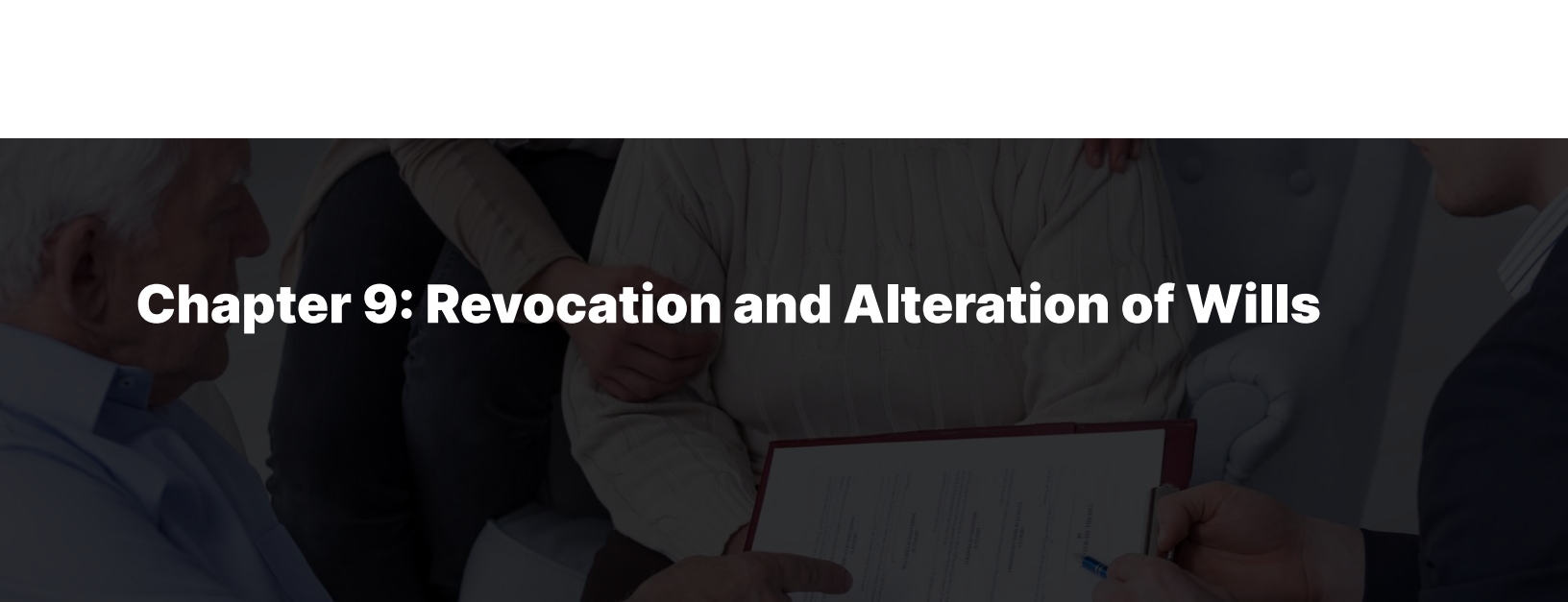




Chapter 9: Revocation and Alteration of Wills



9.1 Introduction



9.2 Revocation of wills



9.3 Alteration to wills



Knowledge check



9.4 Summary

9.1 Introduction

In this chapter we will look at the circumstances in which a will is revoked, whether by choice or by operation of law and the formalities required for a testator to revoke their will.

We will also look at what happens when there are alterations and obliterations on the will itself, and whether the alterations form part of the will or are to be disregarded.

Given the formalities required to make a valid will, it should come as no surprise that there are requirements to either revoke or make alterations to the will itself.

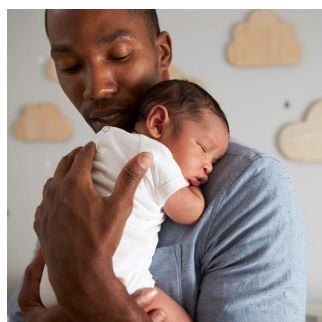


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9.2 Revocation of wills

Wills are by their very nature ambulatory which means they can be revoked or changed at any time to reflect the testator's wishes as their life changes.

For example:



1. A testator leaving everything to their spouse or civil partner and in default to charity may no longer be appropriate if the testator has children after making the will.
2. A testator appointing a sibling as an executor will need updating if the sibling predeceases the testator.

Given the importance that English law attaches to the correct formalities for making a will, it is logical that revoking a will should also meet certain requirements. There must be an intention to revoke accompanying either:

- an express or implied revocation by a subsequent will, codicil or other document executed as if it were a will; or
- destruction of the will.

We will consider the different situations in which wills are revoked in more detail.

CONTINUE

9.2.1 Marriage/civil partnership

Except in certain circumstances (which we will look at in this section), a will is automatically revoked by **s18(1) Wills Act 1837 (WA 1837)** (as amended by the **Administration of Justice Act 1982 (AJA 1982)**) on the marriage or civil partnership of the testator.

It would be unusual if in addition to planning a wedding or civil partnership, a couple included an appointment to make new wills the next working day.

The reality is that the happiness accompanied by a marriage or civil partnership is not normally coupled with the thought of death and provision on death.



The question therefore arises, can a testator protect their will from becoming automatically revoked by operation of law on entering into a marriage or civil partnership?

