Strafford

*Presenting a live 90-minute webinar with interactive Q&A*

# Trust and Probate Challenges: Minimizing and Litigating Claims of Undue Influence, Fraud, Capacity and Mistakes

Overcoming Evidentiary Hurdles With Medical Records, Documentation, Experts and Other Witnesses

THURSDAY, JANUARY 18, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

James A. Bush, Esq., **Law Offices of James A. Bush**, Encinitas, Calif.

Adam M. Fried, **Reminger Co.**, Cleveland

Franklin C. Malemud, Esq., **Reminger Co.**, Cleveland

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

# TRUST AND PROBATE CHALLENGES:

# MINIMIZING AND LITIGATING CLAIMS OF UNDUE INFLUENCE, FRAUD, CAPACITY, AND MISTAKES

January 18, 2018

Part One: Substantive Bases for Will and Trust Document Litigation[1]

James A. Bush, Esq.
Law Offices of James A. Bush, P.C.
4405 Manchester Avenue, Suite 202
Encinitas, CA 92024-7902
(760) 230-2688
jim@attybush.com
Website: http://attybush.com/

[1] The law on this subject tends to be based on common law principles that are observed in most states rather than laws unique to a particular state. Because the presenter is based in California, and for convenience, citations from California law usually are used without an attempt to cite consonant authorities from other states.

I. Bases to judicially challenge an estate planning document include:

A. Lack of Capacity

B. Undue Influence

C. Fraud

D. Mistake

II. Lack of Capacity

A. Generally, persons over the age of majority and with legal capacity may dispose of their property as they wish without regard to the desires, expectations, or opinions of anyone else as long as the terms and conditions of distribution are not prohibited by law or public policy. *Estate of Markham*, 46 Cal. App. 2d 307, 314, 115 P.2d 866, 869-70 (1941).

B. A person over the age of majority is presumed to have capacity to execute a will or trust, and anyone challenging this presumption has the burden of proving otherwise. *Estate of Mann*, 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225, 229 (1986); Cal. Probate Code § 810(a).

C. Capacity is determined as of the date that the relevant document is executed. *See, Andersen v. Hunt*, 196 Cal. App. 4th 722, 727, 126 Cal. Rptr. 3d 736, 739 (2011); *Estate of Mann*, 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225, 229 (1986).

D. Although capacity is determined as of the date the relevant document is executed, proof can be offered of incompetency at earlier or later dates as long as such proof tends to show capacity as of the date of execution. *Estate of Mann*, 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225, 229 (1986).

E. Generally, transferors have testamentary capacity when they can understand the nature of the act they are doing; they understand and recall the nature and situation of their property; and they know, and understand their relationship to, the natural objects of their bounty and the persons affected by the relevant document. *Andersen v. Hunt*, 196 Cal. App. 4th 722, 727, 126 Cal. Rptr. 3d 736, 739 (2011); *Estate of Mann*, 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225, 229 (1986).

1. California embodies such capacity in Cal. Probate Code § 6100.5(a)(1).

2. "[T]he standard for testamentary capacity is exceptionally low." *In re Marriage of Greenway* 217 Cal. App. 4th 628, 642, 158 Cal. Rptr. 3d 364, 374 (2013).

F. Transferors do lack testamentary capacity where they have such broad insanity as to constitute mental incompetency generally or have some mental disorder, hallucination, or delusion that causes them to distribute their property in a way that, but for the disorder, hallucination, or delusion, they would not have done. *Estate of Perkins*, 195 Cal. 699, 703-04, 235 P. 45, 47 (1925).

1. See Cal. Probate Code § 6100.5(a)(2).

2. Cal. Probate Code §§ 810(c) and 811(a) provide that a determination that a person lacks capacity should be tied to evidence of at least one of certain enumerated deficits in mental function and a correlation between that deficit and the decision or act in question.

