

Oklahoma Law Review

Volume 59 | Number 1

2006

The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma

Julia E. Swenton

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Julia E. Swenton, *The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*, 59 OKLA. L. REV. 205 (2006), <https://digitalcommons.law.ou.edu/olr/vol59/iss1/7>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*

I. Introduction

*You can't always get what you want.
You can't always get what you want.
You can't always get what you want.
But if you try sometimes, you just might find, you get what you
need.*¹

As the Rolling Stones so aptly remind us, desires and reality will not always form a perfect match and intent alone cannot ensure a perfect outcome. This is particularly true when testators do not follow the necessary rules and their wills fail. Legal debates between form and function, spirit and letter, and strict constructionism and interpretivism illustrate this principle at work.² The law of decedents' estates is a ready example. Although the primary purpose of succession laws is realization of the decedent's intent,³ statutes interceded to thwart even the dearest goals of a would-be-testator turned intestate.⁴

Naturally, the purpose of these statutes, which set forth the requirements for a valid will, is not to convert the will-writing process into a game of connect-the-dots.⁵ The statutory requirements are generally straightforward,⁶ and as long as the testator is careful, she should succeed in meeting these requirements. Nonetheless, acts alone do not create a valid will.⁷ The testator

* I would like to thank Dean Katherine Guzman for her invaluable suggestions and guidance throughout the editing process. Additionally, I dedicate this article to my husband, Eric Swenton, and my parents, Marvin and Nancy Misak, for their unending love, support, and encouragement.

1. Rolling Stones, *You Can't Always Get What You Want*, on LET IT BLEED (London/Decca Records 1969).

2. See, e.g., Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994).

3. 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* § 1.6 (2003) [hereinafter PAGE].

4. See, e.g., IRVING J. SLOAN, *WILLS & TRUSTS* 16-30 (1992).

5. See *id.*

6. For example, a holographic will in Oklahoma has only three requirements. 84 OKLA. STAT. § 54 (2001). These requirements are that the document be entirely (1) written, (2) signed, and (3) dated by the testator. *Id.*

7. RESTATEMENT (THIRD) OF PROP.: *WILLS & OTHER DONATIVE TRANSFERS* § 3.1 cmt. b (1999).

must intend for the performance of the required acts to create a document that will have testamentary effect.⁸ Without both the requisite acts and testamentary intent, the attempted will fails.⁹

A valid revocation of a will demands the same “intent plus act” formula.¹⁰ Although a testator is free to revoke her will until death,¹¹ the testator must both fulfill certain statutorily prescribed acts and possess a revocatory intent; without both, no revocation occurs.¹² Only the coupling of intent and execution of the requisite act leads to a successful revocation.¹³

Even if the individual’s intent is clear regarding her desire to create or revoke a will, courts cannot circumvent the statutory requirements to realize those desires.¹⁴ Nevertheless, courts recognize that a formalistic approach can result in injustice when, despite the clearest evidence of the decedent’s intent, they are unable to carry out her desires.¹⁵ Thus, the judicial system does not always leave the testator without a remedy.¹⁶ A court’s solution, however, may often only provide the testator with the second best result.

Dependent relative revocation is the doctrine of second best. When a testator’s own mistakes prevent the probate court from realizing her desired result, the court might nonetheless be able to offer the testator what she needs. Judges designed the common law doctrine of dependent relative revocation to help courts attempt to fulfill a testator’s intent even though the testator failed to comply with the statutory requirements for revoking a will.¹⁷ The doctrine

8. *Id.*

9. *Id.*

10. *Id.* § 4.1 cmt. h (noting that if a testator abandons the intent to revoke before completing the requisite act, there is no revocation).

11. *Id.* § 4.1 cmt. a.

12. *Id.* § 4.1 cmt. h.

13. *Id.*

14. *See* Mann, *supra* note 2, at 1035-36.

15. *Id.*

16. George E. Palmer, *Dependent Relative Revocation and Its Relation to Relief for Mistake*, 69 MICH. L. REV. 989, 989 (1971).

17. A “widely accepted and frequently quoted definition” of dependent relative revocation appears in an A.L.R. annotation. *In re Kerckhof’s Estate*, 125 P.2d 284, 285 (Wash. 1942). This definition states that

[w]hen a will, or portions thereof, are canceled or mutilated in order to change the will in whole or in part, and the attempt fails for want of due authentication, or other cause, this effort to revoke in whole or in part will be treated as relative and dependent upon the efficacy of the new disposition intended to be substituted; and hence, if the attempted disposition is inoperative, the revocation fails also, and the original will remains in force.

W.S.R., Annotation, *Effect of Testator’s Attempted Physical Alteration of Will After Execution*, 62 A.L.R. 1367, 1401 (1929). After considering the A.L.R. definition of dependent relative revocation, the Washington Supreme Court observed that dependent relative revocation was the

provides a means to diminish the potentially harsh result of enforcing a testator's mistaken revocation.¹⁸ Under the doctrine of dependent relative revocation, if a testator based her revocation on a mistake of fact or law, a court must determine whether the testator would have preferred to lift the mistaken revocation or allow the property to pass through intestacy.¹⁹

The importance of intent, which reigns supreme in all of probate law,²⁰ maintains its hold in the arena of common law dependent relative revocation.²¹ Thus, a proper application of dependent relative revocation demands an inquiry into the testator's intent.²² By requiring the court to determine whether the testator would have preferred intestacy or removal of the mistaken revocation, the doctrine ensures that the court considers the testator's intent.

In title 84, section 103 of the Oklahoma Statutes, the Oklahoma legislature attempted to codify the common law doctrine of dependent relative revocation;²³ notably absent from this statute, however, is any consideration of testator intent.²⁴ Oklahoma's approach to the doctrine of dependent relative revocation is thus arguably improper. Without examining intent, the doctrine of dependent relative revocation becomes a formalistic rule in the same vein as the strict statutory requirements that necessitated its creation. The Oklahoma Supreme Court has not faced the issue of whether Oklahoma courts should consider testator intent despite its conspicuous absence from the text of the statute. If faced with this issue, the Oklahoma Supreme Court should apply the doctrine of dependent relative revocation properly by considering the testator's intent.

result of the judicial system's "desire to give effect to the intention of the testator." *Kerckhof's Estate*, 125 P.2d at 286.

