Circuit Court for Montgomery County
Sitting as the Orphans' Court
Case No. W91223

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1166

September Term, 2018

MEVLUD KIKNADZE

v.

DENIS ELIS

Graeff,
Leahy,
Battaglia, Lynne, A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Leahy, J.

Filed: August 24, 2020

A valid will may be revoked during the testator's lifetime in several ways under Md. Code, Estates & Trusts ("ET") § 4-105(1) & (2) (1974, 2017 Repl. Vol.)[1], including by "provision in a subsequent, validly executed will" and by "burning, cancelling, tearing, or obliterating the will, by the testator, or by some other person in the testator's presence and by the testator's express direction and consent[.]" In this appeal we are asked to decide whether a writing executed with the same formality as a will and purporting to revoke a valid will, but not otherwise making a disposition of the testator's property, satisfies ET § 4-105.

Nadya Elis died on March 15, 2017, leaving behind two wills executed in 1998 and 2002. According to the appellant, Melvud Kiknadze, who was Ms. Elis's husband, Ms. Elis also left a revocation document that purportedly revoked both wills. On June 12, 2018, the Circuit Court for Montgomery County, sitting as the orphans' court, admitted Ms. Elis's 2002 will to probate. That will that left her entire estate to her adult son, Denis Elis, appellee. The will also named Mr. Elis personal representative of her estate ("the Estate"). Mr. Kiknadze asserts that this was error because the will was revoked in 2016. We hold that the orphans' court did not err by ruling that the 2016 revocation failed to meet the requisites of ET § 4-105, and that, therefore, the 2002 will was not revoked.

[1] In 2019 the Maryland General Assembly made non-substantive amendments to ET § 4-105. This was the first time the statute was amended since 1986. Unless otherwise noted, we refer to the 1986 version of the statute as republished in the 2017 Replacement Volume.

BACKGROUND

The 1998 Will

On November 6, 1998, Ms. Elis, who then was married to Malcolm Houston, executed the "Last Will and Testament of Nadya Houston" ("the 1998 Will"). She devised her entire estate to Mr. Elis and appointed him to serve as personal representative of her estate. She also specified that it was her intention that Mr. Houston would not receive any portion of her estate. **[E. 17]**

The 2002 Will

A little over two years later, on December 4, 2002, Ms. Elis executed the "Last Will and Testament of Nadya V. Elis" ("2002 Will"). In the preamble, she expressly revoked all prior "Wills, Codicils and testamentary dispositions by me at anytime heretofore made." Thus, the 2002 Will revoked the 1998 Will in compliance with ET § 4-105(1). The 2002 Will did not differ substantively from the 1998 Will, but it changed her name to "Nadya V. Elis" and included several other stylistic changes.[2]

The Revocation Document

Fourteen years later, on December 30, 2016, Ms. Elis executed a document titled "**REVOCATION OF WILL**" stating:

> I, Nadya V. Elis, do hereby expressly and unconditionally revoke, terminate, abrogate, nullify, tear apart, destroy, and declare completely null

[2] We take judicial notice of the fact that Mr. Houston was granted an absolute divorce from Ms. Elis in the Circuit Court for Montgomery County, Case No. 11158FL, a little over three months after the 2002 Will was executed.

> and void *any and all wills, codicils, and bequests made by me prior to the date hereof*, including, without limitation, every will made by me on November 6, 1998, and every will unto which I subscribed my name on November 6, 1998.

(Bolded emphasis in title in original; italicized emphasis added). The revocation document was signed by Ms. Elis, notarized, and witnessed by two attorneys, including the attorney representing Kiknadze in this appeal.

On some unknown date, Ms. Elis also struck out each page of the 1998 Will; handwrote "Revoked" on each page; and signed each page "N. Elis."[3]

Orphans' Court Proceedings

Three months after executing the revocation document, Ms. Elis died. On May 10, 2017, Mr. Kiknadze, through counsel, filed a petition for administrative probate with the Register of Wills for Montgomery County ("Register of Wills"). In his petition, he averred that Ms. Elis died intestate and requested that he be appointed personal representative of the Estate. He listed himself and Mr. Elis as the interested parties. He did not reference or file with the Register of Wills the 1998 Will, the 2002 Will, or the revocation document.