The answer lies within **s18 WA 1837** (as amended by **AJA 1982**); however the mechanism only applies if the testator is contemplating marriage or civil partnership with a specific individual who must be named in the will.

s18(3) states:

Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

Under **s18(3)**, the will must show two things:

- that the testator was expecting to marry a particular person; and

- an intention that it would not be revoked by the marriage.

s18(4) provides:

Where it appears from a will at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person:

(a) that disposition shall take effect notwithstanding the marriage; and

(b) any other disposition in the will shall take effect also unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

If the testator should marry someone other than the person expressed in the contemplation, then saving provisions will not prevent the will from being revoked.

ss18B(3) and **(4)** apply similar rules in respect of wills made in expectation of a civil partnership to a particular person.

Court and Others v Despalieres [2009] looks at how the court deals with a clause that does not comply with the saving provisions within **s18 WA 1837** (as amended by **AJA 1982**)

In ***Court*** the court considered a will where the testator had subsequently entered into a civil partnership.

Clause 2 of the will stated that the will “*shall not be revoked by neither subsequent marriage, civil union partnership nor adoption*” and clause 4 gave the whole estate to X with whom the testator later entered into a civil partnership.

The court held that **s18B(3)** had not been complied with to save the will from revocation because the language of the will did not show that the testator expected to form a civil partnership specifically with X. The court found that clause 2 was merely a general statement that the will was intended to survive any marriage, civil partnership or adoption.

It did not show that the testator expected to form a civil partnership, let alone a civil partnership with a particular person. Nor was the court prepared to find that **s18B(3)** had been satisfied just because clause 4 made X the sole beneficiary, since there was nothing in the wording of the will itself to connect clause 2 with clause 4.

9.2.1.1 Same-sex marriages

The **Marriage (Same Sex Couples) Act 2013 (M(SSC)A 2013)** came into force on 13 March 2014, permitting same-sex marriages.

As a consequence of **M(SSC)A 2013**, a will is automatically revoked by a same-sex marriage in the same way as if it was an opposite-sex marriage.

Under **M(SSC)A 2013** an existing civil partnership may be converted into a marriage; the marriage will be treated as having existed since the date on which the civil partnership was formed.

s18D WA 1837 provides that such a conversion of a civil partnership into a marriage will not revoke an existing will made by one of the parties to the marriage. In addition, where a will was made in expectation of a civil partnership with a particular person which was subsequently converted to a marriage, it will **not** be revoked by the subsequent conversion of the civil partnership to a marriage. Similarly, where the will was made in expectation of a civil partnership with a particular person and the parties chose, instead, to get married, the marriage will **not** revoke the will.



Link to Practice

During a will instruction interview it will normally become apparent if the client is in a relationship. If single and in a relationship the client should be

informed that on marrying or entering into a civil partnership the will will be revoked automatically, unless it contains specific provision that it is made in contemplation of a particular marriage or civil partnership. It is unsurprising that many are unaware of this and discussions of this nature can be invaluable to the client.

Ensure the discussion is documented in case a situation arises in the future in which the will is revoked by subsequent marriage or civil partnership and a question arises on the advice given at the time the will was made.



The prevalence of predatory marriages (those involving vulnerable individuals) has caught the attention of the Law Commission which is gathering evidence to consider whether **s18 WA 1837** needs to be amended. The capacity requirement needed to marry someone is significantly lower than testamentary capacity.

Do you think it right that a person who may not have capacity to make or revoke a will can marry and their will is revoked by operation of law (**s18(1) WA 1837** (as amended by **AJA 1982**))? Consider whether **s18(1) WA 1837** should be amended to take into account situations in which the testator did not have testamentary capacity. Think about vulnerable individuals who marry a “new friend” in the last weeks or days of their lives.

9.2.2 Effect of divorce

The effects of a divorce, annulment or dissolution of a civil partnership are different to that of entering into the marriage or civil partnership.

Although the relationship with the ex-spouse or ex-civil partner will have changed, in most cases, the testator will not want their ex-spouse or ex-civil partner to receive any more assets from their estate than were ordered to be paid by the courts. It is also unlikely that the testator will want the ex-spouse or ex-civil partner to be their executor. In other respects, however, the testator may be happy to leave the will unchanged.



Reflecting these assumptions, **s18A WA 1837**, until it was amended by the **Law Reform (Succession) Act 1995 (LR(S)A 1995)**, provided that a gift to a spouse in a will would fail if the testator subsequently divorced. In ***Re Sinclair [1985]*** such a gift was treated as simply lapsing when the testator died, despite the fact that the will had provided that the gift should pass to a charity if the wife predeceased the testator. So, the gift passed under the intestacy rules because the wife had not, in fact, predeceased and the gift did not pass to the charity. This result was considered by legal commentators to be unsatisfactory, given that the testator was assumed to have been more likely to have preferred that the charity should receive the legacy.

The revised **s18A**, which now applies, states that any appointment of a spouse as an executor will be invalid after divorce or nullity. **s18A** also provides that where an ex-spouse

receives a gift under the will after divorce or nullity, they are to be **treated as having predeceased** the testator. The effect of the revised section on the facts of *Re Sinclair* would be that the gift would pass to the charity. **s18C** provides similar rules in relation to the appointment of ex-civil partners as executors and to gifts to ex-civil partners.

s6 Children Act 1989 provides that any appointment of an ex-spouse or ex-civil partner as a guardian of a child will be revoked by the subsequent divorce or dissolution of a civil partnership. This applies only where the ex-spouse or ex-civil partner is **not** the natural parent of the children.