G. The capacity required to make an irrevocable trust, rather than a revocable trust or a will (which is always revocable until the testator dies) may be more stringent. "A person lacking capacity to make an ordinary transfer of property has no capacity to create an inter vivos trust. (Rest.2d Trusts, §§ 19, 333 (see comment f, p. 151); 3 Scott on Trusts (2d ed.) § 333.2, p. 2425; Bogert on Trusts (2d ed.) § 997, p. 450 et seq.)." Walton v. Bank of California, N.A., 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856, 865 (1963).

H. The "exceptionally low" standard for testamentary capacity applies to wills and trust amendments that make simple changes akin to changing a will. But where a trust or trust amendment involves more complex matters, a "sliding-scale" of capacity applies, which focuses on a person's ability to appreciate the consequences of the trust's particular provisions. *Andersen v. Hunt*, 196 Cal. App. 4th 722, 730, 126 Cal. Rptr. 3d 736, 741 (2011); *Lintz v. Lintz* 222 Cal. App. 4th 1346, 1352-1353, 167 Cal. Rptr. 3d 50, 54-55 (2014).

I. That a person is the subject of a guardianship or conservatorship does *not* conclusively establish that such person lacks testamentary capacity (although it may be some evidence of a lack of capacity), especially where there is evidence that the person's mental condition has improved since the appointment of a guardian or conservator. *Estate of Mann*, 184 Cal. App. 3d 593, 604-05, 229 Cal. Rptr. 225, 230-31 (1986).

J. If testamentary incapacity has been determined at any particular point in time due to senile dementia, there is a strong inference that such incapacity continued thereafter because such dementia is continuous and becomes progressively worse. *Estate of Mann*, 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225, 229 (1986).

K. But if a transferor has a mental disorder during which he or she has lucid periods (including early stages of dementia), "it is presumed that his [or her] will has been made during a time of lucidity. . . . Thus, a finding of testamentary incapacity can be supported only if the presumption of execution during a lucid period is overcome." *Estate of Mann*, 184 Cal. App. 3d 593, 604, 229 Cal. Rptr. 225, 230 (1986).

L. Other common circumstances that may bear on questions of incapacity but which do not alone conclusively establish incapacity are as follows:

1. "It is well established that 'old age or forgetfulness, eccentricities or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity.'" *Andersen v. Hunt*, 196 Cal. App. 4th 722, 727, 126 Cal. Rptr. 3d 736, 739 (2011) (quoting *Estate of Wynne* 239 Cal. App. 2d 369, 374, 48 Cal. Rptr. 656 (1966)).

    a. But an irrational belief that has not even a semblance of facts to support it may be sufficient to establish incapacity where the irrational belief affected the provisions of the decedent's will. *Estate of Mickelson*, 37 Cal. App. 2d 450, 454-55, 99 P.2d 687, 689 (1940) (where unsubstantiated delusion was that testator's wife had been unfaithful and their child was born out of wedlock).

2. Addiction to, or heavy use of, intoxicants alone is not enough to establish incapacity. *Estate of Garvey*, 38 Cal. App. 2d 449, 456-57, 101 P.2d 551, 554-55 (1940).

3. That the decedent committed suicide does not alone destroy testamentary capacity, even where the decedent's will unquestionably was written in contemplation of suicide. *Estate of Rich*, 79 Cal. App. 2d 22, 30, 179 P.2d 373, 378 (1947).

M. The terms of the testamentary document itself may be considered in determining whether there was incapacity. "[W]here a man wills all or most all his property away from his wife or children with whom he has

lived on apparently friendly terms, that fact has weight in determining the mental condition of the testator. And if a man has lived in apparently the most affectionate relations with his family, and leaves a will in which his property is given to others, and no reason is suggested or explanation made why they are thus disinherited, . . . 'this circumstance could certainly tend to show delusion or alienation of reason at the time of the testamentary act.'" *Estate of Martin*, 170 Cal. 657, 663-64, 151 P. 138, 141 (1915) (citation omitted).

