlaw, LPC FL-CLE 7-1; Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 814 n.13 (2001) (listing cases).

The Restatement's approach, as revolutionary as it may at first blush appear, is not entirely incongruent with the concepts underlying the traditional interpretive approach to wills. For example, the exercise of connecting the words in the will to the objects in the world to which the words refer always requires resorting to matters external to the document.¹⁹⁵ In addition, the traditional approach permits the admission of evidence of "surrounding circumstances," even at the first stage of will interpretation.¹⁹⁶ As Justice Holmes put it, the court must interpret the words of the will "in the circumstances in which they were used."¹⁹⁷ Although this approach to the interpretation of wills is widely employed,¹⁹⁸ there is unfortunately little harmony in the way courts describe how surrounding circumstances may be used in the interpretive process.¹⁹⁹ Obviously, courts cannot use such evidence to imbue the language employed in the will with meanings the evidence cannot support.²⁰⁰ But some courts go so far as to bar the introduction of evidence of the surrounding circumstances in the absence of ambiguity in the will.²⁰¹ As a practical matter, though, discovering latent ambiguities in the will would be difficult absent evidence of the surrounding circumstances in the first instance.²⁰²

Although the circumstances surrounding the execution of the will have an important role to play in will interpretation, one primary problem is defining what constitutes *surrounding circumstances*. One commentator describes the term as "the context in which the testator had the will drafted."²⁰³ Another specifies that resorting to evidence of the surrounding circumstances recognizes the necessity of "plac[ing] the court in the position of the parties at the time the instrument was created."²⁰⁴ The Restatement lists "the donor's occupation, property at the time of execution of the document, and relationships with family members and with other persons, including the designated or apparently designated donees."²⁰⁵ Other understandings of surrounding circumstances focus more directly on what events occurred around the time of the execution of

¹⁹⁵ See Storrow, *supra* note 189, at 75–76.

¹⁹⁶ *E.g.*, *Bird v. Wilmington Soc'y of Fine Arts*, 43 A.2d 476, 480 (Del. 1945) ("To take such language then, of and by itself and devoid of the surrounding circumstances, may be the means of giving but an imperfect picture of the thought or intent of the testator."); *Norton v. Jordan*, 196 N.E. 475, 479 (Ill. 1935); *Killian v. Killian (In re Trust of Killian)*, 459 N.W.2d 497, 499 (Iowa 1999) ("That intent is to be determined from the language of the instrument, the scheme of distribution, and the facts and circumstances surrounding the document's execution."); *Wills v. Union Sav. & Trust Co.*, 433 N.E.2d 152, 156–57 (Ohio 1982).

[T]he law not only allows but requires the instrument to be read in the light of the surrounding circumstances, and permits the introduction of such extrinsic evidence as will enable the court to place itself in his situation, to see things as he saw them, and to apply his language as he understood and intended it.

Wills, 433 N.E.2d at 156–57 (quoting *James v. Pruden*, 14 Ohio St. 251, 256–57 (Ohio 1863)).

¹⁹⁷ Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899).

¹⁹⁸ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 reporter's note.

¹⁹⁹ See, *e.g.*, *Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) ("It is only where testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning."); *Romero v. Nott (In re Estate of Romero)*, 847 P.2d 319, 322 (N.M. Ct. App. 1993); *Wills*, 433 N.E.2d at 156; *Wilkins v. Garza*, 693 S.W.2d 553, 556 (Tex. App. 1985) (ruling that the lower court properly excluded evidence of circumstances existing when the will was executed because the terms of the will were unambiguous).

²⁰⁰ See *Bird*, 43 A.2d at 480.

²⁰¹ See, *e.g.*, *In re Estate of Romero*, 847 P.2d at 322 ("Where the intent of a testator is not crystal clear from the will itself, the scheme of distribution, circumstances surrounding the testator, and other existing facts should be a subject of judicial inquiry."); *Estate of Rosenberg v. Dep't of Pub. Welfare*, 679 A.2d 767, 772 n.3 (Pa. 1996) ("Only when intent is not clear will a court consider external matters, and then only matters closely related to the execution of the document.").