The next day, letters of administration were granted to Mr. Kiknadze as personal representative of an intestate estate. On July 5, 2017, Mr. Elis hand-delivered the 2002 Will to the Register of Wills. He averred that he had "retrieved [the 2002 Will] from

[3] Ms. Elis signed each page "Nadya Houston" when she executed the 1998 Will.

[Ms. Elis's] safe, which [he] had access to." Simultaneously, Mr. Elis filed a petition to admit the 2002 Will to judicial probate and for him to be named personal representative. He averred that he had retrieved the 2002 Will from Ms. Elis's safe with "a key given to me by my mother."

On November 2, 2017, Mr. Elis filed a Petition to Caveat. As pertinent, he alleged that, acting upon Mr. Kiknadze's petition for administrative probate, the Register of Wills had "admitted to probate" the revocation document.[4] He further alleged that the revocation document and a "related property Deed, dated January 13, 2017 ("the 2017 Deed")"[5] were not valid because Ms. Elis lacked testamentary capacity when she executed the documents; because the writings were procured by undue influence, fraud, or under duress; and/or that the writings were "not properly executed or recorded due to an immutable conflict of interest by the attorney drafting the documents." He asked the orphans' court to rule that the revocation document and the 2017 Deed were invalid, to admit the 2002 Will to probate, and to appoint him as special administrator of the Estate.

Mr. Kiknadze answered the petition to caveat on January 11, 2018, denying most of the allegations. On January 25, 2018, the orphans' court scheduled a two-day hearing on the petition to caveat for June 12 and June 13, 2018. Four months later, on May 24,

[4] The record does not so reflect.

[5] By Deed dated January 13, 2017, Ms. Elis conveyed her condominium unit to herself and Mr. Kiknadze as tenants by the entirety. Consequently, the condominium passed outside the estate to Mr. Kiknadze upon the death of his wife.

2018, Mr. Kiknadze filed the revocation document and the 1998 Will with the Register of Wills.

The Orphans' Court Hearing

On June 12, 2018, the orphans' court held a hearing on the Petition to Caveat at which both parties appeared with counsel. At the outset of the hearing, the court asked Mr. Kiknadze's attorney to explain how the revocation document complied with ET § 4-105. In the court's view, the 2002 Will had effectively revoked the 1998 Will, but the revocation document, which specifically mentioned the 1998 Will but not the 2002 Will, did not satisfy ET § 4-105. The court emphasized that ET § 4-105(2) required the testator to perform a physical act to burn, destroy, or cancel the prior will and that the 2002 Will was in evidence and was not obliterated or stricken out in any way.

Counsel for Mr. Kiknadze asked to see the court file, explaining that he was never served with a copy of the 2002 Will and was unaware of its existence.[6] The orphans' court made a copy of the 2002 Will for counsel and took a recess to permit him to review it.

[6] The record, however, shows that simultaneous with the hand-delivery of the 2002 Will to the Register of Wills, Mr. Elis filed his petition for administration and requested judicial probate. Consequently, the orphans' court issued a "Notice of Judicial Probate" "of the will dated 12/4/2002" and scheduled a hearing for December 1, 2017. A copy of that notice was mailed to Mr. Kiknadze and his attorney on August 15, 2017. That hearing was cancelled after Mr. Elis filed his Petition to Caveat.

When the court reconvened, counsel for Mr. Kiknadze requested a continuance.[7] He questioned the origin of the 2002 Will because the signatures appeared different from those on the 1998 Will and explained that he wished to speak to the witnesses to "figure out how this whole thing came about."

The court then asked counsel about the 2017 Deed, which had transferred Ms. Elis's condominium unit to Mr. Kiknadze and herself as tenants by the entirety. Counsel for Mr. Kiknadze explained that the condominium unit was not part of the Estate because title vested with Mr. Kiknadze immediately upon Ms. Elis's death. The court agreed but noted that if Mr. Elis were appointed personal representative of the Estate under the 2002 Will, he could pursue an action on behalf of the Estate to void the *inter vivos* transfer and, if successful, the condominium unit would become part of the Estate. The orphans' court expressed concern about continuing the case considering the controversy over the 2017 Deed and the possibility that Mr. Kiknadze could sell the condominium unit in the interim.