18. Palmer, *supra* note 16, at 990.

19. See *In re Callahan's Estate*, 29 N.W.2d 352, 355 (1947).

20. See THOMAS E. ATKINSON, LAW OF WILLS 807 (1953) ("If possible, a will should be interpreted according to its terms viewed in the light of the general circumstances surrounding the testator in order to effectuate his intention.").

21. See Palmer, *supra* note 16, at 990.

22. See *Callahan's Estate*, 29 N.W.2d at 355 ("The doctrine of dependent relative revocation is based upon the testator's inferred intention.").

23. See 84 OKLA. STAT. § 103 (2001).

24. *Id.* Oklahoma's statute specifies that:

[a] revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition the testator attempts to revoke a provision of the will by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.

Id.

This note argues that Oklahoma must remedy the lack of testator intent found in title 84, section 103 by demonstrating that without an intent inquiry the statute creates a hyperformalistic rule that runs contrary to the very purpose of dependent relative revocation. One can best appreciate the failure of title 84, section 103 to protect testamentary freedom and intent after considering the pervasive role of intent in all of wills law and in the traditional construction of dependent relative revocation or, perhaps more appropriately, the “conditional intent” doctrine.²⁵ Part II explores that role before turning, in Part III, to precisely why the Oklahoma statute falls short of those goals. Finally, Part IV provides guidance to the Oklahoma courts and legislature for curing the omission of testator intent in title 84, section 103.

II. Background

A. Role of Wills in the Distribution of Estates

At death, property may be distributed in one of two ways.²⁶ The state’s intestacy scheme divides property according to the “inflexible statutory scheme of inheritance and distribution,”²⁷ where the legislature, not the decedent, governs the passage of property.²⁸ Although the aim of the legislature is generally to realize the intent of the decedent,²⁹ the scheme is fairly inflexible and does not allow for tailoring to meet the specific wishes of individuals.³⁰ Because a legislative body could never design a statute that comports with the wishes of every decedent, intestacy schemes only provide an estimate of the average decedent’s intent.

25. ATKINSON, *supra* note 20, at 453-54. According to Atkinson’s hornbook, dependent relative revocation “means, in substance, a conditional revocation.” *Id.* (reasoning that the doctrine is in reality conditional revocation because it is a “fictional process which consists of disregarding revocation brought about by mistake on the feigned ground that the revocation was conditional”).

26. 1 PAGE, *supra* note 3, § 1.1. One might argue that a third method of distribution exists in the form of will substitutes, which attempt to employ the benefits of wills while downplaying the disadvantages. *Id.* § 6.1. Examples of will substitutes include joint tenancies with right of survivorship, tenancies by the entirety, and joint bank accounts.

27. *Id.* § 1.1.

28. *Id.* In Oklahoma, for instance, the legislature’s intestacy scheme directs that the spouse will always receive a share of the decedent’s estate, limited only by the existence of a parent, sibling, or issue of the decedent. 84 OKLA. STAT. § 213.

29. 1 PAGE, *supra* note 3, § 1.1 (noting that “the legislatures of every state have established schemes of succession based upon their assumption as to the natural affections and probable wishes of the ordinary person, or majority of persons”).

30. *Id.* For instance, the Oklahoma succession statute makes no allowances for step-relatives or nonfamily friends. 84 OKLA. STAT. § 213.

The second means of distributing property is through a will, which allows courts to realize a decedent's exact intent.³¹ By creating a will, the decedent decides how the probate court will distribute her property at death.³² If an individual's desires form a perfect match with the statute of intestacy, then she achieves little by creating a will. Nonetheless, property owners often want to distribute their possessions in a manner that differs from the legislature's estimate of testator intent found in the statute of intestacy.³³ Individuals may accomplish this, with some limitation,³⁴ by a will executed in the manner prescribed by law.

There are many advantages to creating a will as opposed to relying on the state's intestacy scheme.³⁵ Individuals primarily write wills to control the distribution of their property at death.³⁶ A will is especially useful if the testator's family members are not equally situated financially and the testator desires to grant certain members more than others.³⁷ Furthermore, considerations such as loyalty may lead the testator to feel that certain family members, or even close friends, deserve a greater portion of the estate.³⁸ This tailoring of recipients, and the portion received by each, would not be possible if an individual died intestate. Another benefit flowing from the creation of a will is the ability to thwart some of the intrafamily arguments that usually accompany distribution of an estate through intestacy.³⁹ For instance, an estate will often hold an item of great sentimental value to family members.⁴⁰ By granting this item to a particular family member through her will, the decedent lessens the possibility of an intrafamily squabble over this item. Finally, monetary considerations, such as estate and inheritance taxes, will likely influence an individual's determination of whether to write a will.⁴¹

Although there are significant advantages to wills, the ability to create a will is by no means absolute.⁴² Most authority "holds that the power to make a will is in no sense a property right, or a so-called natural or inalienable right which

31. 1 PAGE, *supra* note 3, § 1.1.

32. *Id.*

33. *Id.*

34. *See* GEORGE W. THOMPSON, THE LAW OF WILLS § 14 (1916). Generally, a will may dispose of property in any way that "is not illegal, immoral, or against public policy." *Id.*

35. 1 PAGE, *supra* note 3, § 1.6.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* § 1.7.

no government can impair.”⁴³ Because the right to create a will is statutory,⁴⁴ rather than constitutional,⁴⁵ the legislature has the ability to completely revoke this right, or alter or abridge it as the legislature desires.⁴⁶

Although the arguments in favor of allowing testation are strong,⁴⁷ state legislatures must also consider the benefits of an unalterable statute of distribution.⁴⁸ An argument frequently advanced is that property exists for the living and, therefore, should be subject to only minimal control by the deceased.⁴⁹ This argument is commonly referred to as the restriction of “dead hand” control.⁵⁰ Taking advantage of the freedom to limit or completely disallow the right to create a will, many states now deny individuals complex testamentary freedom by restricting their wills in favor of such persons as children or spouses.⁵¹ Another frequently cited reason for limiting testation is that by the use of a singular, formalistic approach to the distribution of a decedent’s property, the judiciary would confront less complex distributions.⁵² In most instances, without a will to probate, the time and expense associated with the distribution of a decedent’s estate would decrease, leading to a more efficient judicial system.⁵³

Despite these arguments in favor of limiting testamentary freedom, every state provides for the creation of a will.⁵⁴ The recognition exists that even the

43. *Id.*

44. *Id.*

45. *Id.* § 3.1.

