

Book VI.
Title XXXVI.

Concerning codicils.
(De codicillis.)

D. 29.7; Inst. 2.25; Bas. 36.1.20.

6.36.1. Emperor Alexander to Mocimus and others.

When a testament is broken by the subsequent birth of a child, there is no doubt that the codicil, too, which is a part of the testament, is invalid. 1. But since you state that after the testament was broken, the father of your minor wards (below the age of puberty) executed documents in which he confirmed his former will, the praetor did nothing contrary to law, if pursuant to such last wish he ordered the trust, first left to the city by the testament, to be delivered as a trust left by a codicil.

Promulgated June 29 (233).

Note.

Codicils.

Generally, nowadays, a codicil requires the same formality in its execution as does a will. That was not true under the Roman law. A codicil, under that law, did not require any formality and might be in the form of a letter, note or memorandum (C. 6.42.22), and at first needed no witnesses. But Constantine, in intestate wills, and Theodosius, in all codicils, required seven witnesses, the same as in wills. C. Th. 4.4.1; 4.4.7.5. Justinian required only five witnesses, and the codicil might be oral or in writing. C. 6. 36.8.3; Inst. 2.23.12. But he further provided that if an heir or other person receiving a benefit under a will was charged to pay a trust to someone, and there were no, or not sufficient, witnesses to such direction - for such direction was in the nature of a codicil to a will - the heir or such other person receiving a benefit under a will might be put on his oath, and unless he swore that no such trust was imposed upon him, he was compelled to discharge it. But his oath, that no such trust had been imposed was binding. C. 6.42.32; Inst. 2.23.12.

Codicils were not in use before the time of Augustus, and were introduced in connection with the creation of trusts, a subject dealt with in headnote to C. 6.37 and C. 6.42. Codicils could be made before a testament was made. Papinian held that if that was done, it would be void unless confirmed by the testament. But the emperors Severus and Antoninus provided that the performance of a trust imposed by codicils written before a will, might be demanded, if it appeared that the testator had not abandoned the intention expressed therein. A codicil might also be made after the execution of a testament, and confirmed by the testament by anticipation. Law 6 of this title. Codicils, so confirmed by a testament, depended for their validity upon the will. They were part and parcel thereof, and if the will was invalid, or the heir under it did not accept, the provisions in the codicil ordinarily failed. D. 29.7.16; D. 29.7.3.2; D. 29.7.2.2. Codicils could be made also in the absence of a will, but while in those which were confirmed by a will, anything could be provided that could be provided in the will itself, except the appointment of an heir, only trusts could be created in a codicil not so confirmed. The

difference, in this respect, was, however, not great, which was even more true under Justinian. A guardian could, however, not be appointed for a minor by a codicil unless it was confirmed by a testament. Moyle, Institutes 311. A man who simply made a codicil, but no testament, was considered as dying intestate.

Coming then to the consideration of the present law, the testament there referred to became invalid because of the birth of a posthumous son, who had been overlooked - for in such case the will became void. C. 6.29. Now the codicil that was made, was made after the will had become void - when there was no will; hence the codicil did not depend on the will, and hence the trust left in it for the benefit of the municipality was perfectly valid, even though reference for identification had to be made to the will.

6.36.2. Emperors Philip and Caesar Philip to Asclepiodatus.

It is manifest that an inheritance can neither be directly given nor taken away by a codicil. Still the law does not render last wishes void which are expressed by precatory words. 1. Hence you are wrongly persuaded that you are ineffectually asked in the codicil to be content with part of the things and to turn over to others a portion given you in the testament.

Promulgated October 15 (244).

Note.

The appointment of an heir was required to be made by a will. Nor could a condition be imposed on an appointed heir, or a direct substitution be effected except by a will. Inst. 2.25.2; C. 6.23.7; C. 6.35.4 and law 7 of this title. But property given to an heir or to anyone else in a will, could be taken away from him indirectly, by a trust, that is to say, as stated in the present law, by precatory words; for instance, by a provision: I ask, or request, or pray, or beg, my heir to turn over the inheritance, (or a portion thereof) to A, or by words of similar import. C. 6.43.2. Such provision created a trust, and the trustee was compelled to carry out the requirement.

6.36.3. Emperors Diocletian and Maximian to Hyacinthus and others.

Since you state that the mother of your minor wards made two codicils, at different times and with discordant provisions, there is no doubt that what she stated in the older codicil is revoked by the later codicil, in which she expressed the secrets of her wish, if the tenor thereof differs from the former and contains a contrary wish.

Promulgated September 8 (290).

6.36.4. The same Emperors and the Caesars to Stratonicus.

Parties to whom anything is left by precatory words do not any the less take the bequest because you mother, without making a testament, made a codicil in your absence (in which she left the bequests).