Counsel for Mr. Elis pointed out for "additional context" that Ms. Elis was represented by independent counsel at the time she drew up the 2002 Will but was represented by Mr. Kiknadze's attorney when she signed the revocation document. He further explained that both Mr. Kiknadze's attorney, Mr. Chernov, and the attorney who signed as a witness had "worked adverse to Ms. Elis['s] . . . interest" in a domestic

[7] Mr. Elis's attorney initially had requested a continuance as well but withdrew his request during the hearing.

violence proceeding that Ms. Elis brought against Mr. Kiknadze as well as a divorce proceeding that she initiated but later withdrew.

At that juncture, the orphans' court ruled that, having been presented with no evidence that the 2002 Will was not authentic, it would admit it to probate and name Mr. Elis personal representative of the Estate.

Mr. Chernov, interjected that, by the express language of the revocation document, Ms. Elis had evinced her intent to "destroy[], tear[] apart and completely declar[e] null and void any and all wills, codicils, and requests made prior to December 30, 2016." He suggested that perhaps Ms. Elis could not locate the 2002 Will when she executed the revocation document and, though under those circumstances she could not have destroyed it, she effectively "terminate[ed] the will . . . by cancellation" consistent with ET § 4-105(2).

The orphans' court disagreed that the revocation document was "sufficient under [s]ection 4-105" to revoke the 2002 Will and reiterated its ruling that the 2002 Will would be admitted to probate. The court issued an order that same day stating that the revocation document was not effective to revoke the 1998 Will or the 2002 Will; that the Petition to Caveat was moot; that the 2002 Will was admitted to probate; that Mr. Kiknadze was removed as special administrator of the Estate; and that Mr. Elis was appointed as personal representative in his place.

Mr. Kiknadze timely appealed and asks this Court to consider whether the 1998 and 2002 wills were properly revoked.[8]

DISCUSSION

Standard of Review

> Pursuant to Maryland Rule 8–131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. "It will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]" "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party[.]" "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous."

Friedman v. Hannan, 412 Md. 328, 335–36 (2010) (internal citations omitted). The trial court's conclusions of law, however, receive no deference, and will be reviewed de novo. *Id.* at 336.

Parties' Contentions

Mr. Kiknadze contends that the orphans' court erred as a matter of law by admitting the 2002 Will to probate because it was revoked in two alternative ways by the revocation document. First, he asserts that it was "cancelled" by the revocation document pursuant to ET § 4-105(2). Alternatively, he argues that the revocation

[8] On July 31, 2018, Mr. Elis, on behalf of the Estate, filed an action to set aside the 2017 Deed in the Circuit Court for Montgomery County. The case was tried to the court over two days in January 2019 and, at the close of all the evidence, the court granted judgment in favor of Mr. Kiknadze. Mr. Elis noted an appeal to this Court, but his appeal was dismissed on July 26, 2019 for failure to order transcripts in compliance with Rule 8-411.

document "is a will in its own right" because it meets the requirements for a valid will set forth at ET § 4-102, meaning that the 2002 Will was revoked "[b]y provision in a subsequent, validly executed will" pursuant to ET § 4-105(1). He asks this Court to reverse the orphans' court order admitting the 2002 Will to probate and to remand the matter for further proceedings.

Mr. Elis responds that because the revocation document did not make any testamentary dispositions, it is not a will. He maintains that the orphans' court correctly ruled that the revocation document was ineffective as a matter of law to revoke the 2002 Will because it did not expressly reference it and because Ms. Elis took no further action to physically destroy the 2002 Will or to void its terms.