N. Generally, a finding of incapacity invalidates the entire testamentary document. If the transferor lacked capacity to make one part of the relevant document, such incapacity presumably would apply to the entire document.

III. Undue Influence

A. Undue influence is a sufficient ground to set aside a trust or will where influence used on the transferor directly procures the challenged document and such influence "amounts to coercion destroying free agency on the part of the testator. . . . There must be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." *Estate of Mann*, 184 Cal. App. 3d 593, 606, 229 Cal. Rptr. 225, 231 (1986).

1. To set aside a testamentary document on this ground, it is not enough that a transferee exercised influence on the transferor. Anyone may solicit a distribution from a transferor. To invalidate the document, the influence must be undue, i.e., it must include some conduct that causes the transferor to make a disposition of property different from that which such person would have made of his or her own free will. *Estate of Baker*, 131 Cal. App. 3d 471, 480, 182 Cal. Rptr. 550, 556 (1982).

2. Neither influence generally (no matter how strong) nor opportunity and a motive to influence is sufficient to support a claim of undue influence. It must be shown that influence was actually used to bring about the challenged transfer in favor of the influencer. *Estate of Kreher*, 107 Cal. App. 2d 831, 839, 238 P.2d 150, 156 (1951).

3. As with capacity, undue influence is determined as of the time the challenged document is executed, but facts occurring before or after the execution can be offered to prove undue influence at the time of execution if they "tend to show such influence" at the time of execution." *Estate of Baker*, 131 Cal. App. 3d 471, 481, 182 Cal. Rptr. 550, 557 (1982).

B. Undue influence often comes about because of false statements by the influencer about the contestant, but that is not required. The influencer's making of completely true statements about the contestant may still result in undue influence where the transferor's will is overborne by the influencer's conduct. *Hagen v. Hickenbottom*, 41 Cal. App. 4th 168, 182, 48 Cal. Rptr.2d 197, 205 (1995).

C. Unlike lack of capacity, which normally infects the entire challenged document, a finding of undue influence may require a voiding of only that part of the document found to be the result of such undue influence, leaving the remainder to stand if "it is not inconsistent with and can be separated from the part which is invalid." *Estate of Molera*, 23 Cal. App. 3d 993, 1001, 100 Cal. Rptr. 696, 701 (1972).

D. As with lack of capacity, the contestant alleging undue influence initially has the burden of proving such defect in the challenged testamentary document. *E.g.*, Cal. Probate Code § 8252(a).

E. But the burden can shift. At least in cases of wills and revocable trusts, there is a presumption of undue influence where: (1) There existed a confidential relationship between the transferor and the transferee; (2) that transferee actively participated in procuring the execution of the testamentary document; and (3) that transferee unduly profits by the testamentary document. If the presumption arises, then the transferee has the burden of showing that the testamentary document was freely made by the transferor. *Estate of Mann*, 184 Cal. App. 3d 593, 606, 229 Cal. Rptr. 225, 232 (1986).

F. The burden may shift even more easily in cases of irrevocable inter vivos trusts. "While no presumption of undue influence is indulged in upon the contest of a will unless confidential relations are first established, with respect to gifts or conveyances inter vivos the susceptibility to imposition, the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence." *O'Neil v. Spillane* (1975) 45 Cal. App. 3d 147, 155, 119 Cal.Rptr. 245, 252 (1975).

    1. *Spillane* applied Cal. Civil Code § 1575 to an inter vivos gift deed. That statute, which applies outside the context of will contests in California, defines "undue influence" as: "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of

obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

G. Presumption of Undue Influence

1. Confidential Relationships

a. Whether a confidential relationship exists is usually a question of fact to be determined on a case-by-case basis. *O'Neil v. Spillane* (1975) 45 Cal. App. 3d 147, 153, 119 Cal. Rptr. 245, 250 (1975).

b. A confidential relationship exists whenever the transferor places trust and confidence in the integrity and fidelity of another person. *Estate of Rugani*, 108 Cal. App. 2d 624, 630, 239 P.2d 500, 504 (1952).

