Ending the Cycle of “Ever-Changing” Wills

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Alex M. Johnson, Jr., *Is It Time For Irrevocable Wills?*, 53 **U. Louisville L. Rev.** 393 (2016).

A will speaks at death. Therefore, the testator is free to change his or her will until the day he or she dies. Giving a person the opportunity to change his or her will makes sense because testamentary dispositions are influenced by lifetime events. For example, after a will is executed, a beneficiary may die or the testator may lose ownership of some of the property mentioned in the will. Currently, persons are permitted to create irrevocable trusts. Although there is no prohibition against irrevocable wills, modern statutes do not provide for the use of such devises. Therefore, a method does not exist for a testator to make an irrevocable will. Nevertheless, in his timely and thought-provoking article, *Is It Time For Irrevocable Wills?*, Professor Alex M. Johnson, Jr. makes the case that the legal recognition of irrevocable wills would not negatively impact testamentary freedom. The availability of irrevocable wills may protect the testator who becomes incompetent after executing his or her will.

In attempt to support his assertion that irrevocable wills have a place in the testamentary process, Professor Johnson begins his article by briefly discussing the historical evolution of wills. During the Middle Ages, the law expressly deemed wills to be irrevocable. At that time, the property owner was permitted to use, a post obit transfer, an inter vivos conveyance, to make an irrevocable testamentary transfer of his property. The post-obit gift consisted of a contractual promise that the donor’s property would be delivered to the beneficiary after the donor died. Usually, the instrument creating the post-obit gift included a provision stating that the gift was irrevocable if the donor did not retain the right to revoke it. Once the Statute of Wills was enacted in 1540, wills were treated as if they were irrevocable. Professor Johnson asserts that no justification was given for making wills revocable instruments. He opines that lawmakers never intended to prohibit irrevocable wills. According to Professor Johnson, the issue of the irrevocability of wills was never fully discussed. Consequently, there is no historical reason for not legally recognizing irrevocable wills.

Professor Johnson points out that a will is nothing more than a donative transfer. Thus, it should be irrevocable like other devices that are used to make donative transfers. Most other mechanisms used to transfer property may be irrevocable or revocable. On the one hand, an inter vivos gift becomes irrevocable once the property is delivered by the donor with the necessary intent and accepted by the donee. On the other hand, a gift causa mortis is revocable because it does not take effect unless the donor dies in the manner contemplated when the gift is given. Professor Johnson spends a significant amount of time discussing trusts as they relate to wills. The settlor has the discretion to make a trust irrevocable or revocable. By permitting donors and settlors to make irrevocable and revocable transfers, the law gives those persons the maximum amount of freedom to create instruments that carry out their wishes. That same freedom should be given to the testator when he or she executes a will.

Professor Johnson contends that the benefits of permitting irrevocable wills outweigh the costs. For example, Professor Johnson claims that the use of an irrevocable will may protect a testator who becomes incompetent. The existence of the irrevocable will permits the person’s competent self to commit his or her incompetent self to distribute the property in accordance with the wishes of the competent self. Moreover, legal recognition of an irrevocable will may help reduce the chances of improper revocations. For example, a testator who becomes incompetent may destroy his or her will

based upon an erroneous or delusional belief. If this occurs in a jurisdiction that recognizes revocation by physical act, the person may end up dying intestate. If a person creates an irrevocable will, he or she would have to take specific steps to revoke or alter it. Thus, an incompetent person would not have the ability to revoke or alter his or her will. Hence, the testator's property would be distributed based upon the wishes he or she expressed while competent.

The system created under the Statute of Wills has not kept up with changing times. Professor Johnson puts forth some compelling reasons why the law should reconsider the irrevocability of wills. The historical information contained in the article indicates that the decision to treat wills as revocable was made without much discussion or exploration. People are living longer and suffering from conditions that may render them incompetent. Therefore, people who revoke or alter their wills late in life run the risk of dying intestate if their new wills are deemed to be invalid. Irrevocable wills may provide one solution to this growing problem. As a result, it is time to have a thorough discussion about the irrevocability of will. Breaking the cycle of the ever-changing will may protect the testator and the probate system.

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