Revocation by Will

We examine, first, Mr. Kiknadze's alternative argument that the revocation document "is a will in its own right" and, therefore, the 2002 Will was revoked "[b]y provision in a subsequent, validly executed will" pursuant to ET § 4-105(1). The controlling statute provides, in pertinent part: [9]

[9] The statute also provides that revocation occurs by operation of law in two circumstances, neither of which are implicated in the instant case. First, if the testator marries after executing a will *and* gives birth to, adopts, or legitimates a child thereafter, then any wills predating the marriage are revoked *if* the child or any descendant of the child survives the testator. ET § 4-105(3). Second, if the testator divorces or has his or her marriage annulled after executing a will, any provision in the will relating to the former spouse is revoked unless the will expressly provides otherwise. ET § 4-105(4).

> A will, or any part of it, may not be revoked in a manner other than as provided in this section.
>
> (1) By provision in a subsequent, validly executed will which (i) revokes any prior will or part of it either expressly or by necessary implication, or (ii) expressly republishes an earlier will that had been revoked by an intermediate will but is still in existence;
>
> (2) By burning, cancelling, tearing, or obliterating the same, by the testator himself, or by some other person in his presence and by his express direction and consent;

ET § 4-105.

The Estates and Trusts Article of the Maryland Code defines the term "Will" as "a written instrument which is executed in the form prescribed by §§ 4-102 through 4-104 . . . and has not been revoked in a manner provided by § 4-105[.]" ET § 1-101(w)(1). The statute requires that a will be "(1) In writing; (2) Signed by the testator, or by some other person for the testator, in the testator's presence and by the testator's express direction; and (3) Attested and signed by two or more credible witnesses in the presence of the testator." ET § 4-102. Sections 4-103 and 4-104 pertain to holographic wills made by active duty military serving outside of the country and wills made outside of the state.

Our research reveals no Maryland cases that address whether an instrument executed with the same formality required of a will that merely revokes a prior will may operate as a will in its own right. Nevertheless, "[i]t is the universally accepted law that in order to be considered a will, codicil or testamentary paper, the paper must be a disposition of one's property, to take effect only after death." *Dietrich v. Morgan*, 179 Md. 553, 558 (1941); *see also Carney v. Kosko*, 229 Md. 112, 117 (1962) ("a will or a

codicil need not be in any particular form, so long as it (a) makes a disposition of the testator's property, and (b) such disposition is to take effect *only upon death*.") (emphasis added) (citations omitted)).

Applying the foregoing principles, we conclude that the revocation document was not a will. First, the revocation document did not make any disposition of Ms. Elis's property; it merely attempted to revoke a previously executed will that disposed of Ms. Elis's entire estate. Second, it was intended to take effect immediately, not upon Ms. Elis's death. Finally, both the title and the body of the instrument express that it was not Ms. Elis's intent to create a new will, but to revoke her prior wills. Consequently, we hold that the revocation document did not operate to revoke the 2002 Will "[b]y provision in a subsequent, validly executed will" pursuant to ET § 4-105(1).

Revocation by Cancellation

A valid will may also be revoked, under ET § 4-105(2), by "burning, cancelling, tearing, or obliterating the will[.]" Recognizing that Ms. Elis did not burn, tear, or obliterate the 2002 Will, Kiknadze contends that the revocation document "cancelled" it. Because we conclude that the term "cancelling," as used in ET § 4-105(2), contemplates a physical act performed on the will, we shall hold that the revocation document was not effective to cancel the 2002 Will.

We are guided by the following well-established canons of statutory construction:

> [T]his Court's principal goal is to determine the legislative intent underlying the relevant statutes. "We begin our analysis by looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered

> surplusage, superfluous, meaningless or nugatory." In some instances, a reviewing court will be able to discern the legislative intent from the clear and unambiguous statutory language; nevertheless, "[o]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language." The key extrinsic source for purposes of confirming the legislative intent is often the legislative history of the pertinent statutes. ("But even when the language is unambiguous, it is useful to review legislative history of the statute to confirm that interpretation and to eliminate another version of legislative intent alleged to be latent in the language.").

Shealer v. Straka, 459 Md. 68, 84 (2018) (internal citations omitted).

