

**IN RE WILL OF McGILL**

**128 N.E. 194**

**Court of Appeals of New York**

**July 7, 1920**

CHASE, J.

Margaret McGill died July 5, 1918, at the age of eighty-two years, unmarried, and without leaving descendant, father, mother, brother, sister, nephew or niece her surviving. She left her surviving thirteen second cousins of the half blood, and four third cousins of the half blood the only persons interested as heirs at law or next of kin in her property, which real and personal, amounted to about \$ 25,000.

She executed a will on September 23, 1916, by which she gave and bequeathed to J. J. Karbry O'Kennedy, her friend and executor named therein, \$ 1,000, and gave, devised and bequeathed to Thomas A. Hart the rest and residue of her estate. She had previously and on July 9, 1909, executed a will by which she gave and bequeathed to said Hart and O'Kennedy each the sum of \$ 1,000 and small legacies to other persons including some of her second cousins, altogether aggregating \$ 13,500, and to said O'Kennedy, who was named as executor therein, the rest and residue of her estate. O'Kennedy is a lawyer and drew both of the wills for the testatrix. The residuary legatee named in the will of 1916 is a young man who had boarded with Miss McGill for twelve or thirteen years, commencing about the time he left a preparatory school for college and continuing until her death, except during the time when he was in college.

On June 30, 1918, Miss McGill became ill and died as stated, July 5, 1918. On July 2, 1918, Agnes Thompson, one of her second cousins, called on Miss McGill, and while she was there, Bessie, a maid in the house, told her that Miss McGill had made a will in favor of Hart. She went to her home but returned to and remained with Miss McGill until she died. On July 3, 1918, two days before the death of Miss McGill, she told Mrs. Thompson to write a note to O'Kennedy to destroy the will leaving everything to Hart. Mrs. Thompson wrote the note and Miss McGill signed it in the presence of Mrs. Thompson and the maid. The following is a copy of the note:

"July 3, 1918.

"Dr. O'Kennedy:

"Dear Friend. -- Please destroy the Will I made in favor of Thomas Hart.

"MARGARET McGILL."

On the back of the note are the signatures of Agnes Thompson and Bessie Gilmore. Each testified that they signed their names thereon at the request of Miss McGill and that they put their signatures on the back of the paper because there was not room for their signatures on the face of the paper.

Agnes Thompson testified that after signing the paper Miss McGill expressed her satisfaction by saying, "I am so glad that is done." Bessie Gilmore testified that Miss McGill said, "I feel so happy now. \* \* \* I have just done what I wanted to do, what I intended to do."

Miss McGill told Mrs. Thompson to deliver the paper to O'Kennedy. It was delivered to him on July fourth, at a hospital where he was a patient. When it was delivered to him, O'Kennedy said that the will was in his safe in his office. He was not discharged from the hospital nor was anything done by him in regard to the will before Miss McGill's death which occurred at three o'clock the next morning.

Every last will and testament of real or personal property, or both, shall be executed and attested as provided by statute. (Decedent Estate Law [Cons. Laws, ch. 13], § 21.) To revoke or cancel a written will, compliance must be had with the statute. (Decedent Estate Law, § 34.) Said section 34 is as follows: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses."

Concededly the will of September twenty-third was never burned, torn, canceled, obliterated or destroyed by Miss McGill or by any other person in her behalf and in her presence. At the time of the execution of the paper of July third the will was in a safe in the office of O'Kennedy and remained there until after her death. The question for our consideration resolves itself into the narrow one of determining whether the execution of the paper of July third was in and of itself an absolute and unqualified revocation of the will of 1916.

The words used by Miss McGill in the paper of July third are not ambiguous except perhaps as to whether she intended to limit the authority of O'Kennedy to a destruction of the will so far as it was "made in favor of Thomas Hart." The testimony relating to its execution and the statements made by her in connection therewith are not contradicted. Her intent in executing the paper, at least so far as such intent is now before us, must be determined by the court as a matter of law.

To revoke a will it is necessary not only that there should be an intent to revoke the will, but the intent must be consummated by some of the acts specified in the statute, or by the execution of an instrument "declaring such revocation." The difficulty with the appellant's position is that the paper writing does not itself declare the revocation. It does not declare an intention to revoke the will

except through its destruction, either wholly or so far as Hart is concerned, by O'Kennedy.

A revocation to be effective must be made pursuant to the statute. (Lovell v. Quitman, 88 N. Y. 377; Burnham v. Comfort, 108 N. Y. 535; Delafield v. Parish, 25 N. Y. 9; Matter of Evans, 113 App. Div. 373.) It is not within the legitimate power of the courts to dispense with the requirements of statute in the execution or revocation of wills and accept even a definite intention to perform the prescribed act in connection therewith or the act itself. (Hoitt v. Hoitt, 63 N. H. 475.)

It is held in Tynan v. Paschal (27 Texas, 286) that a letter of a decedent to his attorney in fact directing him to destroy his will does not operate ipso facto as an immediate revocation of it.

It is urged that Miss McGill intended that her will should be destroyed. That may be admitted. Such intention to destroy the will is not a revocation. Her words do not indicate an intention to revoke the will at once or apart from its revocation through a destruction of the will by O'Kennedy. It is further urged that a construction of the paper by which it is held that it does not in itself constitute a revocation is technical and illiberal. The statute relating to the revocation of a will is specific and unqualified. So is the statute regarding the execution of a will. Both are intended for literal compliance. The reason that exists for requiring that a will to be effective must be executed with certain formalities exists to an equal extent for requiring that an instrument revoking a will to be effective must be executed with like formalities. Formalities in the making and in the revocation of a will are necessary to prevent mistake, misapprehension and fraud. The interests of the people are best subserved by sustaining the statute quoted as it is written.

The ultimate intent of Miss McGill to revoke the will is not sufficient. To make her intent effective it would be necessary to find as a fact that she intended that the act of signing the paper was in itself a complete revocation of her will. Such a finding would not have any evidence to sustain it.

The order should be affirmed, with costs payable out of the estate.