

IMPLIED REVOCATION OF WILLS AFTER DIVORCE AND PROPERTY SETTLEMENT

SOME OF THE DIFFICULTIES that may be engendered by the doctrine of implied revocation of wills, following a change in the testator's marital status,¹ are illustrated by the recent decision in *Younker v. Johnson*.² In that case the testator and his wife were married on February 28, 1898. After 39 years of marriage, the defendant obtained a divorce decree which confirmed a fair and equitable property division. The testator died leaving a will under the terms of which the defendant was devisee of one-half of all property of which the testator was seized at his death. It further appeared that the will was made one and one-half years before the testator and the defendant were divorced, and thirteen and one-half years prior to his death. The Probate Court held that the will had been revoked by implication as to the defendant. That decision was reversed by the court of appeals, and the record was certified to the Ohio Supreme Court for review. The Supreme Court held, five to two, that the divorce decree coupled with the settlement of property rights compelled the conclusion that the will provision wherein the defendant was benefited was impliedly revoked.

It is uniformly held, absent a statute to the contrary, that divorce does not, *per se*, revoke those parts of a will which benefit a divorced spouse.³ There is, however, a split of authority as to whether divorce, coupled with a settlement of property, constitutes such an implied revocation.⁴ This divergence among jurisdictions is attributable, in most

¹ For a general discussion, see 1 PAGE ON WILLS §§ 505-510, at 929-935 (Lifetime Ed. 1941); ROLLISON ON WILLS §§ 147-154, at 268-286 (1939); Note, 18 A.L.R.2d 697 (1951); Byrne, *Implied Revocation of Wills in Wisconsin*, 12 MARQ. L. REV. 293 (1927); Dnrfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406 (1942); Graunke & Beuscher, *The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator*, 5 WIS. L. REV. 387 (1930).

² 116 N.E.2d 715 (Ohio, 1954).

³ See, e.g., *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187 (1881); *Speroni v. Speroni*, 406 Ill. 28, 92 N.E.2d 63 (1950); *In re Arnold's Estate*, 60 Nev. 376, 110 P.2d 204 (1941); *Murphy v. Markis*, 98 N.J.Eq. 153, 130 Atl. 840 (1925), *aff'd*, 99 N.J.Eq. 888, 132 Atl. 923 (1926); *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307 (1875); *In re Jones' Estate*, 211 Pa. 364, 60 Atl. 915 (1905); *Estate of Lufkin*, 32 Hawaii 826 (1933); *accord*, *Baacke v. Baacke*, 50 Neb. 18, 69 N.W. 303 (1896); See, *Evans, Testamentary Revocation by Divorce*, 24 KY. L.J. 1 (1935).

⁴ See, 1 PAGE, *op. cit. supra* note 1, § 522, at 959.

instances, to variations in their statutes governing will revocation—particularly in those provisions pertaining to the effect of a divorce and property settlement on a pre-existing will.

The most uncommon type of statutory provision expressly provides that a divorce, in itself, revokes those portions of a pre-existing will which confer benefits on a divorced spouse.⁵

A second type of statutory provision enumerates the methods by which a will may be revoked, but makes no mention of implied revocation by changes in condition and circumstances.⁶ Here, the courts have refrained from applying the doctrine of implied revocation, and have held the statutory methods to be exclusive.⁷

Another type of statutory provision—the type under which *Younker v. Johnson* was decided⁸—enumerates the standard methods by which a will may be revoked, and then provides, “but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition and circumstances of the testator.”⁹ Under this type of statutory provision, divorce coupled with property settlement is generally held to constitute such a change of condition as to compel the implied revocation of those portions of a will which would enure to the benefit of a divorced spouse,¹⁰ an irrebuttable presumption to that effect

⁵ ARK. STAT. ANN. tit. 60, § 407 (1951); FLA. LAWS, c. 26914 (1951); KAN. GEN. STAT. ANN. § 59-610 (Supp. 1947); KY. REV. STAT. § 392.090 (1946); PA. STAT. ANN. tit. 20, § 180.7(2) (1947); WASH. REV. STAT. ANN. § 1398 (1931). For some cases decided under this type of statutory provision, see Pfeiffer v. Old National Bank & Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931), 7 WASH. L. REV. 305 (1932); *In re Ziegner's Estate*, 146 Wash. 537, 264 Pac. 12 (1928).

⁶ ARK. STAT. ANN. tit. 60, § 60-113 (1947); CAL. CIV. CODE § 1970 (1923); FLA. STAT. ANN. c. 731, § 731.14 (1941); CODE OF GA. ANN. c. 113-4, § 113-404 (1935); CIVIL CODE OF LOUISIANA tit. 2, c. 6, Art. 1691 (1932); ANN. MO. STAT. tit. 31, c. 468, § 468.240 (Vernon, 1952); SOUTH DAKOTA CODE c. 56.02, § 56.0217 (1939).