We begin with the plain meaning of the word "cancelling." Black's Law Dictionary *(Black's)* provides two definitions for "cancel": "1. To destroy a written instrument by defacing or obliterating it" and "2. To terminate a promise, obligation, or right[.]" *Black's* 255 (11th ed. 2019). Significantly, the example given for the first definition is "she canceled her will by marking through it." *Id*. The term "cancelling" appears within the phrase "burning, cancelling, tearing, or obliterating." ET § 4-105(2). Burning, tearing, and obliterating all require a physical act of destruction performed on the will. None of those methods may be performed by a separate writing. In this context, "cancelling" reasonably is construed consistent with the primary definition of "cancel" to mean a defacement or physical striking out of the terms of a will.

This construction also is consistent with the history of ET § 4-105. As pertinent to our analysis, the precursor to ET § 4-105(1) & (2) was adopted in 1884, providing:

> No will in writing devising lands, tenements or hereditaments, or bequeathing any goods, chattels or personal property of any kind, as heretofore described nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same, by the

> testator himself or in his presence, and by his direction and consent; but all devises and bequests so made shall remain and continue in force until the same be destroyed by burning, cancelling, tearing or obliterating the same by the testator or by his direction, in manner aforesaid, unless the same be altered by some other will or codicil in writing or other writing of the devisor signed as hereinbefore said in the presence of two or more witnesses declaring the same[.]

1884 Md. Laws, Ch. 293. The statute remained in that form through various recodifications, until 1964. *See* Art. 93, Ch. 311, Laws of 1888; Art. 93, Ch. 318, Laws of 1904; Md. Code, Art. 93, § 348 (1951); Md. Code, Art. 93 § 351 (1957).

The statute was revised and reorganized between 1964 and 1969,[10] when the legislature renumbered it Art. 93, § 4-105; divided it into subsections; merged language pertaining to revocation arising from the birth or adoption of a child that had appeared in another section previously; added new language pertaining to revocation arising from divorce; deleted the "or other writing language"; and made other stylistic changes.[11] 1969 Md. Laws, ch. 3 § 1. As pertinent, subsections (a) and (b) provided:

> No will, or any part thereof, shall be revoked otherwise than as provided herein:
>
> (a) By provision in a subsequent, validly executed will which (1) revokes such prior will or part thereof either expressly or by necessary implication,

[10] In *Nichols v. Suiter*, 435 Md. 324, 346 (2013), Judge Battaglia explained in her dissent that Maryland revised its testamentary laws on a parallel track to the Uniform Probate Code ("UPC"). Maryland did not adopt the UPC provisions pertaining to revocation of wills, but, as will be discussed, the pertinent provisions are not dissimilar.

[11] The Revisor's Note to Md. Code, Art. 93 § 4-105 (1957, 1969 Repl. Vol.), provides that the revisions were adopted "without change of substance[.]"

> or (2) expressly republishes an earlier will that had been revoked by an intermediate will but is still in existence.
>
> (b) By burning, cancelling, tearing, or obliterating the same, by the testator himself, or by some other person in his presence and by his express direction and consent[.]

Md. Code, Art. 93 § 4-105 (1957, 1969 Repl. Vol.). Five years later, Art. 93 was repealed and reenacted as the ET Article and Art. 93, § 4-105 became ET § 4-105. 1974 Md. Laws, ch. 11.

From this history, we distill the following. First, in its original form, Art. 93, § 311 permitted revocation of a will by provision in a subsequent will, codicil, or "other writing declaring the same ***or*** by burning, cancelling, tearing or obliterating the same[.]" (Emphasis added). By separating the first clause, permitting revocation by writings, from the latter clause, permitting revocation by "burning, cancelling, tearing or obliterating[,]" with the disjunctive "or[,]" the Legislature drew a clear distinction between a revocation by a subsequent writing and a revocatory act performed on a will.[12]

[12] The UPC revocation provision is consistent with this construction. UPC § 2-507 (1969, 2010 Rev.), entitled "Revocation by Writing or by Act," provides at subsection (a):

> (a) A will or any part thereof is revoked:
>
> (1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
>
> (2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious

(Continued…)

Further, the phrase "burning, cancelling, tearing, or obliterating" appears twice in Art. 93, § 311. The second time it is preceded by "destroyed by[.]" This is further evidence that "cancelling" within that phrase was used to mean a destruction of the will, not a mere termination of a will by a subsequent written instrument.