²⁰² See *Hembree v. Quinn (In re Estate of Russell)*, 444 P.2d 353, 358 (Cal. 1968); *In re Estate of Schultheis*, 747 A.2d 918, 923 (Pa. Super. Ct. 2000) ("A latent ambiguity arises from collateral facts [that] make the meaning of a written [document] uncertain, although the language appears clear on the face of the [document].") (quoting *Krizovensky v. Krizovensky*, 624 A.2d 638, 643 (Pa. Super. Ct. 1993)); see also *Norton v. Jordan*, 196 N.E. 475, 479 (Ill. 1935).

²⁰³ Doug Surtees, *Procedure "B" is for Bayda*, 70 SASK. L. REV. 259, 267 (2007).

²⁰⁴ David E. Pierce, *Interpreting Oil and Gas Instruments*, 1 TEX. J. OIL, GAS & ENERGY L. 1, 23 (2006).

²⁰⁵ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. d (1999); see also *Legare v. Legare*, 490 S.E.2d 369, 371 (Ga. 1997) ("The most important of these 'surrounding circumstances' are 'the recipients of testator's bounty, their relations to him and associations with him, his uniform affection for them, or any interruption thereof.'") (quoting *Olmstead v. Dunn*, 72 Ga. 850, no. 1(b) (1884)); *Cent. Carolina Bank & Trust Co. v. Wright*, 478 S.E.2d 33, 37 (N.C. Ct. App. 1996) ("The 'circumstances attendant' include 'the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of the testator's property.'") (quoting *Pittman v. Thomas*, 299 S.E.2d 207, 211 (N.C. 1983)).

the will²⁰⁶ or on what the testator did or did not intend to be included in her will when she signed it.²⁰⁷ Sometimes the controlling law or common business practices at the time of the execution of the will constitute the surrounding circumstances.²⁰⁸ In keeping with this understanding, the time frame is necessarily restricted: surrounding circumstances do not include events occurring after the execution of the will.²⁰⁹

B. Will Interpretation and DRR

Where does DRR figure in this framework? Does it trigger a presumption of probable intent? Is DRR a canon of construction? With DRR seldom understood as part of an interpretive process, no wonder that its workings remain somewhat mysterious. Treatises and casebooks invariably present the doctrine alongside material covering the methods and ramifications of revocation. Although intent is relevant at this juncture, intent is not the central problem under examination. With DRR, by contrast, intent is the primary, if not the sole, concern. Without a better sense of how DRR can help to determine a testator's probable intent for the revocation of her will, decisions applying DRR will continue to exhibit discontinuity and incoherence.

The way DRR works within the interpretive process has never been adequately explained, but the foregoing discussion has hopefully underscored significant insights. First, theories of conditional, ineffective, and mistaken revocations are not helpful in understanding DRR because they either refer too broadly to other sorts of revocations or suggest an awareness that the testator does not possess when she revokes her will (such as with conditional and mistaken revocations). Second, treating DRR like a presumption has undermined many DRR analyses because it implies that as long as some combination of factors is present, DRR can be applied mechanically in one step. This mechanical one-step analysis causes the courts to flounder when they arrive at the point of applying the DRR principles they have articulated, leaving the reader unconvinced that the case at hand is "clearly" an "easy" and "deserving" case to which to apply DRR.

Ideally, courts that resort to DRR should employ a two-step process that mirrors the familiar process of will interpretation. This suggestion is unique, because it posits that courts should only consider the applicability of DRR when confronted with ambiguous revocations, not ineffective, conditional, or mistaken ones. Thus, the first step in the process is to ascertain whether the facts and circumstances surrounding the revocation reveal that the intent behind the revocation is ambiguous. This evaluation of whether the circumstances suggest a revocation that is equivocal or ambiguous parallels the approach to disclosing latent ambiguities in wills.

If the court determines that the revocatory intent is ambiguous, then the court is in a good position to proceed to the second stage. At the second stage of the process, the ambiguity must be resolved either with evidence of the testator's actual intent or with canons of construction that impute intent based on what we conclude a reasonable testator would intend under the circumstances. This step involves considering factors that the courts and commentators have identified, including: (1) whether the revocation and the attempted new disposition are part of one scheme,²¹⁰ (2) how similar or dissimilar the dispositions are to the disposition that would occur if the revocation is deemed effective,²¹¹ and (3) whether the new disposition is rendered partially

²⁰⁶ See, e.g., *Fleming v. Morrison*, 72 N.E. 499, 499–500 (Mass. 1904) (surrounding circumstances showed will to be a sham).