CONTINUE

9.2.3 Revocation by a later will or codicil

For revocation to be effective in a later document, that document must comply with **s9 WA 1837**.

No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (s20 WA 1837).

A common form is the phrase ***"I revoke all earlier Wills"***

Merely describing a document as the last will does not constitute express revocation (*Kitcat v King [1930]*). There may, however, have been implied revocation as to a part or the whole of the will.

The revocation need not be contained in a will so long as the document is executed in accordance with **s9**. In ***Re Durance [1872]*** the testator wrote from Canada to his brother in England requesting him to collect and destroy his will. Although the destruction in isolation would have been ineffective, the letter was signed in accordance with **s9** and was admitted as a testamentary direction.

CONTINUE

9.2.4 Destruction

A lay person may be forgiven for assuming that the destruction of a will has the effect of revoking it. Consider, however, how many testators would be denied their wishes simply because a will was accidentally destroyed if it were that simple. Or, for the less scrupulous, to destroy a will after someone has died relying on either an earlier will or the intestacy provisions for a preferred outcome.

s20 WA 1837 provides:

No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid . . . or by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Put simply the testator must either destroy their own will or have someone do it for them in their presence, in both cases with the intention of revoking it.

s20 WA 1837 refers to *burning, tearing or otherwise destroying*.

The will must be physically destroyed in some way. Simply marking the will as revoked will not have the same effect.

In ***Cheese v Lovejoy [1877]*** the testator put a line across the will and wrote “*all these are revoked*”, crumpled the paper and threw it into the corner of the room. A housekeeper found the will and retained it until the death of the testator.

The court held that there was no revocation, for there was insufficient destruction. The words *or otherwise destroying the same* were treated as requiring physical destruction of the will.

The meaning of “**destruction**” in relation to the signature of the testator was considered in In the ***Estate of Adams [1990]***, where the testatrix telephoned her solicitor instructing him to destroy her will. Her solicitor wrote to her enclosing the will and saying that it would be better if she destroyed it. When the testatrix died five years later, the will was found among her possessions. The typescript had been scribbled over in several places with a blue-black ballpoint pen, and the signatures of the attesting witnesses and the testatrix had been particularly heavily scored out.

The court concluded that the will had been revoked. The court used by analogy the rules on unattested alterations in **s21 WA 1837**, namely, **were the original signatures apparent?** Since they were not, applying that test, the will was revoked.

If the entire will is not destroyed, **a sufficiently large or vital part** (e.g. the signature) must be destroyed (***Hobbs v Knight [1838]***).

As mentioned, the testator does **not** need to destroy the will personally. **s20** is satisfied if someone else destroys the will, provided that the act is carried out **in the presence of the testator and by their direction**. The testator must be in a position to see the act of destruction. In the ***Goods of Dadds [1857]***, for example, a codicil that was burned in an adjoining room was not a valid revocation.

Another good example is ***Re De Kremer [1965]***, where the testator’s solicitor destroyed the will after being instructed to do so by a telephone call from the testator. Not surprisingly, the revocation was invalid.

The direction to destroy must be given **prior to** the destruction.

9.2.5 Intention to revoke

The intention to revoke **must** be present when destruction takes place, although intention will be presumed if there is no evidence of the testator's actual intention. A later agreement to the revocation will not suffice.

In ***Gill v Gill [1909]***, where the testator's will was torn up by his wife during the course of a row between them, there was no revocation. This is so even though the testator did nothing subsequently about his will and probably acquiesced in the action. The intention was not present when the act of destruction took place.

The testator may intend to revoke only part of the will. If only a **non-vital part is destroyed**, such a limited intention will be inferred by the court (***Re Everest [1975]***).

The testator **must have the same mental capacity** when revoking their will as when first making it. In ***Brunt v Brunt [1873]*** the testator suffered from *delirium tremens* (mental disturbance caused by alcohol withdrawal symptoms), causing him to lapse into a state of automatism. During an attack, he took his will from a safe and tore it up. His wife preserved the pieces. The court held that there was no revocation.

Similarly, in ***Re Booth [1926]*** there was no revocation where the will was accidentally destroyed by fire.

A clear intention is crucial to effect revocation under **s20**.

9.2.6 Conditional revocation

Conditional revocation is sometimes known as the doctrine of “dependent relative revocation”.

In circumstances in which a testator revokes a will conditional on an event which does not happen (quite often the validity of a new will) or in the mistaken belief that in doing so it will have the desired outcome (e.g. the intestacy provision will achieve what the testator intends), the revocation does **not** take effect.

The courts apply a presumption that the testator intended the old will to be revoked **only on condition that the new will was valid**.

In *Re Jones [1976]* the court laid down a series of questions to be asked to determine whether the revocation is conditional. The testatrix made a will in 1965 in which she left a smallholding to two nieces. In a conversation with her bank manager in 1970, shortly before her death, she complained about the attitude of the nieces and said that she intended to leave the property to the children of a nephew. A few days later, she told another nephew that she had not made a will. She arranged to see her solicitor to make another will but died before she could do so. After her death, the 1965 will was found with the signatures of the testatrix and witnesses scratched out. Evidence indicated that this action was done soon after the conversation with the bank manager.

The Court of Appeal posed a series of questions to be asked where a testator destroys their will:

- Did they do so with the intention of revoking it? If not, there is no revocation.
- If there was an intention to revoke, is the intention absolute or qualified?
- If qualified, what is the nature of the qualification?

- If the qualification is in the form of a condition or contingency, has that condition or contingency been fulfilled? If not, the revocation is ineffective.

