Some Recent Developments

Domicile and the Revocation of Wills

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Applicable law; Domicile of choice; Implication; Revocation; Wills

This article discusses the decision of Sales J. in Perdoni v Curati[1] *and the subsequent appeal decision of October 31, 2012. The case dealt with the all too common problem of the inadvertent revocation of a will and the impact of domicile.*

Perdoni is a useful reminder of the criteria to be satisfied when replacing a domicile of origin with a domicile of choice and on dealing with the presumption against implied revocation of a will. In *Perdoni* the problem was compounded by the fact that the deceased's domicile was in dispute, with the result that either one of two systems of law could apply in determining succession.

Facts

The deceased was born in Italy in 1927 and moved to England in 1955 "to improve his economic condition". He married in 1955. His wife was born in England to Italian parents. A short while after his marriage his wife's parents made a gift to them of the restaurant in which they worked. By the late 1970s the deceased and his wife had built up a healthy property portfolio in England.

In 1980, the deceased drafted a will that left his English property to his wife. It contained a substitution clause that stipulated that if his wife predeceased him, the property was to pass to the deceased's niece and nephew, the claimants.

On September 20, 1994 the deceased made a holographic will in Italy, written in Italian, in which he declared his wife to be his "universal heir". There were no substitution clauses and so, should Mrs Curati predecease her husband, an intestacy would arise with the result that the deceased's sister (the defendant) would benefit (whether under English or Italian law).

Mrs Curati did in fact predecease her husband. A dispute ensued as to the effect of the 1994 will and whether or not it had revoked the 1980 will.

The parties agreed at trial that the domicile of the deceased in 1994 governed the law to be applied in determining the effect of the 1994 will. The claimants contended that this should be determined according to English law on the basis that the deceased was domiciled in England. The defendant on the other hand argued that the deceased had been domiciled in Italy and that Italian law applied.

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[1] *Perdoni v Curati* [2011] EWHC 3442 (Ch); [2012] W.T.L.R. 505.

Domicile

The court had to consider whether or not the deceased had abandoned his domicile of origin, Italy, and replaced it with a new domicile of choice in England by the time of the execution of the 1994 will.

In considering the criteria to be satisfied, Sales J. referred to the leading authority of *Fuld (Deceased) (No.3)*.[2] In that case Scarman J. stated that a person will retain their domicile of origin unless and until there is sufficient evidence of the deceased intending to acquire a new domicile of choice in the new territory in which he resides.

Strong evidence is required to displace the domicile of origin. For instance, if a person intends to return to the country of his birth on completion of a contract of employment, he does not have the intention to replace his domicile of origin. If, on the other hand, a person would only contemplate returning if he won the lottery but otherwise will not return, then arguably he has replaced his domicile of origin. Each case turns on its own facts, and different factors will have different weight.

In *Perdoni*, Sales J. decided that the deceased was domiciled in England by the time of the 1994 will. The following factors were particularly important:

- The deceased moved to London to work indefinitely. He did not at that time anticipate returning to Italy at a particular time. It was, rather, a "vague possibility".
- The intention to remain in England permanently was reinforced by the deceased marrying a British citizen of Italian parents and establishing the family home in England.
- The deceased's business activities were based in England.
- Even after the deceased and his wife established an Italian property portfolio, they maintained their family home in England and only returned to Italy for holidays or business visits.
- When his wife (to whom the deceased was devoted) became ill in 1992, there was no chance that she would have moved to Italy, and so it was considered highly unlikely that the deceased would have returned to Italy.
- The deceased referred to England as his home and was proud of and took care to maintain the family home.

Although the court found that from 2002 the deceased did from time to time express a wish to return to Italy, it was no more than that. Sales J. therefore determined that English law was to be applied in determining the effect of the 1994 will and whether or not it had revoked the 1980 will. (It should be noted that on appeal Mr Justice Tomlinson agreed with the decision on domicile based on what he called "overwhelming evidence").

Revocation

There was no express revocation clause in the 1994 will, and so Sales J. confirmed that it was necessary to consider whether the 1980 will had been revoked by implication. This was therefore a question of construction.