²⁰⁷ See, e.g., *Smelser v. Smelser (In re Estate of Smelser)*, 818 P.2d 822, 827 (Kan. Ct. App. 1991) (rejecting the provision of the will of which testator had no knowledge); *Estate of Hall*, 462 N.Y.S.2d 154, 155 (Sur. Ct. 1983) (noting that the will is comprised of pages testator embraced "as hers at the time she signed it").

²⁰⁸ See, e.g., *In re Estate of Branigan*, 609 A.2d 431, 437 (N.J. 1992) (underlying estate tax laws); *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 367 (Tex. App. 2003) (workings of the oil industry).

²⁰⁹ See *Bird v. Wilmington Soc'y of Fine Arts*, 43 A.2d 476, 482 (Del. 1945); *Morris v. Sickly*, 31 N.E. 332, 333 (N.Y. 1892).

²¹⁰ See *Schiavo*, *supra* note 44, at 94 ("Was the destruction and execution of the new will contemporaneous? How close in time were those acts?").

²¹¹ See *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1007 (Fla. Dist. Ct. App. 2005); *Bayfront Med. Ctr. v. Jones (In re Estate of Jones)*, 352 So. 2d 1182, 1185 (Fla. Dist. Ct. App. 1977); *Hauck v. Seright*, 964 P.2d 749, 754 (Mont. 1998); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. c (1999). Dissimilarity can preclude application of the doctrine. See *Hauck v. Seright*, 964 P.2d 749, 754 (Mont. 1998); see also *Estate of Kempff*, No. D052004, 2008 Cal. App. Unpub. LEXIS 7368, at *8 (Cal. Ct. App. Sept. 10, 2008); *Kroll v. Nehmer*, 705 A.2d 716, 723 (Md. 1998); *Arrowsmith v. Mercantile-Safe Deposit & Trust Co.*, 545 A.2d 674, 683 (Md. 1988); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. c (1999).

ineffective by a factor surrounding its execution or by an event completely unrelated to it.²¹² When studied as a process, the idea that DRR involves impliedly conditional revocations more clearly becomes a distracting fiction. Using this proposed method will cause courts to linger more patiently over the evidence presented in DRR cases and to craft DRR analyses that are more complete and convincing.

Admittedly, what is underscored most of all in this proposal is that DRR must be placed within the framework used whenever courts interpret a will.²¹³ Because courts seek to elicit intent from any application of DRR, DRR must be considered foremost a process and not a doctrine. Other commentators have also suggested that DRR needs to be applied methodically. Professor Roger Andersen, for example, recommends the following process:

As a device for keeping DRR under control, treat every revocation separately and ask, “Did this happen by mistake?” If not, ignore DRR. If so, proceed to analyze what alternative dispositions would be available if the mistake were undone, asking of each, “Would the testator have preferred this one?”²¹⁴

Professor Frank Schiavo has even developed an impressive flowchart for the purpose of applying DRR.²¹⁵

But as useful as these contributions appear to be, they are nonetheless flawed in retaining an emphasis on mistake, failing to mention ambiguity in connection with the revocations submitted to a DRR analysis, and not referring to the process of will interpretation. Also concerning—for all the reasons articulated in Part II.B—is that Schiavo’s flowchart calls for determining, in the second step of the process, whether the testator has a presumed intent to revive the first will.

C. Reconsidering DRR Decisions

Reconsideration of the cases discussed above will serve to illustrate the application of the author’s proposed alternative two-step process in DRR cases. *La Croix* is, as commentators have pointed out, “an easy case for applying DRR.”²¹⁶ But the analysis would have been much more convincing if the court had taken the two-step approach to DRR. If the court had simply stated that what appeared to be a plainly worded revocation clause in the first will was rendered ambiguous by the surrounding circumstances—that is, the nullifying effect of the interested-witness statute—the court could then have proceeded to resolve the ambiguity by using DRR to impute the intent of the reasonable testator to the testator in that case, *Celestine Dupre*. After all, the court knew little about Dupre’s actual intent and it unnecessarily encumbered the analysis by engaging in speculations about how the revocation must have been mistaken or conditional. Using DRR as a canon of construction would have allowed the court to focus squarely on the similarity of the two dispositions both in terms of the objects of Dupre’s bounty and the property she wished them to receive. Lingering a bit longer over these considerations would have had the salutary effect of freeing the court from producing an opinion peppered by assertions of its obvious truth. The court would instead have stated with greater confidence that, under the circumstances presented, a reasonable testator does not have an intent to revoke her first will.