46. *Id.* § 1.7.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. For instance, an Oklahoma statute provides that:

[w]hen any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided.

84 OKLA. STAT. § 132 (2001). Thus, Oklahoma does not allow for a testator to unintentionally omit a child; however, a testator may disinherit a child if such intent is clear in the will. On the other hand, a testator may not “bequeath or devise away from [a spouse] so much of the estate . . . that the . . . spouse would receive less in value than would be obtained through succession by law” even when intent to disinherit the spouse is unambiguous. *Id.* § 44.

52. 1 PAGE, *supra* note 3, § 1.7.

53. See SLOAN, *supra* note 4, at 10.

54. See ALA. CODE § 43-8-130 (1991); ALASKA STAT. § 13.12.501 (2002); ARIZ. REV. STAT. ANN. § 14-2501 (1995); ARK. CODE ANN. § 28-25-101 (2004); CAL. PROB. CODE § 6100 (West 2004); COLO. REV. STAT. § 15-11-501 (2004); CONN. GEN. STAT. ANN. § 45a-250 (West 2002); DEL. CODE ANN. tit. 12, § 201 (2001); D.C. CODE ANN. § 18-102 (LexisNexis 2001); FLA. STAT. § 732.501 (2002); GA. CODE ANN. § 53-4-10 (1998); HAW. REV. STAT. § 560:2-501

most carefully drafted statute of intestacy could never conform to the desires of every decedent. By allowing testation,⁵⁵ states recognize the limits of intestacy and the important role of testamentary intent. Nonetheless, no state provides testamentary intent with free rein.⁵⁶

Every state establishes particular formalities for the creation of a valid will, and if testators do not meet these requirements, the attempted will fails.⁵⁷ Perfectly fulfilling every required act, however, is meaningless without testator intent.⁵⁸ The testator must intend for the performance of the required acts to create a testamentary document. Without this testamentary intent, the testator cannot create a valid will.⁵⁹

The conditional will exemplifies the importance of testator intent.⁶⁰ A conditional will is “one that is to take effect upon the happening or not of some event.”⁶¹ For example, a testator could state in the will that if she does not return from her camping trip, all her property should go to her best friend. The

(1993); IDAHO CODE ANN. § 15-2-501 (2001); 755 ILL. COMP. STAT. 5/4-1 (2000); IND. CODE § 29-1-5-1 (2000); IOWA CODE § 633.264 (1998); KAN. STAT. ANN. § 59-601 (1995); KY. REV. STAT. ANN. § 394.020 (Banks-Baldwin 1994); LA. CIV. CODE ANN. art. 1476 (1991); ME. REV. STAT. ANN. tit. 18-A, § 2-501 (1998); MD. CODE ANN., EST. & TRUSTS § 4-101 (West 2001); MASS. GEN. LAWS ANN. ch. 191, § 1 (West 1990); MICH. COMP. LAWS ANN. § 700.2501 (West 1999); MINN. STAT. § 524.2-501 (2004); MISS. CODE ANN. § 91-5-1 (2002); MO. ANN. STAT. § 474.310 (West 1995); MONT. CODE ANN. § 72-2-521 (2004); NEB. REV. STAT. § 30-2326 (2002); NEV. REV. STAT. 12.133.020 (1998); N.H. REV. STAT. ANN. § 551:1 (1999); N.J. STAT. ANN. § 3B:3-1 (West 2001); N.M. STAT. ANN. § 45-2-501 (West 1994); N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (Gould 2004); N.C. GEN. STAT. § 31-1 (2001); N.D. CENT. CODE § 30.1-08-01 (2002); OHIO REV. CODE ANN. § 2107.02 (West 2000); 84 OKLA. STAT. § 41; OR. REV. STAT. § 112.225 (1999); PA. STAT. ANN. tit. 20, § 2501 (West 1998); R.I. GEN. LAWS § 33-5-2 (1995); S.C. CODE ANN. § 62-2-501 (1998); S.D. CODIFIED LAWS § 29A-2-501 (2001); TENN. CODE ANN. § 32-1-102 (2004); TEX. PROB. CODE ANN. § 57 (Vernon 2000); UTAH CODE ANN. § 75-2-501 (2004); VT. STAT. ANN. tit. 14, § 1 (2003); VA. CODE ANN. § 64.1-46 (2003); WASH. REV. CODE ANN. § 11.12.010 (West 2004); W. VA. CODE § 41-1-1 (2001); WIS. STAT. ANN. § 853.01 (West 2003); WYO. STAT. ANN. § 2-6-101 (2001). Most states allow wills to take various forms. Oklahoma, for instance, recognizes three types of wills: nuncupative, self-executing, and holographic. 84 OKLA. STAT. §§ 46, 54-55.

55. See *supra* note 54.

56. For instance, all states require that the individual be of a competent age. See *supra* note 55. Generally that age is set at eighteen. *E.g.*, MO. ANN. STAT. § 474.310. Nonetheless, some states grant testamentary capacity at a younger age. *E.g.*, GA. CODE ANN. § 53-4-10 (granting every competent individual fourteen years of age or older the authority to make a will).

57. Aside from age requirements, states require that the will take a certain form; usually this requires that the will be signed by the testator and attested by witnesses. See, *e.g.*, MO. ANN. STAT. § 474.320.

58. See Palmer, *supra* note 16, at 989.

59. *Id.*

60. See THOMPSON, *supra* note 34, § 26.

61. *Id.*

key is to determine whether that language merely recites the inducement for creating the will or describes a condition that must occur for the will to function.⁶² This analysis turns on the testator's intent.⁶³ If a court finds that the testator intended for the will to only have effect if she did not return from the camping trip, it will deem the document a conditional will. Thus, unless the stated event occurs, the will has no effect.