The Court of Appeals also has used the term cancellation interchangeably with obliteration and other forms of destruction of a will. In *Kroll v. Nehmer*, 348 Md. 616 (1998), a testator died in 1994 leaving four wills executed in 1980, 1985, 1990, and 1994. *Id*. at 617. The 1980 will had been altered and the parties agreed it was invalid. *Id*. at 617-618. The 1985 will was drafted by an attorney and "made a complete disposition of [the testator's] estate," leaving her personal property to be split between five individuals; leaving a bank account to a sixth individual; and leaving her stocks and her residuary estate to several charities. *Id*. at 621-22. Her brother (and the appellant) was not named as a beneficiary of the 1985 will. *Id.* at 621.

The 1990 will and the 1994 will that followed both were ineffective because they lacked witness signatures. *Id*. at 618. The 1990 will was handwritten, contained "margin notes[,]" was amended by interlineation, and contained no residuary clause. *Id*. at 622.

(…continued)

> presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will," whether or not the burn, tear, or cancellation touched any of the words on the will.

In it, the testator bequeathed property to individuals identified only by their first names. *Id*. More significantly, however, at the time the testator drew up the 1990 will, "she wrote on the back of her 1985 will 'VOID – NEW WILL DRAWN UP 6-28-90.'" *Id*. at 618. The sole issue on appeal was whether the 1985 will was effectively revoked, meaning that the testator died intestate. *Id.* If so, the testator's brother, who was her closest surviving relative, would inherit. *Id.*

The Orphans' Court for Baltimore County admitted the 1985 will to probate over the brother's objections. *Id*. The brother appealed that ruling to the Circuit Court for Baltimore County. *Id*. After a "brief evidentiary hearing," the circuit court affirmed, ruling that "'the revocation of the April 12, 1985 Will was so related to the making of the June 28, 1990 Will as to be dependent on it.'" *Id*. at 624. Thus, the circuit court concluded that because the 1990 will was invalid, the 1985 will should be given effect despite its apparent revocation. *Id*. On appeal from that ruling, the Court of Appeals granted *certiorari* on its own initiative before consideration by this Court and reversed. *Id*. at 618.

The Court explained that ET § 4-105 permitted "a will to be revoked by 'cancelling . . . the same, by the testator himself . . . .'" *Id*. (Ellipses in original.) The parties agreed that it was "clear" that by writing "VOID – NEW WILL DRAWN UP 6-28-90" on the back of the 1985 will and then retaining the 1985 will "among her papers," the testator "intended to revoke that will" and "effectively" did so. *Id.* at 618-19. The 1985 will only could be valid if it was saved by "the doctrine of dependent relative

revocation," which had been applied by other states "'to invalidate the revocation of a will where it is shown that the revocation was conditioned on the occurrence of certain facts which never came to pass or upon the existence or nonexistence of circumstances which were either absent or present contrary to the condition.'" *Id*. at 619 (quoting 2 William J. Bowe & Douglas H. Parker, *Page on the Law of Wills* § 21.57 at 446 (rev. ed. 1960)). Ultimately, for reasons not relevant to our analysis, the Court declined to apply the doctrine to save the 1985 will. *Id.* at 628.

The *Kroll* decision included a discussion of *Safe Deposit & Trust Co. v. Thom*, 117 Md. 154 (1912). There, after a testator died, a will was found among her private papers in an envelope addressed to her lawyer. *Id.* at 156. The will made a devise of $10,000 to four of the testator's children, a devise to her fifth child to be held in trust, and, after certain other bequests, directed that the residuary of her estate be held in trust for the benefit of her five children, with quarterly payments to be made to them. *Id*. at 157-58. The will had been altered, however, in that it appeared that "the names of the four children . . . in the first item ha[d] been rubbed and that some of the letters making up these names ha[d] been relined or retraced with a lead pencil." *Id*. at 159-60.