However, not every case requires a lengthy, painstaking analysis. In some cases, a consideration of the surrounding circumstances will be sufficient. This analysis was sufficient in *In re Alburn’s Estate*,²¹⁷ in which

²¹² As noted above, this factor might include problems related to the rule against perpetuities, lapse, pretermitted children, and the spousal election. A significant number of DRR cases involve mortmain statutes. *See, e.g.*, *Second Church of Christ v. Kaufman (In re Kaufman’s Estate)*, 155 P.2d 831, 834-35 (Cal. 1945); *Linkins v. Protestant Episcopal Cathedral Found.*, 187 F.2d 357, 358 (D.C. Cir. 1950); *In re Estate of Jones*, 352 So. 2d at 1185; *Shriner’s Hosp. for Crippled Children v. Hester*, 492 N.E.2d 153, 155 (Ohio 1986). These cases do not present proper factual bases for DRR because the testator cannot be said to be under a mistaken impression about when she might die.

²¹³ *See Reinstatement of Wills*, *supra* note 20, at 524 (stating that an interpretation “merely adopts conventional rules applied in any problem of construing wills”).

²¹⁴ ANDERSEN, *supra* note 97, at 70.

²¹⁵ *See Schiavo*, *supra* note 44, at 95.

²¹⁶ DUKEMINIER ET AL., *supra* note 16, at 297.

²¹⁷ *Ruedisili v. Henkey (In re Alburn’s Estate)* 118 N.W.2d 919 (Wis. 1963).

the testator tore her second will to pieces and directed her agent to let them “fly in the wind.”²¹⁸ Although this action is not necessarily an ambiguous revocation, in *In re Alburn’s Estate* there was a prior will and Alburn stated that she wished that prior will to control the disposition of her estate.²¹⁹ Because the law of the relevant jurisdiction at that time did not permit revival of the prior will under these circumstances, Alburn’s revocation of the second will was ambiguous.²²⁰ But the ambiguity was easily resolved because of Alburn’s statement. Luckily, a copy of the second will existed in the office of Alburn’s attorney.²²¹ Its similarity to the terms of the will Alburn wanted to revive and its dissimilarity to intestate distribution made it perfectly plausible that Alburn would prefer the second will to intestacy.²²² Similar evidence existed in the wrongly decided *In re McCaffrey’s Estate*,²²³ in which the testator wrote his intention to revive the first will on the cancelled second will. But most DRR cases lack evidence of this sort and will require proceeding through the two steps of the interpretive process before a proper outcome lies in view.

Additionally, a determination that the revocation is ambiguous will not necessarily result in invalidating the revocation. In *In re Dougan’s Estate*²²⁴ the court noted two discernible transactions: one in which the testator obliterated the provisions of her will and declared them revoked, and the second in which the testator visited her attorney and presented an outline of items she wished a new will to contain.²²⁵ The new will was never executed because the testator became ill within hours of the visit and died shortly thereafter.²²⁶ The court was convinced that the testator was not trying to revive a prior will because the prior will contained dispositive provisions that conflicted with the sort of bequests she desired to appear in her new will.²²⁷ Thus, though the circumstances supported a finding that the revocation was ambiguous at the first stage of the DRR analysis, the ambiguity was resolved by considering evidence that the testator wanted to remove certain persons from her will to benefit her son who was not a beneficiary in either of her wills.²²⁸ As in *Alburn*, the testator’s statements about her intent were relevant to resolving the ambiguity that arose due to the short period of time within which her obliteration of her will and her visit to the attorney occurred. Because we do not know what the testator’s true intent was from the available facts, employing a reasonable testator standard to resolve the ambiguity that was raised by the facts is permissible.

There is no question that, as the Restatement notes, a slightly different set of facts might serve as a proper basis for the application of DRR.²²⁹ In a case in which a testator revokes his will and then contacts an attorney with details relating to the new will he wishes to execute, step one of the analysis results in the same analytical position as the court took in *Dougan*—the conclusion that the revocation is ambiguous. If the pattern of distribution, unlike in *Dougan*, suggests that a testator has a preference for the old will versus a preference for intestacy, DRR resolves the ambiguity. DRR offers the resolution not because we have such strong evidence of the testator’s actual intent, but because the reasonable testator would have preferred the old will.

²¹⁸ *Id.* at 921.

²¹⁹ *See id.*

²²⁰ *See id.* at 923.