The conditional will demonstrates the importance of testator intent to the creation of a valid will. Without performance of the requisite acts, however, even the clearest intent of the testator cannot save the attempted will.⁶⁴ Recognizing the harsh results even a small breach may cause if they require strict compliance with the statutory acts, the more forward thinking jurisdictions have developed saving doctrines that require less than absolute conformity with the statutory requirements.⁶⁵ For example, some jurisdictions have adopted a substantial compliance doctrine, which allows for the creation of a valid will with only "substantial compliance" with the required acts.⁶⁶ Still, to create a valid will, the testator must perform, at least to some extent, the requisite acts and have the intent to create a document with testamentary effect.⁶⁷

If the testator meets both requirements and therefore successfully creates a will, it is still "not . . . binding and has no legal force or operative effect until . . . death."⁶⁸ Because of this essential concept, the property specified in the will does not transfer until the death of the testator.⁶⁹ Thus, a testator may revoke her will at any point before death.⁷⁰ Should the testator become displeased with her will, she may revoke it and create a replacement or simply die intestate.⁷¹ As with the creation of wills, however, intent alone is not

62. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. s (1999).

63. *Id.*

64. See SLOAN, *supra* note 4, at 10.

65. See, e.g., 84 OKLA. STAT. 182 (2001). Oklahoma's substantial compliance doctrine states that a court may deem the formalities performed when "substantially, though not literally complied with." *Id.*

66. See *id.*

67. See SLOAN, *supra* note 4, at 10.

68. 1 PAGE, *supra* note 3, § 1.2.

69. *Id.*

70. *Id.*

71. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. h (1999). In Oklahoma, to create an attested will as a replacement the testator must (1) subscribe the document at the end (or by another in her presence and at her direction), (2) subscribe in the witnesses' presence or acknowledge the subscription, (3) declare that the document is her will, and (4) two witnesses must sign at the end in the testator's presence. 84 OKLA. STAT. § 55. There are fewer requirements for a holographic replacement will. To create

enough for revocation.⁷² The testator must demonstrate her revocatory intent by performing the requisite acts.⁷³ The methods available to revoke a will vary by state, but each method requires that the testator meet particular formalities.⁷⁴ Only the coupling of intent and execution of the requisite act leads to a successful revocation.⁷⁵

Recognizing the importance of fulfilling testator intent, courts generally dislike striking down a will or attempted revocation for failure to comply with formalities when the testator's intent is clear.⁷⁶ Thus, courts attempt to realize the decedent's wishes to the greatest extent possible. When mistakes of the testator prevent the court from allowing a perfect match between intent and reality, however, courts will strive for as close of a match as possible.⁷⁷

B. History of the Common Law Doctrine of Dependent Relative Revocation

The role of a probate court is to carry out the wishes of the testator. One method devised by the court system to effectuate the wishes of a testator is the common law doctrine of dependent relative revocation.⁷⁸ With dependent relative revocation, even when courts cannot provide the testator with her truest desires, they may nevertheless avoid the potentially severe results of failure to comport with formalities by realizing the testator's second best choice.⁷⁹

The doctrine of dependent relative revocation is essentially the doctrine of the Rolling Stones.⁸⁰ When the court cannot grant the testator exactly what she wants, it attempts to give the testator the second best result.⁸¹ Dependent relative revocation applies when the testator has revoked the entire will, or a portion of it, based on a mistaken belief of law or fact.⁸² If such a mistaken revocation occurs, the court must then determine whether the testator would

a holographic will, the testator must create a document "entirely written, dated and signed by the hand of the testator himself" while present in Oklahoma. *Id.* § 54.

72. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. h.

73. See SLOAN, *supra* note 4, at 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See Palmer, *supra* note 16, at 990.

79. *Id.*

80. ROLLING STONES, *supra* note 1 ("You can't always get what you want. But if you try sometimes, you just might find, you get what you need.").

81. *Id.*

82. Palmer, *supra* note 16, at 991.

have preferred to lift the revocation and distribute the property according to the mistakenly revoked will or allow the property to pass through intestacy.⁸³

Faced with a conditional will,⁸⁴ a court would likely have no difficulty finding that the testator's actions created a conditional revocation. With a conditional revocation, invalidating the second will means that the testator never actually revoked the first will.⁸⁵ The revocation would occur only if the express condition is fulfilled.⁸⁶ If the condition is not met, the revocation never occurred because the testator did not have the requisite revocatory intent.⁸⁷

Occasionally, a testator expressly conditions the revocation of a will on the occurrence of a specified event, in which case no significant difficulty arises in finding the revocation incomplete.⁸⁸ The revocation is effective only if the express condition occurs.⁸⁹ Much more common, however, is the unexpressed condition.⁹⁰ When applying dependent relative revocation, the court gives effect to the same, albeit unwritten, "conditional intent." By examining the testator's intent, the court must determine whether, although not express, the revocation was conditional in the mind of the testator on a mistaken belief of fact or law.⁹¹ Thus, dependent relative revocation is not the reinstatement of a will or clause that has already been revoked, but instead is a determination that, because of an unmet condition, the testator never revoked the will in the first place.⁹² Dependent relative revocation allows courts to correct testators' mistaken assumptions regarding the revocation of a will or one of its provisions.⁹³ The doctrine of dependent relative revocation most commonly applies in three distinct situations.⁹⁴

83. *Id.*

84. For an example of a conditional will, consider the circumstance of Mick Jagger. Mick, having written an initial valid will, writes a second, invalid will. Mick writes on the second will: "My revocation of Will #1, both through this will as a subsequent instrument, and through the physical act I am about to commit on Will #1, are both conditioned on my belief that this second will is valid."

85. ATKINSON, *supra* note 20, at 452.

86. *Id.*

87. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.3 cmt. a (1999).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Joseph W. deFuria Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation* 40 CATH. U. L. REV. 1, 23-24 (1990).