Here, the court accepted the evidence that the revocation was unconditional, therefore she died intestate.

Conditional revocation was considered in some detail in ***Re Finnmere (Deceased) [1992]***.

The testator made a will leaving a house, contents and three-quarters of the residuary estate to X and the remaining quarter to Y and Z. Two years later, in 1986, the testator executed two further wills. Both these wills of 1986 contained express revocation clauses. The first 1986 will repeated the gift to X and gave the remaining quarter to two charities. The second will was identical save that the quarter share of residue was now divided between three charities. Unfortunately, the two wills of 1986 were attested by X's husband, thereby avoiding the gifts to X by virtue of **s15 WA 1837**.

The court was asked to give directions as to whether, the gift to X having failed, the property should be held on trust for X on the basis that the express revocation clause in the last two wills was conditional, in that the intention of the testator all along was to benefit X, or whether the property passed on intestacy. The court held that the express revocation clauses could be given a distributive meaning, confirming some gifts and varying others. In adopting such an approach, the court was then able to hold that the revocation clause could apply absolutely in respect of the gift of one-quarter of the residue, but only conditionally to the gifts to X, thereby allowing an application of conditional revocation to save the gifts to her.

Conditional revocation will also apply to revocation by **destruction** if the testator intentionally revokes their will under a mistaken belief or where the testator revokes subject to a condition which is never fulfilled. ***Re Southerden [1925]*** is a good example of the application of the doctrine where a will is destroyed. In this case the deceased made a will leaving all his property to his wife, before going to America. On his return, he threw the will in the fire saying to his wife: *"This is no good now. We have safely returned and it is all yours. We might as well burn it."* The testator believed that his wife would take all the estate on his intestacy, but this was not the case.

The court held that there was no revocation, the action of burning was done on the basis of a mistaken belief.

CONTINUE

9.2.7 Lost and destroyed wills

Where the original will was in the possession of the testator at death and is found in a mutilated condition, there is a presumption that the testator carried out the act with the intention to revoke (***Lambell v Lambell [1831]***).

Where a will, known to be in the possession of the testator, cannot be found at death after reasonable searches and enquiries, the presumption arises that he has destroyed it with the intention of revoking it (***Welch v Philips [1836]***). The presumption can be rebutted by evidence to the contrary.

In ***Sugden v Lord St Leonards [1876]*** a former Lord Chancellor kept his will, a lengthy document, together with codicils, in a box to which he had the key. After his death, the will (but not the codicils) was found to be missing from the box. Evidence showed that it was possible for a number of people to have had access to the key.

Evidence was admitted to show that Lord St Leonards made numerous references to his will, and his daughter, who had acted as his secretary, was able to give a full account of the contents of the will that was fully consistent with the codicils. The court was impressed with her evidence and, further, considered that a Chancery lawyer was extremely unlikely to destroy his will without also destroying the codicils. Given his attitude to the will and the fact that the box could have been interfered with, the court concluded that the presumption of revocation with intention to revoke had been rebutted. ***Sugden*** shows the importance of evidence of the testator's attitude in rebutting the presumption.

9.2.8 Procedure for evidencing a lost will

The procedure is contained in set out in **r54 Non-Contentious Probate Rules 1987 (NCPR 1987)**.

It must be proved by affidavit evidence that a lost or destroyed will was validly executed and that it was not validly revoked.

Enquiries must be made with the deceased's family, friends, professional advisers, bank, as well as a search of the HMCTS probate service, certainty will register, and an advert placed in the *Law Society Gazette*.

The contents of the will must also be proved. This may be done by producing a completed draft or a copy, or the will may be reconstructed from the evidence of anyone who has knowledge of its contents, for example, a solicitor, witnesses or beneficiaries.

If a will is lost or destroyed, the court may need to determine whether it revoked an earlier will. The issue is whether the court is satisfied on the evidence that the earlier will was expressly or impliedly revoked.

In ***Re Wyatt [1952]*** the court declined to accept the evidence of the solicitor who prepared the will that it was his usual practice to insert a revocation clause.

Contrast this decision with ***In the Estate of Hampshire [1951]***, where Karminski J thought it unlikely that a will prepared by a solicitor would not contain a revocation clause and therefore concluded that the later missing will, on the balance of probabilities, revoked the earlier will.

Key Case

To see how the court will consider evidence as to the existence and content of a lost or destroyed will, read and consider ***Fernley v Napier and Others [2010]***. In the case it was claimed that the defendants suppressed a validly executed will.

CONTINUE

9.2.9 Severance of joint tenancy

We have already looked at the effect of joint tenancies. In summary, if property is held as joint tenants that property will pass by survivorship and outside the terms of the will.

The question may arise as to **what happens to property in which a joint tenancy is severed after a will has been prepared, and does the severance impact on the will?**

While it is common for joint tenancies to be severed as part of lifetime planning and the preparation of a will, that is not always the case or the order of events.

Severing a joint tenancy after a will has been prepared has **no** effect on that will, and will certainly **not** revoke it.

If the beneficial share has been specifically referred to in the will, that is the direction the share will pass on death. If not, the share will fall into residue.



Activity

Write in your own words, in tabular form, every way in which a will can be revoked, include a column to explain whether revocation is by action of the testator, or operation of the law. Then do the same setting out every way in which an attempted revocation may fail. Include case law where relevant.

CONTINUE

9.3 Alteration to wills

Before considering the detailed rules, first look at the following examples of the changes that might be found in a will.

