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Wills - Revocation by Change in Circumstances - Effect of a Separation and Property Settlement Agreement

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WILLS—REVOCATION BY CHANGE IN CIRCUMSTANCES—EFFECT OF A SEPARATION AND PROPERTY SETTLEMENT AGREEMENT—Testator's will, executed in 1944, named his wife executrix and sole devisee. One month before his death in 1952 he entered into a detailed separation and property settlement agreement with her in which, though not referring directly to the will, the wife released any present, future or after-acquired interest in the same realty as was devised in the will. The widow's offering of the will for probate was contested by the heirs. The lower court directed a verdict for the contestants on the ground that

the agreement operated to revoke the will. On appeal, *held*, reversed. Since neither a divorce alone nor a property settlement alone will work a revocation by operation of law because of the change in circumstance, a separation and property settlement agreement will not do so. *Price v. Price*, (Tenn. App. 1954) 269 S.W. (2d) 920.

Generally, statutes will determine whether a jurisdiction will recognize any form of marital severance as working a revocation of the provisions for one spouse in the will of the other because of the change in circumstances. Tennessee appears to be the only jurisdiction completely lacking a statute on revocation of wills.¹ The statutes of other states may be divided between those providing specific means for revocation of a will, but with a saving clause recognizing revocation by change in circumstances,² and those without such a saving clause,³ some of which expressly deny the possibility of revocation by change in circumstances.⁴ As divorce was relatively unknown at English common law, the change in circumstances concept was there limited to cases where marriage or marriage and birth of issue were held to revoke the prior will of a woman or man respectively.⁵ Though the concept is expanded in this country,⁶ prior to the instant holding the question of whether a separation and property settlement is included within it had been decided only twice. Michigan appears to support the decision,⁷ while a lower Pennsylvania court does not.⁸ In contrast, the same

¹ Blackard, "The Effects of the Enactment of the 1941 Wills Act," 17 TENN. L. REV. 447 at 450-451 (1942).

² Not including divorce as one of the means, e.g.: Mass. Laws Ann. (1933) c. 191, §§8, 9; Mich. Comp. Laws (1948) §702.9; Ohio Rev. Code (Baldwin, 1953) §2107.33; Wis. Stat. (1953) §238.14; Wyo. Comp. Stat. (1945) §6-306. Including divorce as one of the means: Minn. Stat. Ann. (1947) §§525.19, 525.191.

³ Not including divorce as one of the means, e.g.: Cal. Prob. Code (Deering, 1953) §§70-74; Iowa Code Ann. (1950) tit. 32, §633.10; 13 N.Y. Consol. Laws (McKinney, 1949) §§34, 35, 40; Tex. Rev. Stat. (Vernon, 1941) art. 8285; W.Va. Code (1949) §§4044-4045. Including divorce as one of the means: Ala. Code (1940; Supp. 1953) tit. 61, §§9(1), 26; Fla. Stat. (1953) §§731.12, 731.14, 732.261; Ga. Code Ann. (1935; Supp. 1954) tit. 113, §§401-408; Kan. Gen. Stat. Ann. (1949) c. 59, §§610-611; Pa. Stat. Ann. (Purdon, 1950) tit. 20, §§180.5, 180.7; Wash. Rev. Stat. (1953) tit. 11, c. 12.040, 12.050.

⁴ Not including divorce as one of the means: R.I. Gen. Laws (1938) c. 566, §§16-18. Including divorce as one of the means: Ark. Stat. Ann. (1947; Supp. 1953) §§60-113, 60-115, 60-407; N.C. Gen. Stat. (1953) c. 31, §§5.1 to 5.4. See Model Probate Code §§51-54 (1946). Including divorce and annulment among the means: Ind. Stat. Ann. (1953) §§6.506, 6.508.