94. *Id.*

The first situation in which dependent relative revocation applies occurs only in antirevival jurisdictions.⁹⁵ In antirevival jurisdictions, the revocation of a subsequent will cannot result in the reinstatement of a previous will despite the testator's intent to revive the initial will.⁹⁶ Dependent relative revocation might apply if a testator executes an initial, valid will but revokes that will by making a different testamentary disposition through a second, valid will.⁹⁷ If the testator thereafter totally revokes the second will, under the mistaken belief that this will revive the initial will, the testator based the revocation of her second will on a mistake of law.⁹⁸ Thus, the court could employ dependent relative revocation to best effectuate the testator's intent. Although the court cannot probate the initial will in an antirevival jurisdiction, the court can consider whether the testator would have preferred to lift the mistaken revocation of the second will or allow the property to pass through intestacy.⁹⁹

Dependent relative revocation also potentially applies in a second total revocation situation. Under this scenario, a testator executes an initial, valid will but then creates a second, invalid will.¹⁰⁰ If the testator then revokes the initial will because of the testator's belief that the second will is valid, the revocation is based on a mistaken belief.¹⁰¹ As is the case in dependent relative revocation circumstances, the court cannot give the testator her best wish by recognizing the invalid second will.¹⁰² Nonetheless, the court can attempt to fulfill the testator's second best choice by determining whether she would have preferred to lift the mistaken revocation of the initial will or to have the property pass through intestacy.¹⁰³

Finally, dependent relative revocation also applies in a partial revocation scenario. In this third situation, the testator executes an initial, valid will; thereafter, the testator elects to alter a particular clause by marking it out and inserting an unsigned, undated handwritten notation.¹⁰⁴ As with the other two dependent relative revocation examples, the court must determine whether the testator would have preferred to have the mistaken revocation of the initial

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Palmer, *supra* note 16, at 995.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* For example, the testator could revoke a valid clause (“\$10,000 to Keith Richards”) by the physical act of marking through the clause and handwriting above it: “\$50,000 to Keith Richards.”

clause lifted or to have the property pass through the residuary clause,¹⁰⁵ if one exists, or through intestacy.¹⁰⁶

Testator intent permeates the common law version of dependent relative revocation.¹⁰⁷ The common law version of dependent relative revocation was “based upon the testator’s inferred intention”¹⁰⁸ and established to realize this inferred intent despite the testator’s failure to meet certain formalities.¹⁰⁹ When the testator’s own failure to meet the necessary formalities bars the fulfillment of the testator’s intent, “the doctrine of dependent relative revocation helps courts to nevertheless give effect to the intent of a testator.”¹¹⁰ Testator intent is therefore a required element of dependent relative revocation analysis because the court must determine whether the testator would have preferred to have the initial will admitted to probate rather than having her property distributed through the laws of intestacy or a residuary clause.¹¹¹ Without considering testator intent, the doctrine of dependent relative revocation does not function correctly. As summarized by the Supreme Court of Georgia, the doctrine of dependent relative revocation is “a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator.”¹¹²

When asked to apply the common law version of the doctrine of dependent relative revocation, courts across the United States have recognized the importance of considering testator intent. For instance, in the case of *In re Olmsted’s Estate*,¹¹³ a California court held that whether to apply the common law version of dependent relative revocation should depend primarily on the presumed intent of the testator.¹¹⁴ The Supreme Court of Georgia agreed with the importance placed on testator intent, stating in *McIntyre v. McIntyre*¹¹⁵ that the common law doctrine of dependent relative revocation “has grown up as

105. “Generally speaking, a residuary clause disposes of all the testator’s estate for which there has not been some previous disposition.” *In re Estate of Derifield*, 624 N.E.2d 361, 363 (Ohio Ct. App. 1993).

106. Intestacy is defined as “[t]he state or condition of a person’s having died without a valid will.” BLACK’S LAW DICTIONARY 840 (8th ed. 2004).

107. *In re Kerckhof’s Estate*, 125 P.2d 284, 285-86 (Wash. 1942).

108. *In re Callahan’s Estate*, 29 N.W.2d 352, 355 (Wis. 1947).

109. Jonathan M. Holda, Recent Decision, 58 MD. L. REV. 841, 844 (1999).

110. *Id.* (footnote omitted).

111. *Id.*

112. *Carter v. First United Methodist Church of Albany*, 271 S.E.2d 493, 496 (Ga. 1980) (quoting *McIntyre v. McIntyre* 47 S.E. 501, 503 (Ga. 1904)).

113. 54 P. 745 (Cal. 1898).

114. *Id.* at 746.

115. 47 S.E. 501.

a result of an effort which courts always make to arrive at the real intention of the testator.”¹¹⁶

III. Oklahoma's Adoption of Dependent Relative Revocation

Oklahoma adopted a statute that replaced the common law version of dependent relative revocation with an inflexible, legal rule. The state's earliest version of the doctrine of dependent relative revocation did not change at statehood¹¹⁷ and remains unchanged today.¹¹⁸ Oklahoma's legislature attempted to codify one aspect of the common law doctrine of dependent relative revocation in title 84, section 103, which reads as follows:

A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition the testator attempts to revoke a provision of the will by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.¹¹⁹

Title 84, section 103 does not replace the common law version of dependent relative revocation for circumstances of a mistaken total revocation. Thus, the common law doctrine of dependent relative revocation still controls the mistaken revocation of an entire will. The statute only applies when a “testator attempts to revoke *a provision* of the will.”¹²⁰ Therefore, the statute's key consequence is the replacement of the common law version of dependent relative revocation for the partial revocation scenario, in which the testator revokes only a clause of her will and interlineates an unsigned, undated change. The statute states that the court should lift the partial revocation automatically, without considering the testator's intent.¹²¹

Thus, Oklahoma's statute of dependent relative revocation fails to consider testator intent,¹²² the defining characteristic of the common law doctrine of dependent relative revocation.¹²³ Despite the long history of the statute, the Oklahoma Supreme Court has not yet addressed whether courts should impute testator intent into the statute. Nonetheless, the Oklahoma Supreme Court has confirmed that the legislature only codified the doctrine as it applies to the

116. *Id.* at 503 (finding that “[t]he matter finally turns upon the intention of the testator”).

117. OKLA. COMP. LAWS § 8910 (1909).

118. 84 OKLA. STAT. § 103 (2001).

119. *Id.*

120. *Id.* (emphasis added).

