CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

IN THE COURT OF PROBATE

IN THE ESTATE OF HUGH PALMER MACKINLAY, of Bedford, in the County of Halifax, Province of Nova Scotia, Deceased.

1993, January 25th, Bateman, Judge of Probate:-

This is a proof of will in solemn form. Certain facts are agreed by the parties.

Hugh Palmer MacKinlay died on April 14, 1992. He signed his Will on December 8, 1989; made a first Codicil signed on March 26, 1992 and a second Codicil dated April 4, 1992. All instruments were executed in conformity with the **Wills Act**, R.S. 1989, c.505 and Mr. MacKinlay was competent. On April 3, 1992, Mr. MacKinlay married Lulu Ellen Borden.

By operation of law the marriage revokes the will and codicil pre-dating it. The only issue is whether the subsequent codicil revives the will.

The Court's role is to determine the intention of the testator as expressed in the testamentary instrument, in this case the second codicil.

The **Wills Act** provides in s.21 that no codicil revives a will unless "showing an intention to revive the same".

The Will had initially provided for a split of the residue of the estate among Mr. MacKinlay's four children along with some specific bequests. The first codicil replaced Mr. MacKinlay's son as executor, substituting Lulu Borden. In addition, it included Ms. Borden, equally, in the division of the residue. The second codicil bequeathed Mr. MacKinlay's three motor vehicles to his two sons and "my wife Lulu", individually. It provided a cash bequest of $1500 to Mr. MacKinlay's daughter, Carrie. The vehicles had not been specifically bequeathed in the previous instruments.

The law is far from clear as to what evidence of intention in a codicil is sufficient to revive a will. It has been generally held that the intention to revive must appear on the face of the codicil.

The simplest statement of the test appears in **Theobald on Wills**, 12th edition, 1963 at page 63:

> "When a will is revived by codicil, the intention to revive it must appear on the face of the codicil either by express words referring to a revoked will and implying an intention to revive it or by a disposition of the testator's property inconsistent with any other intention or by some expression showing with reasonable certainty the existence of the intention in question."

There are a number of cases dealing with revival in the context of a codicil which, in apparent error, refers to the first of two prior wills, which will has been revoked by the second in time. (see **In the Goods of Steele** (1868) 1 P&D 575; **MacDonnell v. Purcell** (1894) 23 S.C.R. 101; Re Debaie's Will (1977), 22 N.S.R. (2d) 326) I do not find these cases helpfull in this matter. Mr. MacKinlay had only one will. The clarity of intention necessary to revive a will in the face of apparent ambiguity as to which will the testator wishes to revive differs, in my view, from that required where only one prior will exists.

What is unclear is whether "intention to revive" means the testator's intention that the prior Will continue to operate or a specific intention to revive. The latter requires knowledge that the will has been revoked while the former does not. It would seem reasonable that some distinction be made, in terms of the clarity of intention required, between the situation in which the testator has clearly and conciously taken the step to revoke his will (in which event he will most certainly know of its revocation) and that where the will has been revoked by operation of law. In this latter circumstance the testator may or may not be aware of the status of the will. Where the testator has actively revoked his will, the statement of intention to revive must be explicit to ensure that the testator's intention is given effect. "Intention to revive" must be determined in the context of the objective

circumstances, in this case, a revocation by operation of law. In my view, therefore, unlike the situation in many of the cases considering revival, there is not, here, the clear prior intention to revoke.

Of most assistance is **In The Estate of Davis, [1952] 1 All E.R. 509.** Willmer J. says at p.509:

> "If I am not to infer that, in preparing this document and having it executed in the form of a codicil, the testator intended to revive his will, what other intention can possibly be imputed to him?"

Admittedly, in **Davis** there was extrinsic evidence of the codicil being in an envelope containing the words "The herein named Ethel Pheboe Horsley is now my lawful wedded wife". That evidence does not, in my view, distinguish **Davis** from the case under consideration.

The fact of Mr. MacKinlay drawing the second codicil must itself be treated as some evidence of intention. Mr MacKinlay refers to the final instrument as "the second codicil to" my last will and testament "dated Dec.8, 1989", there being only one prior Will. He refers to Ms.Borden as "my wife Lulu" as distinct from his reference to her in the first codicil as "Lulu (Betty) Ellen Borden". He makes only limited bequests and those not inconsistent with his will as altered by the first codicil. The only possible intention I can infer is that Mr.MacKinlay intended that his prior

Will continue to govern the disposition of his property. This is consistent, as well, with the presumption against intestacy.

I find no ambiguity. In such circumstances I am satisfied that it is not necessary or appropriate to hear extrinsic evidence of intention as gathered from the circumstances surrounding the execution of the codicil.

I find that the codicil executed on April 5, 1992 revives the Will of December 8, 1989 and the first codicil dated March 26, 1992.

Taxed solicitor/client costs together with disbursements of the parties shall be paid from the estate.

Nancy Bellamy

A Judge of Probate