²²¹ *See id.*

²²² *See id.* In a case with similar facts, *Estate of Kempff*, No. D052004, 2008 Cal. App. Unpub. LEXIS 7368, at *8 (Cal. Ct. App. Sept. 10, 2008), the dissimilarity of the wills belied any sense that the testator would have preferred the later will to remain in force. The more important point about *Kempff*, though, is that this factor undermined any sense that the revocation was ambiguous in the first place. *See id.*

²²³ 20 N.Y.S.2d 178, 181 (Sur. Ct. 1940).

²²⁴ *Chappelle v. Williams (In re Dougan’s Estate)*, 53 P.2d 511 (Or. 1936).

²²⁵ *See id.* at 512.

²²⁶ *See id.*

²²⁷ *See id.* at 523.

²²⁸ *See id.* at 512.

²²⁹ *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.3 cmt. c, illus. 6 (1999). Without calling the proposition of illustration 6 into question, it bears noting that the majority of cases cited in the reporter’s note to support the proposition do not adequately do so.

But consider a case in which no steps are taken to draw up a new will. The findings in *Larrick v. Larrick*²³⁰ showed that the testator destroyed his will with the intention of making a new one but did not contact a lawyer or prepare an outline of the dispositive provisions he desired.²³¹ The trial court determined that the testator's revocation was conditional, but the appellate court reversed, reasoning merely that the presumption that the testator physically destroyed his will with the intent to revoke it had not been overcome.²³² A similar result occurred in *Estate of McKeever*,²³³ in which the testator's revoked will was found with unexecuted will forms that could not be linked in time with the revocatory act performed on the executed will.²³⁴ The court, in ruling that DRR does not come into play unless the alternative dispositive scheme is actually executed but contains a defect,²³⁵ was clearly wrong on the law. The *McKeever* court might have done better to suggest, as did the court in *Larrick*, that the testator had not gone far enough in the direction of creating a new will to warrant invoking DRR.

With *Dougan* and *Larrick* in view, how should a court resolve a case like *In re Bronham*,²³⁶ in which the testator expressed his desire to revoke his old will and was in contact with his attorney about drawing up a new will? The new will, the proposed contents of which were never established, was never prepared due to the illness of the attorney.²³⁷ Meanwhile, the testator died, having mutilated his will.²³⁸ Here the court had evidence, as it did in *Larrick*, that the testator wished to put together a new will, but it had no details about the contents of the new dispositive scheme—only the fact that the testator contacted an attorney. Does this fact alone put the case on footing different from *Larrick* as the Restatement suggests? If DRR is truly a presumption, then it forces the conclusion that the first will must stand. This analysis is how the court decided the case. However, the fact that Bronham picked up a telephone but Larrick did not seems too slight a basis on which to distinguish the cases. A sounder approach would have been for the *Bronham* court to have resolved the ambiguity with the evidence that the testator had no heirs at law, and the question of whether he would have preferred intestacy was for that reason moot.

If the *Bronham*, *Larrick*, and *McKeever* courts had considered the revocations ambiguous and had proceeded to resolve them, the decisions in all three cases would have been much stronger and the distinction among them that much plainer. The *McKeever* and *Larrick* courts would have resolved the ambiguity by considering attributed intent and declaring that the reasonable testator in such circumstances is not displaying a hesitancy to revoke based on the efficacy of a new dispositive scheme. By raising DRR as a presumption, these courts merely perplex readers, disabling them from understanding decisions in DRR cases as anything more than ad hoc.

V. AN ILLUSTRATION FROM THE CLASSROOM

I have taught wills, trusts and intestate estates for fifteen years. I have discussed DRR with each class using a casebook for ten years and my own materials for the last five. The cases I use to illustrate DRR are *In re Will of Sharp*,²³⁹ described above, and *In re Will of Collins*.²⁴⁰ The trial court in *Sharp* applied DRR with a very broad brush, eventually electing to admit to probate the second of a succession of five documents consisting of four wills and an unexecuted draft.²⁴¹ The appellate court reversed, finding no basis for applying

²³⁰ 607 S.W.2d 92 (Ark. Ct. App. 1980).

²³¹ *See id.* at 93.

²³² *See id.* at 95.

²³³ *Christopher v. Kraus (In re Estate of McKeever)*, 361 A.2d 166 (D.C. 1976).

²³⁴ *See id.* at 171.