c. Some relationships are deemed as a matter of law to be such that any testamentary disposition to a person in the relationship is presumed to be the result of undue influence. For example, in California:

1) Transfers to certain care custodians, persons in a fiduciary relationship with the transferor who also transcribed the instrument or caused it to be transcribed, and persons related to or employed by or cohabiting with care custodians or such fiduciaries are presumed to have obtained the transfers by fraud or undue influence, which presumption can be overcome, but only by clear and convincing evidence. Cal. Probate Code § 21380(a)-(b). (Persons who are related by blood to the transferor are exempt from these presumptions. Cal. Probate Code § 21382. Also, persons for whom a written certificate of independent review is executed in a prescribed form by an attorney who counsels the transferor outside the presence of the beneficiary about the nature and consequences of transfer and attests that the transfer is not the product of fraud or undue influence are exempt from these presumptions. Cal. Probate Code § 21384.)

2) Transfers to the person who drafted the testamentary document, relatives of such person, employees and cohabitants of such person, and partners and shareholders

and employees of a law firm in which such person has an ownership interest are *conclusively* presumed to have obtained by fraud or undue influence. Cal. Probate Code § 21380(a) and (c). (Again, persons who are related by blood to the transferor are exempt from the presumptions, Cal. Probate Code § 21382, as are persons for whom an appropriate certificate of independent review by an attorney is executed. Cal. Probate Code § 21384.)

3) California law usually requires a will to be attested to by two subscribing witnesses. Where a subscribing witness also receives a devise under the will (other than in a purely fiduciary capacity), it is rebuttably presumed that such witness obtained the devise through duress, menace, fraud, or undue influence unless there are at least two other, disinterested, subscribing witnesses to the will. Cal. Probate Code § 6112(c).

4) Where a person with an interest in an instrument that makes a donative transfer physically signs the document on behalf of the transferor, such signature is presumed invalid unless the signer proves that the transferor intended to have the signer sign his or her name purely as a mechanical act on behalf of the transferor. *Estate of Stephens*, 28 Cal. 4th 665, 677-78, 122 Cal. Rptr. 2d 358, 367, 49 P.3d 1093, 1100-01 (2002).

5) Where the presumptions in the preceding paragraphs do not arise, a contestant may still allege and prove that the transfer was the product of undue influence. The contestant simply would not have the benefit of the presumption in such a case.

2. Transferee's participation in procuring document.

a. A challenged transferee was found to have participated in procuring the challenged document where the challenged transferee was present when the will was executed, the transferee gave the decedent pen, ink and paper, the decedent then wrote the will and immediately gave it to the challenged transferee, and the challenged transferee then took it to his own attorney (whom the decedent did not know). *Estate of Garibaldi*, 57 Cal. 2d 108, 113, 17 Cal. Rptr. 623, 626, 367 P.2d 39, 42 (1961).

b. But "'[T]he mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient "activity" to bring the presumption into play . . .; or selection of attorney and accompanying testator to his office . . .; or mere presence in the attorney's outer office; . . . or presence at the execution of the will . . .; or presence during the giving of instructions for the will and at its execution . . . .'" *Estate of Mann*, 184 Cal. App. 3d 593, 608, 229 Cal. Rptr. 225, 233 (1986).

c. It also is not inappropriate for a challenged transferee to have encouraged the transferor to make a testamentary document where the challenged transferee did not urge any particular disposition of the subject property. *See Estate of Mann*, 184 Cal. App. 3d 593, 608, 229 Cal. Rptr. 225, 233 (1986).

d. The fact that the challenged transferee took the transferor to the transferee's own attorney also is insufficient to establish that the transferee participated in procuring the document unless the choice to use that attorney was obtained by deception. *Estate of Beckley*, 233 Cal. App. 2d 341, 348, 43 Cal. Rptr. 649, 654 (1965); *Estate of Mann*, 184 Cal. App. 3d 593, 608, 229 Cal. Rptr. 225, 233 (1986).