121. *Id.*

122. *See id.*

123. *See* Palmer, *supra* note 16, at 999.

revocation of a provision of a will and not where the testator intended to revoke the entire will.¹²⁴

Under the common law version of dependent relative revocation, the testator's intent controls.¹²⁵ The Oklahoma Supreme Court established this approach in *Hood v. Ausley (In re Estate of Ausley)*.¹²⁶ In *Ausley*, a testator attempted to revoke his will by writing "void" across the pages and marking out the signatures.¹²⁷ Afterward, he retained an attorney to draft a new will.¹²⁸ By the time the testator contacted the attorney, however, he was ill and unsure of the exact testamentary changes he wanted the attorney to make to his will.¹²⁹ The testator died before the execution of the second will.¹³⁰ The decedent's brother, who the decedent named in the initial will as beneficiary and executor, submitted the initial will for probate.¹³¹ Thereafter, relatives of the decedent challenged the admission of the will.¹³²

The trial court ruled that the testator had revoked the will submitted for probate and, therefore, the statute of intestacy governed.¹³³ The appellate court reversed, determining that title 84, section 103 controlled, and, thus, the effectiveness of revocation was conditional on execution of a new will.¹³⁴ "[B]ecause the new deposition was not legally effected," the revocation was inoperative.¹³⁵

The Oklahoma Supreme Court reversed the court of appeals,¹³⁶ finding that the court of appeals "indicated a belief the second clause of [title 84, section] 103 was a codification of the common law doctrine of dependent relative revocation," and that "[t]his is only partly correct."¹³⁷ The court explained that title 84, section 103 only applies when the testator revokes a provision of a will, not when the testator revokes the entire will.¹³⁸ Because the common law approach to dependent relative revocation applied to both partial and total

124. *Hood v. Ausley (In re Estate of Ausley)*, 1991 OK 105, ¶ 22, 818 P.2d 1226, 1231.

125. *Id.* ¶ 26, 818 P.2d at 1232; *Estate of DeWald v. Whittenburg*, 1996 OK CIV APP 114, ¶ 2, 925 P.2d 903, 904.

126. *Ausley*, 1991 OK 105, 818 P.2d 1226. *Ausley* is the most recent Oklahoma Supreme Court discussion of title 84, section 103.

127. *Id.* ¶ 25, 818 P.2d at 1232.

128. *Id.* ¶ 20, 818 P.2d at 1230.

129. *Id.* ¶ 19, 818 P.2d at 1230.

130. *Id.*

131. *Id.* ¶ 22, 818 P.2d at 1231.

132. *Id.*

133. *Id.* ¶ 1, 818 P.2d at 1227.

134. *Id.* ¶ 2, 818 P.2d at 1227.

135. *Id.*

136. *Id.* ¶ 30, 818 P.2d at 1233.

137. *Id.* ¶ 22, 818 P.2d at 1231.

138. *Id.*

revocation, the court stated that the common law version of the doctrine should continue to apply to total revocation.¹³⁹

After determining that the common law version of dependent relative revocation should control, the court was then free to consider the critical element of testator intent.¹⁴⁰ The court relied upon presumed testator intent to determine whether the estate should pass according to the previous will or the statute of intestacy.¹⁴¹ After reviewing the evidence, the court concluded that because “the evidence as to the probable intent of decedent as to whether the revocation was intended to be complete and absolute [was] conflicting,”¹⁴² the trial court’s decision not to apply the doctrine of dependent relative revocation was not “against the weight of the evidence.”¹⁴³ The court determined that the testator did not condition the revocation of the initial will on the execution of a second will.¹⁴⁴ Therefore, the Supreme Court reinstated the initial decision of the trial court.¹⁴⁵

In 1996, five years after the *Ausley* decision, the Oklahoma Court of Civil Appeals reaffirmed the importance of testator intent under the common law doctrine of dependent relative revocation. In *Estate of DeWald v. Whittenburg*,¹⁴⁶ the testator completely revoked his first will and executed a second will.¹⁴⁷ Nine years after executing the second will, the testator named his friend as the primary beneficiary and executor of the will by interlineations, replacing the previous beneficiary and executor.¹⁴⁸ After the previous beneficiary contested the second will,¹⁴⁹ the trial court declared it invalid.¹⁵⁰ Upon review, the court of appeals held that because the testator totally revoked, rather than partially revoked, the first will, title 84, section 103 did not control.¹⁵¹ Again the Oklahoma courts recognized that title 84, section 103 only applies to partial revocations.¹⁵²

Given that the testator totally revoked his first will, the *DeWald* court determined that the common law approach to the doctrine of dependent

139. *Id.* ¶ 22, 818 P.2d at 1231-32.

140. *Id.* ¶ 23, 818 P.2d at 1232.

141. *Id.*

142. *Id.* ¶ 28, 818 P.2d at 1233.

143. *Id.*

144. *Id.* ¶ 29, 818 P.2d at 1233.

145. *Id.* ¶ 30, 818 P.2d at 1233.

146. 1996 OK CIV APP 114, 925 P.2d 903.

147. *Id.* ¶ 2, 925 P.2d at 904.

148. *Id.* ¶ 4, 925 P.2d at 904.

149. *Id.* ¶ 5, 925 P.2d at 904.

150. *Id.* ¶ 6, 925 P.2d at 904.

151. *Id.* ¶ 16, 925 P.2d at 906.

152. *Id.*

relative revocation controlled.¹⁵³ The appellate court recognized the importance of considering the testator's intent for a proper dependent relative revocation analysis by stating, "[w]hether a will revocation should be negated under the doctrine is a question of fact, and if the doctrine is so applied, it will not be done arbitrarily, but only after a review of the record to determine the intention of the testator."¹⁵⁴ Examining the record, the court found substantial evidence that rebutted any presumption that the decedent would have preferred that the recipient under the first will take the entire estate rather than have the estate distributed through intestacy.¹⁵⁵ Therefore, the court of appeals held, after considering the intent of the testator, that the testator would rather have died intestate than have the first will control.¹⁵⁶

IV. Potential Problems Resulting from Title 84, Section 103 and Suggested Solutions

A. Problems Arising from Section 103

The Oklahoma legislature's replacement of the common law approach to dependent relative revocation with a rigid, formalistic rule causes significant problems. Oklahoma's approach to dependent relative revocation, codified in title 84, section 103, devalues testator intent, stands in contrast to other Oklahoma statutes, and institutes an unnecessarily formalistic approach to dependent relative revocation analysis.