²³⁵ *See id.*

²³⁶ *In re Bronham, rev'd sub nom. Wass v. Treasury Solicitor*, [1952] 1 All E.R. 110, note (Eng.).

²³⁷ *See id.*

²³⁸ *See id.*

²³⁹ 852 N.Y.S.2d 713 (Sur. Ct. 2008), *rev'd sub nom. In re Estate of Sharp*, 889 N.Y.S.2d 323 (App. Div. 2009).

²⁴⁰ 458 N.Y.S.2d 987 (Sur. Ct. 1982).

²⁴¹ *See In re Will of Sharp*, 852 N.Y.S.2d at 713.

DRR.²⁴² Both cases rely on the *Macomber* decision, which employs the by now familiar definition of DRR-cum-conditional revocation.²⁴³ They both invoke the presumption against intestacy as well.²⁴⁴ The *Sharp* case gives students a potent warning that the doctrine is misapplied when the connection between the revocation and an alternative testamentary plan or between the revocation and a misapprehension of law or facts is “purely speculative.”²⁴⁵

In re Will of Collins is of the classic variety of DRR cases that involve the testator’s tinkering with her old will by striking out certain provisions and inserting names, property, or amounts as substitutions.²⁴⁶ Because New York does not permit partial revocation by physical act, the court had to determine first whether the markings constituted a revocation of the entire will. The court held that the markings indicated an intent to change the will, not to revoke it.²⁴⁷ But as an alternative approach to this same outcome, the court employed DRR to conclude that, even if the markings *did* constitute a revocation, they should be ignored because the testator clearly did not desire to die intestate.²⁴⁸ *Collins* helps students practice recognizing revocations, but it also opens up a discussion of what evidence would better support the use of DRR than the court’s conclusory reliance on the presumption against intestacy.

Questions of revocation feature prominently on my wills examinations going back fifteen years, but I do not recall having tested students on DRR specifically before the fall of 2012. Bar exam questions, however, sometimes trigger issues of DRR.²⁴⁹ In the fall of 2012, I decided to test my wills students on their understanding of DRR. The fact pattern finds the testator, Meredith Rosado, visiting her attorney to execute a new will (W2). She brings her old will (W1) with her. She intends to change the recipients of two items—an item of real property and an item of personal property. The recipient of her residuary estate is the same in both wills.

In her meeting with the attorney but before executing W2, Rosado writes “This will is not good” on W1 and then draws large Xs from corner to corner on each page. Rosado then executes W2, which is to be left in the care of her attorney given Rosado’s fear that she might misplace it in her impending move to a new home. Before leaving the office, Rosado says to her attorney, “I want you to know, though, Saul, that if you lose W2, I want W1 to stand.” W2 is later destroyed in a conflagration at the attorney’s office. Upon the testator’s death no copy of W2 can be found, and its terms cannot be legally established.

As the reader can no doubt discern, this fact pattern raises issues in addition to DRR. For the sake of focusing on DRR, however, the first step in the analysis is to recognize that a court will determine that Rosado did not revoke W2. With respect to W1, though, a court could determine either that Rosado’s defacements of W1 revoked that will by physical act or that the execution of W2 revoked W1 by inconsistency. What, then, is a plausible conclusion about the applicability of DRR?

A student of the law of wills is perfectly within her rights to question whether physical destruction of the original will followed by the successful execution of a new will that is later burned is a proper predicate for the application of DRR. Indeed the *La Croix v. Senecal*²⁵⁰ court stresses that the revocation must be accomplished “with a present intention of making a new one immediately and as a substitute.”²⁵¹ But for some students a myopic focus on the necessity that the revocation be conditional and on the time frame from which to draw evidence showing such conditionality appeared to get in the way of a fuller analysis. One student responded as follows:

²⁴² See *In re Estate of Sharp*, 889 N.Y.S.2d at 325.

²⁴³ See *id.* at 324–25 (citing *In re Macomber’s Will*, 87 N.Y.S.2d 308 (App. Div. 1949)); *In re Will of Sharp*, 852 N.Y.S.2d at 716.

²⁴⁴ See *In re Estate of Sharp*, 889 N.Y.S.2d at 325; *In re Will of Sharp*, 852 N.Y.S.2d at 717.

²⁴⁵ *In re Estate of Sharp*, 889 N.Y.S.2d at 325.

²⁴⁶ See generally 458 N.Y.S.2d 987 (Sur. Ct. 1982).