3. Undue profit.

a. A will or codicil may give an undue benefit where "the will was unnatural." *Estate of Mann*, 184 Cal. App. 3d 593, 606, 229 Cal. Rptr. 225, 232 (1986).

b. Whether a benefit is undue or unnatural is usually a question of fact focused on the relationship between the transferor and the relevant parties, and circumstances that may be considered include dispositional provisions in prior versions of the estate plan, past expressions of the decedent's testamentary intentions, and the extent to which the relevant parties would benefit in the absence of the challenged document. *Estate of Sarabia*, 221 Cal. App. 3d 599, 607-08, 270 Cal. Rptr. 560, 564-65 (1990).

c. It is not unnatural to provide for "one who has had a particularly close relationship with, or cared for the testator, or is in comparatively greater need of financial assistance." *Estate of Mann*, 184 Cal. App. 3d 593, 607, 229 Cal. Rptr. 225, 232 (1986)

4. Absence of any of the foregoing factors needed to shift the burden of proof does not preclude a finding of undue influence. Such absence merely leaves the burden of proof with the claimant.

H. Mental state of the transferor

1. Undue influence does not require a showing that the transferor lacked capacity to make the challenged document, and undue influence may be found even if the transferor had no reduced capacity of any kind.

2. But the reality is that "in nearly every case where a will has been set aside as the result of undue influence . . . there has existed the element of a mind and will weak or for some reason impaired." *Estate of Anderson*, 185 Cal. 700, 708, 198 P. 407, 410 (1921).

3. The transferor's state of mind is often a relevant factor because a person in a weakened state of mind (which could be due to any number of factors, including some form of senility or dementia, physical or mental illness, medications, alcohol or drug use, loneliness, dependence on others for physical or financial care, death of a loved one, divorce, etc.) may be more susceptible to subversion of his or her free will. *See Estate of Yale*, 214 Cal. 115, 122, 4 P.2d 153, 156 (1931); *Estate of Anderson*, 185 Cal. 700, 707-08, 198 P. 407, 410 (1921).

I. Recent Developments

1. Effective January 1, 2014, California adopted some new statutes that provide further definition of what constitutes undue influence and which statutes "supplement" the common law.

2. Cal. Probate Code § 86 now states that "Undue influence" has the same meaning as in Cal. Welfare & Institutions Code § 15610.70 and that "the intent of the Legislature [is] that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law."

3. If the new statutes only supplement the common law without superseding or interfering with it, does this mean that the new statutes only explain what already was the common law and can therefore be used in any case (whether already pending or filed hereafter) in any state following the common law of undue influence?

4. Cal. Welfare & Institutions Code § 15610.70(a) defines "Undue influence" generally as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity." This sounds much like the common law.

    a. Section 15610.70(b) expressly provides that proof of an inequitable result is not alone enough to establish undue influence.

5. Cal. Welfare & Institutions Code § 15610.70(a)(1)-(4) go on to enumerate factors to be considered in determining whether there has been undue influence, "all [of which] shall be considered." They include:

    a. The victim's vulnerability, evidence of which may include "incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability."

    b. The influencer's apparent authority, evidence of which may include "status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification."

    c. The influencer's conduct, evidence of which may include "(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep; (B) Use of affection, intimidation, or coercion; (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes."

    d. The equity of challenged result, evidence of which may include "the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

6. Whether or not the foregoing is controlling in any particular estate planner's jurisdiction, there would not appear to be any harm in considering the above factors when considering whether drafting any particular document might run afoul of undue influence law, and someone litigating the validity of an estate plan could argue that these factors are all part of the overall circumstances that a court generally considers when deciding a claim of undue influence.

## IV. Fraud

A. Although evidence of fraudulent conduct may support a claim of undue influence (such as where the challenged beneficiary uses fraudulent misrepresentations to unduly influence the transferor to favor the challenged transferee over the contesting party), fraud may be a separate basis on which to void a testamentary document.