⁷ *Mosely v. Mosely*, 217 Ark. 538, 231 S.W.2d 99, 18 A.L.R.2d 695 (1950); *In re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374 (1923), *error dism'd*, 266 U.S. 594 (1924); *Davis v. Davis*, 57 So.2d 8 (Fla. 1952); *Ireland v. Terwilliger*, 54 So.2d 52 (Fla. 1951); *Pacetti v. Rowlinski*, 169 Ga. 602, 150 S.E. 910 (1929); *Gartin v. Gartin*, 371 Ill. 418, 21 N.E.2d 289 (1939), 52 HARV. L. REV. 332 (1938); *Cunningham's Succession*, 142 La. 701, 77 So. 506 (1918); *Robertson v. Jones*, 345 Mo. 828, 136 S.W.2d 278 (1940); *In re Darrow's Estate*, 164 Pa. Super. 25, 63 A.2d 458 (1949); *In re Nenaber's Estate*, 55 S.D. 257, 225 N.W. 719 (1929).

⁸ OHIO. GEN. CODE ANN. § 10504-47 (Page, 1938).

⁹ E.g., ANN. LAWS OF MASS. c. 111, § 8 (1932); MICH. COMP. LAWS c. 2, § 702.9 (1948); MINN. STAT. ANN. c. 525, § 525.191 (1945); REV. STAT. OF NEBRASKA c. 30, § 30-209 (1943); WIS. STAT. c. 238, § 238.14 (1947); WYOMING COMP. STAT. ANN. c. 6, § 6-306 (1945).

¹⁰ *Wirth v. Wirth*, 149 Mich. 687, 113 N.W. 306 (1907); *Lansing v. Haynes*, 95 Mich. 16, 54 N.W. 699 (1893); *Donaldson v. Hall*, 106 Minn. 502, 119 N.W.

frequently being created.¹¹ Notwithstanding this general rule, however, there is a minority view which maintains that since this statutory provision merely codifies the common law doctrine of implied revocation, then only those changes of circumstance sufficient to effect a revocation at common law will suffice under the statute.¹² At common law, those changes recognized as sufficient to revoke a will by implication of law were quite clear: as to a woman, marriage was held to revoke a will which she had executed before her marriage;¹³ as to a man, marriage plus the birth of issue was considered to be a change of circumstance sufficient to revoke a will executed prior to his marriage.¹⁴ Accordingly, the doctrine of implied revocation of wills upon change of the testator's condition and circumstances is thus limited in those jurisdictions where the minority view prevails.

Thus, while states do have statutory provisions recognizing that wills may be revoked by implication, it is significant that judicial construction thereof has precluded inquiry, in any particular case, into the validity of the premise upon which the doctrine is founded—namely, a presumption of a change in the testator's intention, brought about by a change in certain conditions and circumstances.¹⁵ In short, what had

219 (1909); *In re Martin's Estate*, 109 Neb. 289, 190 N.W. 872 (1922); *In re Kort's Estate*, 260 Wis. 621, 51 N.W.2d 501 (1952); *In re Battis*, 143 Wis. 234, 126 N.W. 9 (1910); *Bornheim v. Roesch*, 13 Ohio Law Abst. 180 (1932); *Pardee v. Grubiss*, 34 Ohio App. 474, 171 N.E. 375 (1929); *accord*, *In re McGraw's Estate*, 228 Mich. 1, 199 N.W. 686 (1924), *aff'd*, 233 Mich. 440, 207 N.W. 10 (1926); *cf.* *Johnston v. Laird*, 48 Wyo. 532, 52 P.2d 1219 (1935) (annulment due to insanity plus property settlement gave rise to implied revocation). *But cf.* *Baacke v. Baacke*, 50 Neb. 18, 69 N.W. 303 (1896); *Codner v. Caldwell*, 156 Ohio St. 197, 101 N.E.2d 901 (1951) (where the will was executed *before* the marriage, so that intervening between the execution of the will and the testator's death, there was a *marriage*, divorce and property settlement—*held* by the Ohio Supreme Court, composed of the same judges as sat in the *Yunker* case, that there was not sufficient change of condition and circumstances to warrant a revocation).

¹¹ *In re McGraw's Estate*, *Wirth v. Wirth*, *Donaldson v. Hall*; *In re Martin's Estate*; *In re Kort's Estate*; *In re Battis*, all cited in note 10 *supra*.