²⁴⁷ See *id.* at 991.

²⁴⁸ See *id.* at 993.

²⁴⁹ See, e.g., NEW YORK BOARD OF LAW EXAMINERS, NEW YORK STATE BAR EXAMINATION 5–6, question 5 (July 2011), available at <http://www.nybarexam.org/ExamQuestions/JULY2011QA.pdf>.

²⁵⁰ 99 A.2d 115 (Conn. 1953).

²⁵¹ *Id.* at 117.

Here, if W1 is successfully revoked, and she says to the attorney “I want you to know that if you lose W2 I want W1 to stand,” [DRR] most definitely [would] not work because it has already been revoked at the time of the execution of W2. The conditional revocation would need to happen [when W1 is revoked], not when she is executing W2.²⁵²

Perhaps more artfully phrased were these three responses:

Here, even though Rosado told her attorney that she wants W1 to stand if W2 is lost, a court is not likely to find that DRR applies. Rosado stated the condition after she duly executed W2, which had already revoked W1. Since Rosado did not communicate a condition of revocation when she was revoking W1, the revocation of W1 was not conditional. DRR only applies if the court finds [that] the actual act of revocation is based on a condition. There is no evidence that Rosado had such a condition in mind at the time she revoked W2.²⁵³

Weighing in favor of the fact that the revocation was independent enough to constitute a non-conditional revocation is that she completely and separately revoked W1, crossing out each page and not mentioning in her brief writing at the top of it that she planned for W2 to dispose of her estate.²⁵⁴

Here, W1 was revoked through Rosado’s defacements. And only after that was W2 executed in a will execution ceremony. As such, since W1 had been revoked prior to the execution of W2, the doctrine of dependent relative revocation has no application here. W1 was not revoked on the condition that W2 was valid.²⁵⁵

These responses are consistent with the tenet that courts should apply DRR sparingly, but the students insist on a showing of conditionality that, as explained above, is not particularly realistic in DRR cases. The responses demonstrate that the concept of conditionality in DRR is a distraction and that by asking, in the alternative, whether the revocation was ambiguous, a court will be better positioned to catch other important factors that suggest that the revocation and the new dispositive plan were part of one scheme.

Even responses that resulted in the opposite outcome emphasized conditionality as dispositive:

Here, Rosado conditioned the revocation of her former will upon the existence of the subsequent will at her death; she told her attorney Saul Packer that if he were to lose her second will she wanted the first will to stand (as opposed to having her estate distributed under intestacy law). This condition was not fulfilled, however, because of a fire that destroyed Packer’s office and her second will that was contained therein. Thus, given that the revocation of her first will was conditional and the condition was not fulfilled, Rosado’s first will can be probated.²⁵⁶

But again, even though Rosado’s statement to her attorney approaches a condition, her statement is not conditional but is instead an expression of what she prefers to happen. As illustrated above,²⁵⁷ if statements like Rosado’s render a revocation conditional, courts do not need to resort to DRR. If a revocation has an actual condition attached to it, the more complex analysis that is demanded by DRR would be superfluous.

One response to the examination question approached the two-step analytical method that is advocated in this Article:

²⁵² Exam no. 1598. The following responses are student excerpts from the author’s Wills, Trusts and Estates exam from the fall of 2012.

²⁵³ Exam no. 3279.

²⁵⁴ Exam no. 4701.

²⁵⁵ Exam no. 9306.

²⁵⁶ Exam no. 1806.

²⁵⁷ See discussion *supra* Part III.A.1.

Here, it is unclear whether Rosado's revocation of the original will was really dependent on the condition that W2 remain her will or if she did in fact revoke but decide afterward that if W2 didn't stick that W1 would be OK, too. As it is not clear, DRR cannot be applied.²⁵⁸

But as quickly as this response approaches a discussion of the ambiguity of the revocation, it retreats, concluding that ambiguity and DRR are somehow incompatible. This conclusion could be from a misperception that courts should somehow see conditionality in the revocation before DRR is even relevant. It certainly stems from the misperception that a glance at the facts will instantly reveal whether a DRR claim is viable.