Obliteration:

"I give ~~£2,500~~ to Georgina Harris."

The original words have been made completely indecipherable.

Alterations:

(a) "I give to Ellen Chang ^{£3,000} ~~£2,500~~."

(b) "I give to Peter Chekhov a legacy of (£500,000)"

A stick-on label has covered up the original text.

(c) "I give to Deirdre McBride the sum of *£20,000* free of tax."

A gap was left in the text and "£20,000" inserted by hand.

(d) "I give to Morwenna Alys Jones the sum of ~~£45,000~~ free of tax."
£4,500

The amendment is in pencil.

(e) "I give to Abigail Lewis ~~£100~~ free of tax."
£1,000 *AL FRC PRC*

The testator and the two witnesses have added their initials.

There are two questions when considering the effect of any alteration:

1. **Is it valid so that effect can be given to it?**, and
2. **If it is not valid, how does this affect the relevant provision in the will?**

9.3.1 s21 Wills Act 1837

Where an alteration has been made to a will or part of the text has been obliterated after the will was executed, **s21 WA 1837** states:

No obliteration, interlineation [insertion between the lines of the will] or other alteration in any will after the execution thereof shall be valid or have any effect, except so far as the words or the effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will.

This dense paragraph has a number of important effects.

1. Alterations and obliterations which have been executed by the testator and witnesses

Although a will should be signed by the testator and witnesses writing their full signatures, alterations need only be executed by the initials of the testator and witnesses (*In the Goods of Blewitt [1880]*).

2. Alterations or interlineations where the original text is still apparent and which have not been

executed

An example of this would be where the sum given as a legacy has a line through it and the replacement sum is written above it. Under **s21**, the will is to be construed (interpreted) as if the ruled-through text had not been deleted:

I give to Hercules Chapman ~~£2,500~~^{£5,000}."

The gift would not fail but Hercules Chapman will receive £2,500 not £5,000.

Or in the example below, Ellen Chang will receive £2,500 not £3,000.

(a) "I give to Ellen Chang ~~£2,500~~^{£3,000}."

3. Unexecuted obliterations of the original text – the original text is not apparent

Under **s21**, an obliteration applies where the original wording is not apparent. An example of such an obliteration can be seen below with the obliterated gift to Georgina Harris.

"I give ~~£2,500~~ to Georgina Harris."

The original wording will not have been obliterated if it can be read by natural means, for example, by using a magnifying glass or holding the paper up to the light. Where strips of

paper have been stuck over the original text (see below), the original wording has been held to have been obliterated (***Re Itter [1950]***). Other scientific methods of finding the original wording, such as infrared photography, are not permitted since they are not applied using natural means.

(b) "I give to Peter Chekhov a legacy of (£500,000)"

The effect of an obliteration will be that probate will be granted with a blank space instead of the obliterated words (***In the Estate of Hamer [1943]***). The example at below would read:

"I give to Georgina Harris."

"I give ~~£500,000~~ to Georgina Harris."

In effect, Georgina would receive nothing because the obliteration amounts to a partial revocation of that part of the will.

There are two exceptions to the above rule about obliterations.

(a) Unintentional obliteration —

If the testator did not intend to obliterate the words – for example, they spilled ink on the will or a third party obliterated the words without the testator's knowledge – the original wording will still apply because they lacked intention to revoke. Evidence for this wording may be found from a copy will.

(b) Conditional revocation

Where the testator intended the original wording to be obliterated only if replacement wording was valid and the replacement wording was **not** valid – for example, because it was not executed – the doctrine of conditional revocation will apply. In these circumstances, non-natural means or extrinsic evidence such as a copy of the original may be used to identify the original obliterated wording.

This doctrine was applied in ***Re Itter*** and the strips of paper were removed to find the original wording. Probate is granted with the original wording.

So, in the example below, because £500,000 has been written on the sticky label with the intention of replacing the original figure, the label can be removed to reveal the original amount, which is then admitted to probate. However, if no replacement figure had been written on the label (or elsewhere on the will), then it is treated as a partial revocation of that part of the will and so Peter would receive nothing.

(b) “I give to Peter Chekhov a legacy of £500,000”

4. Alterations made before the execution of the will

When a court is considering a will on which an alteration has been marked but not attested by the testator's and witnesses' signatures or initials, it will apply a legal presumption that the alteration was made after execution and so is invalid. The presumption does not apply if the alteration was simply completing a blank space on the original document (as seen below) (***Cooper v Bockett [1846]***).

(c) “I give to Deirdre McBride the sum of £20,000 free of tax.”

Where the alteration is in pencil (as seen below), it is presumed to be merely deliberative, that is, the testator was still mulling over their decision (***In the Goods of Bellamy [1886]***).

The alteration will not be valid.

(d) "I give to Morwenna Alys Jones the sum of ~~£45,000~~ free of tax."
£4,500

If there is evidence, such as affidavits from the witnesses to the will, that shows that the alteration was present at the time the will was executed, the Registrar or District Judge will be able to overturn the presumption that the alteration was made after execution (**r14 NCPR 1987**). The alteration will be treated as having been made before execution and will therefore be valid.



Immediately after execution the testator notices that the amount of a specific legacy is incorrect. She amends the amount by pen. What needs to happen to ensure the alteration is valid?

CONTINUE

9.3.2 Republication

Where a will has been altered after execution and the alteration is unexecuted, a codicil to the will will republish the will as valid at the date of the codicil. If the codicil refers to the alteration to the will in some way, the alteration will be valid (*In the Goods of Heath [1892]*).