The evidence showed that two years after making that will, the testator contacted her lawyer and asked him to mail her the original of the will, which he did. *Id*. at 159. Thereafter, she told her lawyer that she wished to amend her will to give four of her

children one-fifth of her estate absolutely, rather than in trust.[13] *Id*. at 160. In keeping with that intention, she informed her lawyer that she had "rubbed out [the first item] in her will" making specific monetary devises to her children. *Id*. at 161. Her lawyer advised that she should not attempt to rub out the provisions of the will. *Id*. The testator died before her lawyer could draft a new will for her. *Id*. at 160-61.

The Court of Appeals explained that if a "will was in the custody of the testator and upon his death is found among his private papers, *cancelled or obliterated*, it is presumed that it was so *cancelled or obliterated* by the testator, and that he did it *animo revocandi*," *i.e*., with the intent to revoke. *Id*. at 162 (emphasis added) (citation omitted). This presumption rested upon the proposition that if a "will was in the custody of a testator and is found canceled, etc., . . . there is no other way to account for its condition." *Id*. at 163. The Court of Appeals discussed cases holding that though "the parts canceled need not be entirely erased or rendered illegible," the "cancellation must be such as to clearly indicate an intention to revoke." *Id*. In one such case, a testator "urged by sudden impulse of passion against one of the devisees, undertook to cancel his will by tearing, and, after tearing it twice through, was persuaded . . . to desist" and put the pieces of the will back together. *Id*. at 164 (citing *Doe v. Perbes*, 3 B. & Ald. 489 (106 Eng. Rep. Full Reprint, 740)). On those facts, it was held that the will was unrevoked. *Id*. Relying

[13] The fifth child's share still would be held in trust, however, because he was mentally incompetent. *Safe Deposit & Trust Co. v. Thom*, 117 Md. 154, 160 (1912).

upon these cases and others, the *Thom* Court held that the testator's incomplete "rubbing" of the names of her children in the first item of her will was too equivocal to give rise to a presumption of revocation and reversed. *Id*. at 166-69.

Returning to the issue before us, we take special note that in both *Kroll* and *Thom*, the Court of Appeals presumed that the "cancelling" of the terms of a will amounted, at the very least, to marking up the original will. Further, in *Thom*, the Court made clear that the application of a presumption of revocation turned upon the *physical* condition of the will, coupled with evidence that it had remained in the custody of the testator. These cases support our construction of the term "canceling" in ET § 4-105 as meaning a marking, physical destruction or obliteration of the terms of a will. In the case at bar, Ms. Elis did not mark up the 2002 Will in any manner. This is in stark contrast to her actions with respect to the 1998 Will, upon which she wrote "Revoked" and lined through each page. Having taken no action to mark, destroy or obliterate the terms of the 2002 Will, we hold that it was not cancelled pursuant ET § 4-105(2).

Revocation Outside Maryland

We find appellate decisions of our sister states instructive in examining Mr. Kiknadze's alternative arguments. *In re Estate of Martinez*, 985 P.2d 1230 (N.M. Ct. App. 1999), a testator executed a will leaving certain property to two of his children. *Id.* at 1231. Eleven years later, he executed a document titled "Revokation [sic] of Last Will and Testament" that merely revoked the prior will but made no disposition of his property. *Id.* After the testator's death, a trial court ruled that his will had been revoked

and, thus, that he had died intestate. *Id*. On appeal from that ruling, the New Mexico Court of Appeals, its intermediate appellate court, reversed. New Mexico had adopted the Uniform Probate Code ("UPC") revocation provision, which, as noted, permits a will to be revoked: 1) "'by executing a subsequent will that revokes the previous will or part expressly or by inconsistency'" or 2) "'by performing a revocatory act *on the* will . . . includ[ing] burning, tearing or canceling'" the will, "'whether or not the burn, tear, or cancellation touches any of the words on the will.'" *Id*. at 1232 (quoting N.M. Stat. Ann. § 45-2-507 (1993) (emphasis in *Martinez*)). There was no dispute that the decedent had not performed a revocatory act on the prior will. The only argument advanced on appeal was that the "Revokation [sic] of Last Will and Testament" was not a new will and did not effectively revoke the prior will. *Id.* at 1231. The appellate court agreed with that proposition, holding that the instrument purporting to revoke the will was "not testamentary in nature" because it "would have taken effect immediately, not after the death of the decedent." *Id*. at 1232.