Without day or consul.

6.36.5. The same Emperors and the Caesars to Flavia.

It is most certain law that an insane person cannot even make a codicil. If, however, a writing was brought forward in the form of a codicil of your father, for the purpose of making a claim thereunder, it is necessary for you to prove your assertion that he was not of sound mind.

Given at Divellum November 26 (294).

6.36.6. The same Emperors and the Caesars to Demosthenes.

Whether he (the testator) ordered generally in the first place that what he was about to leave in a codicil should be valid or whether he ordered in a later testament that the bequests made (in codicils) should be enforced, you, who are protected by such confirmation, are unnecessarily worried.

Given at Nicomedia December 11 (294).

6.36.7. Emperor Constantine to Maximus, City Prefect.

If codicils could subserve the same purposes as testaments, why should a different name be given to documents which have the same force and effect? Hence the law specially deny the right to appoint heirs or make substitutions for them in a codicil.¹

Given June (332).

6.36.8. Emperor Theodosius to Asclepiodatus, Praetorian Prefect.

If a person shall want to claim under a testament, which is either oral or in writing, he shall not thereafter be permitted to claim under a trust. 1. So far are we from permitting anyone to shift the grounds of his claim that we even ordain that if a testator who makes a testament states therein that it shall be valid also as a codicil, the person who claims the inheritance has the right at the beginning of his suit to elect whether he wants to claim under the one or the other, knowing that by his election to claim under the one he is precluded from claiming under the other; so that, if he asks for the right of possession of the inheritance pursuant to the provisions of a written or a nuncupative will, or made in other similar ways, or if he asks to be put in possession according to custom, he must immediately, when he first makes his legal claim, make his intention known. 1a. With equal reason must a testator who had declared his intention to make his testament but who was unable to complete it, be considered as having died intestate, nor will it be permitted to treat his last wishes as a trust left by a codicil, unless the writing contains a provision that it shall have the force of a codicil; and in such case forsooth (as above stated), an election must be made and a person who wants to claim under the document as a testament, cannot subsequently change his mind and claim under a trust. 2. But if an ascendant or descendant of either sex related by the ties of agnation within the fourth degree, or by the bond of cognation within the third degree, has been appointed as heir in a written or a nuncupative will, which the testator has declared to be valid also as a codicil, and claims the inheritance, according to the decedent's wish, under the document as though it were a testament, but is perchance defeated, or if he changes his mind, he may, thereafter claim it under a trust. For not to reap a profit² cannot be considered in the same light as to lose what is justly due. 3. In making any last wish, moreover, excepting a testament, five witnesses must be present, either specially called or present by chance, at one and the same time, whether such last wish is in writing or is nuncupative. If the last wish is in writing, the witnesses must subscribe it.

Given at Constantinople February 14 (424).

¹ [Blume] C. 6.23.7; 6.35.4; law 2 of this title.

² [Blume] Which would be true in the case of other persons.

Note.

Where a testator indicated that he was making a testament, but was unable to complete it, his action could not be interpreted that he was making a codicil. Note C. 6.23.14. If a man's testament failed as such, it could not be interpreted as a codicil, unless he provided therein, which he might do, that if the will, for any reason, failed as a testament, it should be valid as a codicil, as stated in this law. See also C. 7.2.11; headnote C. 6.39; D. 29.1.3; Buckland 357.

Where, in such case - namely, where the testator had provided that the document should also be valid as a codicil - a doubt arose as to whether the document was a will or merely a codicil, a claimant thereunder, except relatives within the degrees specified, were required to make an election whether they would claim under the document as a will or as codicil, and the election so made was binding. This is contrary to our principles of jurisprudence - a man would get just what he would be entitled to under the document, whatever it might be, and whatever claim to the contrary he might make. But inasmuch as the election required by Justinian was binding only on strangers, or remote relatives, the requirement could, perhaps, not be considered as harsh.

As an illustration of the importance of this proposition, let us say that a slave was manumitted directly and it was also therein requested that he should be manumitted. If the document was valid as a will, he became free immediately upon the acceptance, by the heir, of the inheritance, and owed no duty to anyone as a freedman. If, on the other hand, the document was not valid as a will, but only as a codicil, he could not be free until the heir manumitted him, and he would accordingly be the heir's freedman, and owed him certain duties as such. Now the slave had to elect whether to claim under it as a will, or as a codicil. If he claimed under it as a will, and the will was invalid, he lost all his rights and would remain a slave. Again suppose that a man was appointed as heir in a will for an inheritance, and it was also requested that he be given the inheritance. Under the document as a will, he would receive the whole inheritance; as a trust it was subject to the Falcidian fourth, mentioned in C. 6.50. Hence he had to take the chance whether to receive all or only three-fourths.