Alternatively, the alteration will be valid if there is other evidence that it was made before the codicil was executed.

9.3.3 Revival

A will that has been revoked other than by destruction can be revived, that is, brought back into effect, by the re-execution of the will or by a codicil properly executed showing an intention to revive it (**s22 WA 1837**).

It follows, therefore, that a will revoked by destruction cannot be revived. The court looks for clear evidence of the intention to revive. Following the *dictum* of Sir James Wilde in ***In the Goods of Steele [1868]***, in order to effect revival by a codicil, the intention to revive must appear in the codicil in **one of three ways**:

- express words showing an intention to revive;
- by some disposition clearly inconsistent with any other intention; or
- by any other form of expression which conveys the intention with reasonable certainty.

In ***Marsh v Marsh [1860]*** merely attaching a codicil to a revoked will by means of a tape did not effect revival.

In ***Re Dear [1975]*** the testatrix made her first will in 1942 and expressly revoked it by a will in 1950. In 1962, she executed a codicil which referred to the previously revoked will of 1942. The court held that the reference in the codicil was insufficient to effect revival (following ***In the Goods of Steele***). The reference merely created an ambiguity, but as there was no evidence to resolve the ambiguity, there was no revival.

9.3.4 Incorporation by reference

Given the complexities for preparing and altering a valid will, it is unsurprising that the courts have had to deal with situations in which testators have attempted to incorporate documents by reference.

While it is possible to incorporate a document by reference (e.g. a long list of specific legacies, or items the subject of a specific legacy), the rules do not provide for the flexibility a testator may be trying to achieve.

For a document to be incorporated by reference it must:

- be in existence at the date on which the will was executed; and
- be referred to in the will as being in existence; and
- be clearly identified in the will.

These conditions are strictly applied if incorporation of an unexecuted document is to be allowed.

If a document is not in existence at the date on which the will is executed, but the will is republished (executed again) or a codicil is made to the will, provided that the document is in existence at the date of republication or the date of the codicil, it is validly incorporated so long as the other requirements are satisfied (*In the Goods of Lady Truro [1866]*).

NB Once the will has been executed, the document **cannot** be changed.

9.3.4.1 Referred to as in existence at the date of the will

The will must also refer to it as being in existence. This condition was not satisfied in ***University College of North Wales v Taylor [1908]***. On the facts of the case, a testator left a gift by will which was conditional on compliance with “any memorandum found in my papers”. The court held that the reference to “any memorandum” could refer to a document not in existence at the date of the will so the document had not been validly incorporated. Similarly, the incorporation of a document was held to be invalid in ***Re Bateman's Will Trusts [1970]*** where the executors of a will were directed to pay the income from the fund to “*such persons as shall be stated by me in a sealed letter in my handwriting and addressed to my trustee*”. “***Shall be stated***” suggested that the letter had not necessarily been written at the date of the execution of the will.

9.3.4.2 Clear identification of the document

The document to be incorporated must be identified in the will. If the identification is vague, it will be invalid. In ***In the Goods of Garnett [1894]*** the testator referred in his will to documents numbered one to six, but there were so many papers in his desk at death that it was impossible to identify with certainty the documents in question.

9.3.4.3 The effect of incorporation

The incorporated document is admitted to probate as part of the will, although this may be dispensed with if impracticable, as with a large library catalogue in ***In the Goods of Balme [1897]***.

The rules in relation to incorporation by reference mean that a testator cannot avoid **s9 WA 1837** requirements by incorporating a document that they subsequently amend as and when they choose to.



Link to Practice

Except in relation to incorporating the STEP standard trust provisions, which we will discuss in detail in Chapter 10, there are modern alternatives to incorporating a document by reference.

Consider either leaving chattels to the executors with a request that they distribute according to latest wishes left with the will, or placing chattels into a discretionary trust with a letter of wishes. While neither option is binding, they do provide a more flexible option in dealing with wishes that may change over time.

CONTINUE

9.3.5 Rectification

9.3.5.1 s20 Administration of Justice Act 1982

s20(1) AJA 1982 gives the court a limited power to rectify wills and codicils.

If the court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence:

(a) of a clerical error; or

(b) a failure to understand instructions,

(c) it may order that the will shall be rectified so as to carry out his intentions.

An application for rectification must be made **within six months** from the date a grant is first taken out, although the court has discretion to extend the time limit.

For a better understanding on how the court will allow rectification to correct a clerical error, see ***Marley v Rawlings [2014]*** in which a husband and wife each signed the other's will by mistake. The Supreme Court held that the will of Mr Rawlings (the testator) was valid, despite the fact that the document which he had actually signed contained his wife's wishes, not his own.

Marley v Rawlings was tested recently in ***Barrett v Hammond and Others [2020]***. In this case the solicitor prepared a codicil to the deceased's (Dr Black) will. Under the terms of the will the residuary estate was divided into 52 equal parts. The first codicil removed gifts to two of the individuals (12 parts) and added gifts to two charities (4 parts), leaving 8 parts unaccounted for.

The executrix sought clarification from the court on the true construction of the will. The court determined that under the will and two codicils there was a partial intestacy and directed the executrix to make a claim for rectification.

Handwritten notes and evidence produced gave the judge a very clear indication that Dr Black and his wife intended their wills to dispose of their estates in their entirety, and that there should be no balance to fall into intestacy.

The judge held that the mismatch between the codicil and will was a clerical oversight, a failure to balance the figures. The judge ordered that the codicil be amended so that the

estate was divided into 44 parts and not 52.