The most significant problem with title 84, section 103 is the absence of testator intent. Failure to consider the intent of the testator runs contrary to the main goal of probate courts — realization of testator intent¹⁵⁷ — and leads to an inappropriate dependent relative revocation analysis. Without an inquiry into the testator's intent, courts cannot correctly apply dependent relative revocation. A correct application of dependent relative revocation requires the court to first determine whether a mistaken revocation occurred.¹⁵⁸ If such a mistaken revocation occurred, the court must then determine whether to apply dependent relative revocation and lift the mistaken revocation.¹⁵⁹ To make this decision, the court determines whether the testator would have preferred to lift the mistaken revocation or to have the property pass through intestacy.¹⁶⁰

153. *Id.*

154. *Id.* ¶ 19, 925 P.2d at 906.

155. *Id.* ¶ 20, 925 P.2d at 906.

156. *Id.*

157. *See* Palmer, *supra* note 16, at 990.

158. *Id.*

159. *Id.*

160. *Id.*

Without an intent inquiry, title 84, section 103 does not represent a true dependent relative revocation analysis because the pivotal decision of what the testator would have preferred — removal of the mistaken revocation or intestacy — is absent. Thus, by enacting title 84, section 103, the Oklahoma legislature has directed the court to use an incomplete and incorrect approach to dependent relative revocation.

The overriding principle of probate courts is to give effect to the testator's intent.¹⁶¹ There are numerous policy reasons behind effectuating testamentary intent to the greatest extent possible.¹⁶² For example, ignoring the testator's intent during probate greatly reduces the benefits of electing to execute a will rather than allowing the estate to pass through intestate succession. If the decedent had wanted the intestacy scheme to control the distribution of her property, she would not have wasted the time and expense associated with creating a will.¹⁶³ Given the burdens associated with creating a will, the majority of testators most likely execute a will because the controlling intestacy statutes do not result in their desired distribution of property. If the court system frequently ignores the testator's intent, the public will doubt that any real benefit exists in creating a will because the court system allows formalistic rules to thwart a testator's intent, even when that intent is clear. The ability to control the distribution of one's property, and all the associated benefits, is the most obvious benefit of creating a will. If courts do not recognize a testator's clear intent whenever possible, the public will lose the strongest motivator for will creation.

Title 84, section 103's lack of testator intent not only conflicts with the overarching purpose of wills law in general, it also conflicts with other Oklahoma statutes and case law. For example, one Oklahoma statute specifically recognizes the importance of testator intent.¹⁶⁴ In title 84, section 151 of the Oklahoma Statutes, the legislature specifically directs probate courts to effectuate the intent of the testator whenever possible.¹⁶⁵ This section states that "[a] will is to be construed according to the intention of the testator. Where [a testator's] intention cannot have effect to its full extent, it must have

161. *Id.*

162. *Id.* at 990-91.

163. *See* Estate of Cleveland, 22 Cal. Rptr. 2d 590, 599 (Dist. Ct. App. 1993) (finding that individuals may be forced into the time and expense of drafting a will if they are not content with the intestacy scheme's nonrecognition of stepchildren as heirs); *see also* MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 205 (1970) (finding that a significant number of individuals engage in the time and expense of writing a will because they are not satisfied with the intestacy scheme).

164. *See* 84 OKLA. STAT. § 151 (2001).

165. *Id.*

effect as far as possible.”¹⁶⁶ The legislature further emphasized that courts should effectuate testator intent by describing what courts may consider when attempting to ascertain the testator’s intent.¹⁶⁷ In cases of uncertainty, the court should determine testator intent “from the words of the will, taking into view the circumstances under which it was made, exclusive of the testator’s oral declarations.”¹⁶⁸ Therefore, the Oklahoma legislature itself has recognized the importance of testator intent and has expressly held that courts should respect such intent whenever possible.

Oklahoma case law also recognizes the importance of testator intent. As previously discussed, in both *Ausley* and *DeWald*, Oklahoma courts clearly acknowledged the importance of testator intent in the context of dependent relative revocation.¹⁶⁹ Oklahoma courts, however, also recognize the importance of testator intent as an overarching principle of probate law. In *In re Estate of Worsham*,¹⁷⁰ the Oklahoma Court of Civil Appeals noted that testamentary intent is the guiding principle for a probate court.¹⁷¹ Thus, a court’s failure to consider testator intent stands in stark contrast to the guiding principle of testator intent for succession of property in Oklahoma, according to both statute and case law.

Title 84, section 103 replaced the common law doctrine of dependent relative revocation with an unnecessarily harsh, formalistic rule. Although potential benefits from the use of formalistic rules exist, these benefits do not outweigh the burdens, especially in the context of wills law. Some supporters argue that using formalistic rules advances the goal of judicial efficiency¹⁷² because using formal, statutory requirements for creation of a valid will assists the judiciary by channeling the “vast array of testamentary things . . . into a form that is readily recognizable as a will.”¹⁷³ When the judiciary demands strict compliance with the statutory rules, however, the principle of freedom of testation is lost, and the replacement is “harsh and relentless formalism.”¹⁷⁴

166. *Id.*

167. *Id.* § 152.

168. *Id.*

169. See *Hood v. Ausley (In re Estate of Ausley)*, 1991 OK 105, ¶ 26, 818 P.2d 1226, 1232; *Estate of DeWald v. Whittenburg*, 1996 OK CIV APP 114, ¶ 14, 925 P.2d 903, 906.

170. 1993 OK CIV APP 122, 859 P.2d 1134.

171. *Id.* ¶ 7, 859 P.2d at 1136 (finding that “[i]n interpreting a will the intention of the testator is paramount”).

172. Mann, *supra* note 2, at 1036.

173. *Id.*

174. *Id.* at 1037 (quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975)).

Dependent relative revocation developed as a means of realizing the testator's intent despite an absence of formalities.¹⁷⁵ When states demand strict compliance with statutory formalities to create a valid will, courts are unable to realize the testator's intent even when they ruefully acknowledge the existence of the clearest evidence of the testator's true intent.¹⁷⁶ Thus, dependent relative revocation allowed the courts to offer the testator her second best option when her truest desires were thwarted by unmet statutory requirements.¹⁷⁷ By replacing the common law version of dependent relative revocation with a formalistic rule in which the partial revocation is always lifted, Oklahoma has turned the solution for strict, formalistic rules into a strict, formalistic rule itself. Thus, although Oklahoma's formalistic rule that a testator's attempted partial revocation is never valid unless its replacement is legally effective allows for a faster and cheaper probate, the high cost of incorrect dependent relative revocation analysis and loss of consideration of testator intent is unacceptable.