B. As with undue influence, fraud may be a basis on which to void an entire testamentary document or, alternatively, only that portion that was procured by fraud where such portion can be severed from the remainder. *Estate of Carson*, 184 Cal. 437, 441, 194 P. 5, 8 (1920).

C. Fraud is similar to undue influence. The key difference is that in fraud cases, transferors may have been acting of their own free will but were deceived into doing something they would not have done but for the fraudulent misrepresentations. *Estate of Newhall*, 190 Cal. 709, 718, 214 P. 231, 235, 28 A.L.R. 778 (1923).

D. Fraud also requires proof that the alleged fraudfeasor intended to deceive the transferor or intended to induce the transferor to execute the testamentary document. *Estate of Newhall*, 190 Cal. 709, 719, 214 P. 231, 235, 28 A.L.R. 778 (1923).

E. The contestant alleging fraud also must prove that such fraud was present when the testamentary document was executed, either by showing that the fraudulent conduct was engaged in at the time the document was made or that it was engaged in at some earlier time and that the transferor's belief in it persisted through the time the document was executed. *Estate of Newhall*, 190 Cal. 709, 722, 214 P. 231, 236, 28 A.L.R. 778 (1923).

V. Mistake

A. Mistake is not often asserted as a ground to void or reform a testamentary document, but there are a few instances where it is used.

B. For example, in a case where drafting errors in the relevant documents led to ambiguities in an estate plan, a court held that the equitable common law power of a court could be used to reform a trust agreement based on mistake but could not be used to create a new trust agreement. *Ike v. Doolittle*, 61 Cal. App. 4th 51, 85, 70 Cal. Rptr. 2d 887, 908-09 (1998).

C. But other authority holds that, if a will by mistake omits a devise that the testator intended to make, such omission cannot be cured under the mistake doctrine because to do so would be to make a new will, not to merely cure some ambiguity. *In re Page's Trusts*, 254 Cal. App. 2d 702, 719, 62 Cal. Rptr. 740, 752 (1967).

D. Where a transferor through mistake signs the wrong document or signs a document that differs materially from what he or she believed it to contain, such document may be set aside on the grounds of mistake. See generally 79 Am. Jur. 2d Wills §§ 415-20.

E. The long-time general rule, at least in California, was that a testamentary document that was unambiguous on its face could not be modified with extrinsic evidence even if the extrinsic evidence showed some mistake had been made in the unambiguous will. *See Estate of Duke*, 61 Cal. 4th 871, 875, 190 Cal. Rptr. 3d 295, 297, 352 P.3d 863, 865 (2015). This was an application of the rule that a court cannot make a new document that the decedent never made. But the California Supreme Court modified this rule in 2015 by holding that "an unambiguous will may be reformed if clear and convincing evidence establishes that the will contains a mistake in the expression of the testator's intent at the time the will was drafted and also establishes the testator's actual specific intent at the time the will was drafted." *Estate of Duke, id.*

VI. Effect Of Setting Aside A Testamentary Instrument

A. Under the doctrine of dependent relative revocation, where a testamentary document that revokes or supersedes prior documents is set aside as ineffective (including because of lack of capacity, undue influence, fraud, or mistake), it is presumed that the transferor intended the most recent effective document to continue in place unless and until superseded by another effective document,

and the most recent effective document is thus deemed to be the binding expression of the transferor's intent ("i.e., the revocation is not absolute, but is relative, and dependent upon the validity of" the subsequent document). *Estate of Anderson*, 56 Cal. App. 4th 235, 242-43, 65 Cal. Rptr. 2d 307, 312 (1997). In other words, if a decedent's testamentary document is set aside, then the most recent prior, valid testamentary document of that decedent comes back to life and becomes the operative document. If there is no prior, valid document, then the decedent's estate would pass by the rules of intestacy.