Instead, a court should approach a DRR analysis in two stages, asking first whether the revocation is ambiguous. First, a court should consider the facts and circumstances surrounding the revocation. Rosado made an appointment with her attorney to execute a new will and she did not revoke W1 until she was in her attorney's office preparing to execute the new will. Moreover, whether or not the defacements she made to W1 were with the intent to revoke, the facts illustrate that W1 was revoked either by the defacements or by the execution of W2, which disposed of her entire estate. Her bringing W1 to the meeting and defacing it in that context means, at the very least, that she considered the revocation of W1 to be connected in some way with the reason she made the appointment—the execution of W2. Moreover, Rosado then says she would prefer W1 to stand if her attorney loses W2. The revocation is thus ambiguous because the testator's intent regarding whether she would want the revocation to stand if the will is later destroyed in a fire is not clear. Had she not defaced W1 or even brought it with her to the meeting, we could more justifiably conclude that her revocation via the inconsistent provisions of W2 is less ambiguous because she did not have the revocation of W1 as fully on her mind as she did the execution of W2. And had she performed the defacements to W1 at home absent any kind of plan to execute a new will, we could justifiably conclude that her revocation was not ambiguous. At this first stage of the interpretive process, a court should consider all of the factors that could support an assessment that the revocation was either ambiguous or unambiguous. Arriving at a final conclusion that DRR renders the revocation inoperative is unnecessary at this stage.

At the second stage of the interpretive process, courts should consider whether the evidence of actual intent, or intent that we can attribute to the testator based on assumptions about reasonable testators, supports ignoring the revocation in question. Arguably, Rosado's statement to her attorney comes very close to an expression of actual intent that W1 stands in the event W2 is legally inoperative. In the alternative, if the statement feels inconclusive and does not support anything more than the conclusion that the revocation is ambiguous, considering attributed intent is then proper. The facts provide little information about the relationship of Rosado to her beneficiaries or the value of her estate, but as illustrated in additional facts provided on the exam, Rosado chose to benefit primarily friends, colleagues, and her "helpmate." W2 removes her nephew from the will. It would be helpful to know why Rosado chose to eliminate him and to know the value of her home in proportion to her residuary estate. Without this information, a court could soundly conclude that a reasonable testator whose wills have primarily benefited nonfamily members would choose a will that reflected this preference over dying intestate.

VI. CONCLUSION

The doctrine of DRR is an intent-promoting doctrine that plays an important role in the law of wills. The fact that revocations take effect immediately and can have devastating consequences on the estate plans of unsuspecting testators or those represented by unskilled legal counsel may explain why this doctrine has emerged in the context of a body of law that is largely unsympathetic to correcting the mistakes testators make. But as important as the doctrine is, DRR has long suffered from various doctrinal imprecisions and inconsistencies.

Judicial use of DRR has been inconsistent at best. At times, the courts apply the doctrine directly to the facts, appearing to make conclusions about the testator's actual intent without thinking more deeply about, first, what the facts suggest about the quality of the revocation, and second, what a reasonable testator in that

²⁵⁸ Exam no. 2177.

position would have preferred. In other cases, courts have used DRR as an alternative basis for their decisions, as if they were not certain enough about their primary reasoning and wished to press DRR into service as a bolstering principle. This practice muddies our understanding of DRR's appropriate function. Some of these missteps are possibly attributable to a misapprehension of the relation DRR bears to the doctrine of revival. The more likely cause is our misguided sense that DRR is a special kind of revocation instead of a way to interpret the quality and character of revocations.

Repositioning DRR as a tool for determining a testator's probable intent, rather than a mere corollary of revocation, would afford the legal system several advantages. The first of these advantages is judicial economy. A reenvisioned doctrine would dissuade courts from applying it just because a case presents a succession of wills, and would inspire courts to more carefully consider whether the circumstances of such cases warrant consideration of DRR at all. The second advantage arises from harmonizing DRR with the law of will interpretation. Treating DRR as a type of revocation with its own independent logic has led to discontinuity in the development of the doctrine. If we situate DRR within the familiar framework of will interpretation, it will no longer be an isolated doctrine with contours that are blurry and unmoored to any other area of the law of wills. Finally, a two-stage interpretive approach to DRR will serve as a reminder that DRR is a tool for ascertaining probable intention; DRR cases usually figure among those in which the testator's actual intent is unknown. If the testator has been clear in his or her will that the revocation is conditional, or if the surrounding circumstances provide clear evidence that he or she is laboring under a mistake of law regarding the efficacy of his or her new disposition, considering DRR would be largely unnecessary. Repackaged as a process within the familiar framework of will interpretation, DRR will better position courts to carry out the important work of promoting testators' intent.