When considering whether a will has been revoked, the primary consideration is the intention of the testator at the time of the purported revocation. *Dempsey v Lawson*[3] stated that it was necessary to examine the testamentary document itself to determine whether the testator intended to vary the dispositions set out in the earlier will either partially or wholly.

In *Perdoni*, the deceased's wife had shortly before her death given instructions for a new will in relation to English assets in circumstances that suggested that she herself did not consider that the 1994 will had revoked the 1980 will, thereby inferring that the deceased did not consider the 1980 will to have been

[2] *Fuld (Deceased) (No.3), In the Estate of* [1968] P. 675; [1966] 2 W.L.R. 717.
[3] *Dempsey v Lawson* (1877) 2 P.D. 98; [1869-72] All E.R. Rep. 296.

revoked. Significantly, the court did not consider that such a subjective view controlled the "meaning and effect" of a will. It was not considered that the deceased's subjective view as to whether or not an earlier document had been revoked was significant. What was significant was the intention in relation to the gifts themselves rather than the testamentary documents.

This supports the view that a person's testamentary wishes could be expressed through a combination of several different documents. Sales J. referred to *Lemage v Goodban*,[4] in which case Sir J.P. Wilde confirmed that any number of testamentary documents can exist together and be admitted to probate as the last will: "[t]he will of a man is the aggregate of his testamentary intentions".

Sales J. confirmed that there was a presumption against implied revocation and that to rebut the presumption it would be necessary to consider whether the testator's intentions (as determined from the testamentary documents) were that earlier dispositions were no longer operative. He held that the 1994 and 1980 wills were not inconsistent because the 1994 will did not provide for a substitute heir in the event of the deceased's wife predeceasing the deceased. Consequently he held that the 1980 will had not been revoked.

Sales J. also discussed the position as it would be under Italian law in the event that his findings on domicile were incorrect. Interestingly, he said that he would have held that the 1980 will had been revoked by the 1994 will because of the special position of the "universal heir" in Italian law.

The appeal

The defendant appealed the decision on two grounds.

First, as noted above, it had been agreed at trial that the law of the deceased's domicile should govern the construction of the will. The defendant now sought to abandon that argument and stated that the presumption that the law of the deceased's domicile should apply to construction could be rebutted where it could be shown that the deceased had intended otherwise, i.e. that he intended Italian law to apply to the construction of his 1994 will. On the facts of this case, the defendant argued that the 1994 will should be construed according to Italian law as it was written in Italian, in Italy, by an Italian citizen and used Italian terminology.

Mr Justice Tomlinson gave little weight to the first two of these factors, as it was accepted that the deceased was not comfortable speaking in English and that there was little evidence of the circumstances in which the will was drafted and executed in Italy. The fact of citizenship was also held to have little weight bearing in mind the presumption as to domicile, and the terminology was seen as ordinary Italian words having no special significance. He therefore held that the presumption had not been rebutted.

The second ground for appeal was that the Judge had erred in holding that the 1994 will did not revoke the 1980 will. Mr Justice Tomlinson held that it was not permissible to speculate on the deceased's intentions and that one had to look at his testamentary writings. The 1994 will did not set out what would happen in the event that the deceased's wife predeceased him, but the 1980 will did. It was held that there was nothing in the testamentary documents to suggest that there was an intention to revoke that disposition and there was no inconsistency. The decision of Sales J. was therefore upheld.

Conclusion

It is possible for a number of consistent testamentary documents to be read together as forming the last will of the testator, but it makes matters a great deal more complicated, and litigation is more likely to follow, if it is necessary to try and unravel what the testator's intentions actually were. This becomes even more complex if there are foreign assets and foreign wills. Practitioners therefore need to be alive to the

[4] *Lemage v Goodban* (1865–69) L.R. 1 P. & D. 57; (1865) 12 Jur. N.S. 32.

possibility of foreign domicile, the implications of foreign domicile and the dangers of inadvertently revoking a testamentary document.