B. Suggestions for the Oklahoma Judiciary

Even though Oklahoma's dependent relative revocation statute¹⁷⁸ fails to consider testator intent, the court system must consider intent or the application of the doctrine will become a hyperformalistic rule that is of no more benefit to the testator than the rules that necessitated its creation. In both *Ausley* and *DeWald*, Oklahoma courts recognized that testator intent is an indispensable element of the common law doctrine of dependent relative revocation.¹⁷⁹ The courts' continued application of the common law version of dependent relative revocation for total revocation, rather than adopting the approach in title 84, section 103, indicates that Oklahoma courts recognize the difficulties that can arise from failing to consider the testator's intent.

The Oklahoma judiciary therefore faces the difficult task of adhering to the statute while maintaining fidelity to the main function of a probate court. A probate court should always attempt to fulfill the testator's intentions, and a proper dependent relative revocation analysis would consider testator intent.¹⁸⁰ Nonetheless, the Oklahoma court system should respect the obvious preference of the legislature for lifting a partial revocation without considering testator

175. See, e.g., L.S. Tellier, *Effect of Testator's Attempted Physical Alteration of Will After Execution*, 24 A.L.R.2d § 4 (Supp. 1996).

176. Mann, *supra* note 2, at 1036.

177. Palmer, *supra* note 16, at 989-91.

178. See 84 OKLA. STAT. § 103 (2001).

179. Hood v. Ausley (*In re Estate of Ausley*), 1991 OK 105, ¶ 26, 818 P.2d 1226, 1232; Estate of DeWald v. Whittenburg, 1996 OK CIV APP 114, ¶ 14, 925 P.2d 903, 906.

180. See Palmer, *supra* note 16, at 990.

intent.¹⁸¹ Thus, Oklahoma courts must strike a balance between these two competing interests.

The best resolution to this tension rests in adopting a presumption that courts should lift a mistaken partial revocation. By starting with the presumption that they should lift the revocation, courts would comport with the obvious preference of the statute. The presumption would not, however, foreclose the consideration of testator intent; therefore, a proper dependent relative revocation analysis, including a determination of testator preference, would still be possible.

The approach that a partial revocation is only presumptively ineffective, not automatically ineffective, follows the approach recommended by the American Law Institute (ALI).¹⁸² As stated by ALI, the use of a presumption preserves the important element of testator intent and the revocation will stand despite the presumption if “the outcome of allowing the revocation to remain in effect comes closer to the testator’s failed dispositive objective.”¹⁸³ Under this approach, the Oklahoma courts would presume that the mistaken revocation should be lifted. The presumption could be rebutted by a demonstration that allowing the revocation to stand was more in line with the testator’s intent.¹⁸⁴ Thus, the use of a presumption in favor of lifting the revocation strikes the necessary balance between the Oklahoma statute and the role of a probate court.

C. Suggestions for the Oklahoma Legislature

Alternatively, the Oklahoma legislature could rewrite the statute to represent a true version of dependent relative revocation. Ideally, the statute would set forth the common law approach, in which testator intent is the determining factor for whether courts apply dependent relative revocation to lift a mistaken revocation.¹⁸⁵ Such a statute would require the courts to consider two distinct elements. First, the court would determine whether the testator based her revocation on a mistake of fact or law.¹⁸⁶ If so, the courts would then ask whether the testator would have preferred for the revocation to stand and, thus, have the property pass through the residuary clause, if one

181. 84 OKLA. STAT. § 103.

182. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.3 (1999).

183. *Id.* § 4.3 cmt. a.

184. *Id.* § 4.3.

185. See Palmer, *supra* note 16, at 989-90.

186. *Id.*

exists, or intestacy, or whether the testator would have preferred to lift the mistaken revocation.¹⁸⁷

If the legislature believes that a presumption for or against the application of dependent relative revocation is necessary for smooth probate procedures, then the Oklahoma legislature could model the statute after the example provided by the ALI.¹⁸⁸ If the legislature rewrites the statute to include a presumption that the revocation should be lifted, the legislature will be able to state its preference for the application of dependent relative revocation. Nonetheless, the legislature should write the statute so a complete bar would not exist to consideration of testator intent. The legislature should explicitly state that the presumption is rebuttable upon a demonstration that allowing the revocation to stand more closely reflects the testator's intent than lifting the mistaken revocation.¹⁸⁹ This approach allows for the legislature to set forth its preference. By allowing testator intent to function as the only trump on the presumption in favor of lifting the mistaken revocation, a proper dependent relative revocation analysis would still be possible.

Furthermore, the legislature should eliminate the distinction between partial and total revocation that currently exists in the statute.¹⁹⁰ A correct dependent relative revocation approach applies equally to both partial and total mistaken revocations.¹⁹¹ Fortunately, the present version of title 84, section 103 does not thwart a correct dependent relative revocation analysis for a total revocation.¹⁹² Nonetheless, if the legislature revises the statute to represent a proper approach, the distinction will be unwarranted and unnecessary.

V. Conclusion

As the Rolling Stones warn,¹⁹³ desires and realities do not always match. Unfortunately, Oklahoma's dependent relative revocation statute only exaggerates the disparity. Oklahoma's statute has converted the intent-based doctrine of dependent relative revocation into the type of hyperformalistic doctrine it was designed to remedy. As it stands now, this statute works as a formalistic rule that prevents an appropriate dependent relative revocation analysis. Thus, the Oklahoma legislature should reform title 84, section 103. The Oklahoma judiciary should continue to approach dependent relative

187. *Id.*

188. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.3.

189. *See id.*

190. *See* 84 OKLA. STAT. § 103 (2001).

191. *See* Palmer, *supra* note 16, at 990.

192. 84 OKLA. STAT. § 103.

193. ROLLING STONES, *supra* note 1.

revocation analysis properly by considering testator intent until the Oklahoma legislature redrafts the statute to comport with other areas of wills law and the common law approach to dependent relative revocation. In this way, dependent relative revocation can continue to help those testators who “can’t always get what [they] want” to nonetheless “get what [they] need.”¹⁹⁴

Julia E. Swenton

194. *Id.*