9.3.5.2 Omitting

The power to rectify was considered in *Re Segelman [1995]*, where the testator set up a trust by his will and provided that the residue was to be divided among needy members of his family. His secretary was to supply a list of the family members in question. The solicitor drafted the gift in such a way that the issue of any named family member who predeceased them would inherit their parent's share. The list contained the names of six family members and the issue of all but one. The will included the list of names, but provided that the issue of the sixth family member could inherit their share if they predeceased him, contrary to the testator's wishes. The question for the court was whether the error in the will was caused by clerical error.

It was held that the words **clerical error** in **s20(1)** included omissions from the will and a failure by the draftsman to understand the effect of the words used in the will. Chadwick J went on to say that he did not believe that **s20(1)** was confined to cases where **"the intended words of the testator"** could be defined with precision. He said that the jurisdiction extends to cases where the relevant provision of the will has been introduced (or in this case has not been deleted) in circumstances where the draftsman has not applied his mind to its significance or effect.

9.3.5.3 Changing and supplying words

In *Sprackling v Sprackling [2008]* the court ordered rectification of a will in circumstances where the solicitor had incorrectly treated the words "farm" and "farmhouse" as interchangeable. Nonetheless, the testator's intention could be ascertained by the court despite the omissions in the solicitor's attendance note.

In *Austin v Woodward and Another [2011]* the court held that a solicitor, who had mistakenly inserted wording from a revised firm's precedent into a will that he was updating with the result that the will no longer reflected the testatrix's intentions, had made a clerical error that could be rectified under **s20(1)**. The solicitor had updated the will by simply

inserting his firm's revised precedent wording without realising the effect that the new wording might have on the rest of the will. The outcome was that the testatrix's daughter did not receive an outright gift of the family home as the testatrix had intended.



Do you think that **s20(1) AJA 1982** strikes the right balance between upholding a testator's wishes in circumstances in which a clerical error may not achieve, and allowing the will draftsman and insurers to escape a claim for negligence?

Consider your response in circumstances in which the will writer was not a lawyer, operated through a limited company that has no assets, and did not have insurance.

- Is the power to amend in circumstances in which the will drafter failed to understand the testator's instructions too wide?
- Is it not part of the will drafter's role to understand and prepare a will that reflects those instructions?





Law Explained: Incorporation by reference

In this recording we review the reasons why clients want to incorporate lists and other documents into their wills. We also explain the requirements for a valid incorporation.



5:28

1x



Audio Transcript

Hello. In this recording we're going to consider one particular element of alteration of a will, and that is incorporation by reference.

We have seen that wills are very important documents, and it is vital that they should not become vehicles for fraud. In most cases the will is drawn up by the lawyer, executed by the client and witnessed in accordance with the provisions of the **Wills Act 1837**, with very little need in the modern world for further documents to be incorporated.

However, this has not always been the case and the courts have been very keen to ensure that the possibilities for someone to replace the testator's list with one of their own devising are very limited. This is why the rules for incorporation by reference are strictly applied.

There are many possible reasons why a testator may wish to try to incorporate a document rather than set out the desired terms in the will itself. Firstly, they may be under the mistaken impression that a separate document will not become public. This, in fact, is not the case: if a document is found to have been incorporated by reference, then it is treated as part of the will and it becomes a public document once the will itself is published when probate is granted. Secondly, they may not at the time of executing the will have made up their mind as to the distribution of their estate and, again mistakenly, feel that adding a list at some point in the future is permissible. As we can see from the rules, this is not the case as any document which a testator wishes to incorporate must be in existence at the date of the will. Finally, a testator may wish to incorporate a document as a form of shorthand rather than setting out their wishes in full in the will, and this is probably the most legitimate reason for incorporation.

In order to be validly incorporated by reference, a document must satisfy three conditions: first of all, the document must be actually in existence at the date on which the will was executed; secondly, it must be referred to in the will as being in existence; and, thirdly, it must be clearly identified in the will.

If the document is not in existence at the date of execution, then it cannot be deemed to be incorporated; however, if the will is republished (i.e., re-executed) or a codicil is made to the will which effectively republishes it, provided that the document was actually in existence at the date of republication or the date of the codicil, then the document will become validly incorporated so long as the other requirements are satisfied.

The second requirement is that the will must also refer to the document as being in existence. This is a requirement which, again, is strictly applied, so the testator must be very careful as to the wording which they use – for example, the words *“any list found in my papers”* could refer to a list which the testator is planning to write in the future but was not in existence at the date of the will. The use of future tenses is also dangerous, so if the testator refers to a letter *“which I will leave in my desk”*, this again gives the impression that the document was not in existence at the date of execution of the will.

Finally, the document must be clearly identified in the will. If the reference to the document is vague or unclear it will not be considered to be incorporated – so, for example, if the testator refers to *“a letter which I have left in my desk”*, but when the executors examine the desk they find a number of different letters which could fit the bill, incorporation will not have been successful.

If the document **is** found to have been successfully incorporated, as mentioned above it becomes part of the will. This has several consequences: first of all, it means that the document becomes public; secondly, if any witness to the will is named in the incorporated document as a beneficiary or the witness is the beneficiary’s spouse or civil partner, then **section 15** of the **Wills Act 1837** will apply, and the named individual will not be able to take the gift mentioned in the incorporated document.

As we have seen, it would be unwise for a testator to rely on a document being considered to be incorporated by reference and in the modern era, when wills can be quickly and accurately word-processed, there is very little need for such a device.