¹² *Hertrais v. Moore*, 325 Mass. 57, 88 N.E.2d 909 (1949); *accord*, *In re Brown's Estate*, 139 Iowa 219, 117 N.W. 260 (1908); *cf.* *In re Arnold's Estate*, 60 Nev. 376, 110 P.2d 204 (1941).

¹³ *Brown v. Thompson*, 1 Eq. Cas. Abr. 414, 21 Eng. Rep. 1143 (1701); *Eyre v. Eyre*, 1 P. Wms. 304, n. 4, 24 Eng. Rep. 400 (1704); *Christopher v. Christopher*, Dick. 445, 21 Eng. Rep. 343 (1771); *Brady v. Cubitt*, 1 Dougl. 31, 99 Eng. Rep. 24 (1778); *Gibbons v. Caunt*, 4 Ves. Jun. 840, 21 Eng. Rep. 435 (1799); and for further cases see 30 AM. AND ENG. ENC. 650, n. 7 (1905).

¹⁴ *Forse and Hembling's Case*, 4 Co. Rep. 60b, 76 Eng. Rep. 1022 (1901); *Hodsdon v. Lloyd*, 2 Bro. ch. 534, 29 Eng. Rep. 293 (1789); *Doe v. Staple*, 2 T.R. 684, 100 Eng. Rep. 368 (1788); 1 JARMAN, WILLS 110 *et. seq.* (1893).

¹⁵ 4 KENT. COMM. 521 (14th ed. 1896).

been formulated as workable rules for determining probable testamentary intent have been crystallized into invariable rules of substantive law.¹⁶ The distortion and injustice that may result from such extension of a rule beyond the logical limits of its principle is illustrated in the *Younker* case. The particular facts there did not justify the Ohio court's holding that the will had impliedly been revoked. The couple had been married for forty-one years; and the will was executed only six months before the divorce proceedings were begun, evidencing a desire by the testator to provide for his wife—a desire extending even into the waning moments of their marriage. The same attorney who drafted the decedent's will also represented him in the divorce proceedings.¹⁷ As Judge Taft, in dissent, intimated:

Is it reasonable to infer that counsel . . . did not then advise the husband to revoke the will if he did not want his wife to take under it?¹⁸

Also to be considered is the fact that the testator lived for twelve years after the divorce and settlement, kept the will in a safe deposit box along with a number of other valuable papers, and died without taking steps to revoke or destroy it. As Judge Taft further pointed out:

Is it reasonable to assume that the husband, notwithstanding the divorce and property settlement, intended that his wife of over forty years and the mother of his children, should take on his death what he would no longer need, and what he had provided for her in his will? Notwithstanding the divorce and property settlement, it is not unlikely that he still had a continuing interest in the welfare of his former wife. If he did not intend for her to take under his will, he could easily have revoked it. He did not. Why should this court do it for him on the doubtful assumption that he would have wanted it that way?¹⁹

Thus, the decision of the Ohio Supreme Court in the *Younker* case seems to have been based not on its conception of the probable intent of the testator—the very *raison d'être* of the doctrine of implied revocation—but rather on rigid application of a rule of substantive law that a divorce coupled with a property settlement is in itself a sufficient change of condition to require the revocation of those provisions of a pre-existing will which benefit a divorced spouse.

¹⁶ Illustrative of the adherence of courts to rules of substantive law rather than to rules for determining probable testamentary intent are the cases cited in notes 7 and 11 *supra*.

¹⁷ Brief for Appellee, p. 6, *Younker v. Johnson*, 116 N.E.2d 715 (Ohio, 1954).

¹⁸ 116 N.E.2d 715, 725 (Ohio, 1954). ¹⁹ *Ibid*.

There is, of course, considerable justification for such a decision. It must be conceded that in the vast majority of cases the testator's failure to revoke his will subsequent to a divorce is due to neglect, and that to find an implied revocation usually gives effect to a testator's real intentions. Moreover, emphasis on the demonstrable probable intent of the testator, *formed after he has executed the will*, would probably invite fraud and perjury.²⁰ In view of these factors, many courts understandably would prefer to rely unequivocally on a rule of law which is essentially sound, although pursuant thereto they might occasionally be forced to disregard the probable intent of the testator. Nevertheless, it is clear that such a construction is inconsistent with the principle upon which the doctrine of implied revocation rests. It is submitted that the better treatment of this case would have been to find a presumption of intended revocation as to any provision of a pre-existing will benefiting a divorced spouse, rebuttable, however, by clear and convincing proof of the testator's intention to give his divorced spouse the benefit of the provision of the will.²¹

GARY S. STEIN

²⁰ ROLLINSON, *op. cit. supra* note 1, at 237.

²¹ See Durfee, *supra* note 1, at 416.