The Supreme Court of New Mexico reached a similar result in *Gushwa v. Hunt*, 197 P.3d 1 (N.M. 2008). There, a testator executed a will leaving his separate property to his wife, in trust for her support, and, upon her death, to his nieces and nephews. *Id*. at 2. He gave the will to a family member for safekeeping. *Id*. Soon after, he apparently decided to revoke his will. *Id*. There was a dispute as to whether the testator requested that the family member return the original will to him, but ultimately, the family member sent the testator photocopies of certain pages of the will. *Id*. Thereafter, a lawyer for the

testator drafted a document entitled: "Revocation of Missing Will(s)" in which he stated that he wished to revoke his will and attached to it the photocopied pages of his will, upon which he wrote "Revoked." *Id*. The document was signed by two witnesses and notarized. *Id*. Subsequently, the testator received a photocopy of his entire will and wrote "Revoked" on all of the pages. *Id*.

After the testator died, his wife filed a petition to be appointed personal representative of his estate and averred that he had died intestate, having revoked his prior will. *Id*. One of the testator's nieces objected, asserting that the will remained in full force and effect because the testator had "failed to follow the statutory formalities for revocation[.]" *Id*. The trial court granted summary judgment in favor of the niece and the wife appealed. *Id*. at 3.

The New Mexico Supreme Court held that the "Revocation of Missing Will(s)" document was not a subsequent will because it was not testamentary for the reasons enunciated in *Martinez*. *Id.* It emphasized that the testator had explained within the revocation instrument that he understood that a will could be revoked in two ways: "drafting a subsequent will or performing a revocatory act on the will" and that he was performing an "acceptable revocatory act[]" by "cancel[ing] the first three (3) pages of will[.]" *Id*. at 4. Thus, the court reasoned that the testator made clear that he did not intend the revocation instrument to be a subsequent will. *Id.*

The court further held that writing "Revoked" on a "mere photocopy of [the] original [w]ill" did not satisfy the statutory requirement that a revocatory act be

performed "on the will[.]" *Id*. at 5-7. The court determined, however, that there was a dispute of fact on the issue of whether the testator had intended to revoke his will and was prevented from doing so because he was unable to retrieve the original of his will. *Id*. at 7. It thus remanded the matter to the trial court to determine whether that court should impose a constructive trust in favor of the wife. *Id.*

In *Brown v. Brown*, 21 So.3d 1 (Ala. Civ. App. 2009), the Alabama Court of Civil Appeals construed its identical revocation of wills statute consistent with *Martinez* and *Gushwa*. *See* Ala. Code § 43-8-136 (1975). There, a testator executed a will naming his wife as the sole beneficiary of his estate. *Id*. at 2. Sixty years later, he executed a document titled "Revocation of Last Will and Testament" that revoked "all last wills and testaments heretofore made by me" and stated that it was his "intention and desire to die without a will." *Id*. One of the testator and his wife's children contested the probating of the original will and petitioned to admit the revocation instrument to probate. *Id.* The trial court ruled that the original will had not been revoked and admitted it to probate. *Id*.

On appeal, the Court of Civil Appeals affirmed. The court emphasized that the Alabama Legislature had amended its probate code in 1983 and had eliminated language permitting revocation of a will by "some other writing" in addition to a new will or codicil. *Id*. at 4. The testator's child did not argue that the revocation instrument amounted to a cancellation of the will, but rather argued that it was a subsequent will. *Id.* For the same reasons discussed in *Martinez* and *Gushwa*, the court held that the

revocation instrument was not a subsequent will and did not otherwise satisfy the statutory criteria to revoke a will. *Id.* at 5-6.

Conclusion

We hold that the revocation document was not a new will and did not otherwise comply with the requisites of ET § 4-105(1). We further conclude that, because there was no evidence that the testator in this case, Ms. Elis, acted to mark, destroy or obliterate the terms of the 2002 Will, it was not cancelled pursuant ET § 4-105(2). Accordingly, we affirm the ruling of the circuit court that the revocation document did not revoke the 2002 Will as a matter of law.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, SITTING AS THE ORPHANS' COURT, AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.