Law in Context: Revocation of wills

The unintended consequences of revocation without taking care to make sure the new will was properly in place were illustrated by ***Burgess v Penny and Another [2019]***. Here, the Chancery Division was asked to rule on a dispute over two wills made by Freda Burgess. Although Freda was elderly, there was no suggestion that she lacked capacity. Also, on the facts, the court found that there was no lack of knowledge and approval of her later will on her part; in fact, her son, at her request and in her presence, shredded her previous will and thus revoked the earlier will presumably in her expectation that the later will was valid. On the evidence, it was found that Freda had not signed the later will in the presence of one of the witnesses, so the presumption of due execution had been successfully displaced and her will had not been executed in accordance with the law.

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

Question 1 of 3

Katie is planning to marry Kyle. She makes a validly executed homemade will leaving everything to Kyle in which she says, *"I make this will as I am planning to get married."* The day after the marriage she dies. Which of the following statements is correct?

- ☐ Katie's new will would be valid, but the gift to Kyle would not be effective as her will does not refer explicitly to her intention to marry Kyle.
- ☐ The new will would be valid as it has mentioned that Katie is planning to get married.
- ☐ The new will would be revoked by the marriage as it is not made in expectation of a specific marriage to a specific individual. Katie would die intestate.



The new will would be valid but any reference to Kyle would be read as if he had predeceased Katie.

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Assume each of the individuals mentioned below has a validly executed will. Match each event to the relevant law.



Bertie divorces his wife.

Revocation by s18(1) Wills Act 1837



Yvonne deliberately tears up her will.

No revocation as no intention.



Baljit's will is accidentally destroyed in a house fire.

Revocation by destruction



Kirsten enters into a civil partnership with Amy.

Revocation by subsequent testamentary disposition



Jeremy's civil partnership with Theo was converted into marriage.

Invalidates the gift, not the will



George makes a new will.

No revocation – s18D Wills Act 1837

SUBMIT



Complete the question above before moving on.

Question 3 of 3

Match the following cases with the correct descriptions:



Brunt v Brunt [1873]

No revocation where T wrote "all these revoked" on their will and threw it into a corner of the room



In the Goods of Dadds [1857]

Revocation where T heavily scribbled and scored out signatures



Cheese v Lovejoy [1877]

No revocation where the will was destroyed by burning, but not in T's presence



Gill v Gill [1909]

No revocation where the will was destroyed by a solicitor on the instructions of but not in the presence of T



Re De Kremer [1965]

No revocation where the will was torn up by T's wife during an argument



In the Estate of Adams [1990]

No revocation where the will was destroyed by T during an episode of delirium tremens

SUBMIT



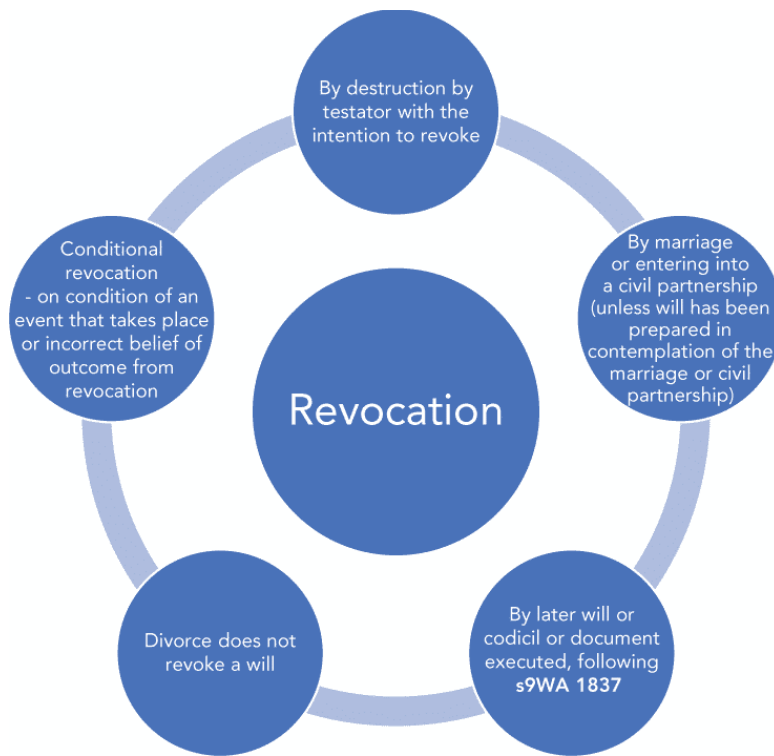
Complete the question above before moving on.

9.4 Summary

Revocation

- By destruction by testator with the intention to revoke
- By marriage or entering into a civil partnership (unless will has been prepared in contemplation of the marriage or civil partnership)
- By later will or codicil or document executed, following s9 WA 1987
- Divorce does not revoke a will
- Conditional revocation: on condition of an event that takes place or incorrect belief of outcome from revocation

Figure 9.4a



Alteration to wills

- Alterations and obliterations must be initialled by the attesting witnesses or will be disregarded
- Presumption that alterations in pencil are deliberative and not testamentary
- Invalid alteration can be made valid by republication or revival of will (s9 WA 1837 must be followed)
- Documents incorporated by reference must exist at the time will is prepared and clearly identified
- Rectification: s20 Administration of Justice Act 1982; *Marley v Rawlings* [2014]

Figure 9.4b



You have completed Chapter 9.

EXIT