⁵ ATKINSON, WILLS, 2d ed., §85 (1953). The Statute of Wills of 1837 abrogated the doctrine in England. 7 Wm. IV & 1 Vict., c. 26, §20 (1837). For a further historical discussion, see 5 Wis. L. Rev. 387 (1930).

⁶ See the cases cited in notes 9, 10, and 11 *infra*.

⁷ In re Blanchard's Estate, 267 Mich. 189, 255 N.W. 190 (1934), noted in 33 MICH. L. REV. 637 (1935). The case is weak authority, however, since the court appears to lean on extrinsic factors, e.g., that the testator and his wife had been reunited before his death. *Accord*, Walter v. Pugh, 30 Ohio Op. 561 (1945), holding that an antenuptial property settlement was not an implied revocation of the wife's will, wherein the man later to be her husband was made residuary legatee on condition that they were married.

⁸ In re Morris' Estate, 22 Pa. Dist. R. 466 (1912). This case, too, is weak authority on the point because the holding, a short and alternative one, displays some confusion in the court's mind between revocation by change in circumstances, ademption and satisfaction.

court that decided the principal case and the heavy majority of courts interpreting statutes with the saving clause have held that provisions for the spouse in a will are revoked by a divorce and a property settlement,⁹ or an annulment and a property settlement,¹⁰ occasionally with considerable liberality as to what constitutes the requisite property adjustment.¹¹ As jurisdictions with statutes lacking the saving clause hold that a divorce even with such a settlement will not work a revocation¹² because the enumerated methods are deemed exclusive,¹³ argument as to the effect of a separation and property agreement on that basis is seldom attempted. Rather, the issue generally is whether the agreement constitutes such a subsequent writing by the testator as may revoke the will.¹⁴ The largely unexplored issue of whether the property disposition alone works as a satisfaction of the provisions for the spouse is also present.¹⁵ The problem is thus narrowed to whether, under statutes allowing revocation by change in circumstances, a distinction should be drawn between divorce and separation, each accompanied by property settlements. An affirmative answer would un-

Though the Wyoming court in *Johnston v. Laird*, 48 Wyo. 532 at 544-545, 52 P. (2d) 1219 (1935), saw the holding as involving revocation, the Pennsylvania statute then in force lacked a saving clause. Pa. Laws 1833, No. 250-1, §§13-16. Because of this, a testator's divorce was held not to produce a revocation. *Jones' Estate*, 211 Pa. 364, 60 A. 915 (1905). For indications obiter that, had the statutes so permitted, similar actions might amount to such a revocation, see *Swann v. Swann*, 131 W.Va. 555, 48 S.E. (2d) 425 (1948). Cf. *In re Will of Watson*, 213 N.C. 309, 195 S.E. 772 (1938).

⁹ *Rankin v. McDearmon*, (Tenn. App. 1953) 270 S.W. (2d) 660; *Estate of Kort*, 260 Wis. 621, 51 N.W. (2d) 501 (1952); *Yunker v. Johnson*, 160 Ohio St. 409, 116 N.E. (2d) 715 (1954), distinguishing *Codner v. Caldwell*, 156 Ohio St. 197, 101 N.E. (2d) 901 (1951), noted in 23 UNIV. CIN. L. REV. 277 (1954). *Contra*, *Hertrais v. Moore*, 325 Mass. 57, 88 N.E. (2d) 909 (1949), noted in 50 COL. L. REV. 531 (1950). The earlier cases are collected in the annotation, 18 A.L.R. (2d) 697 at 705 (1951). See 5 WES. RES. L. REV. 394 (1954).

¹⁰ *Johnston v. Laird*, note 8 supra.

¹¹ See *In re McGraw's Estate*, 228 Mich. 1, 199 N.W. 686 (1924), wherein a so-called waiver of alimony rights was deemed sufficient.

¹² *Ireland v. Terwilliger*, (Fla. 1951) 54 S. (2d) 52; *Davis v. Davis*, (Fla. 1952) 57 S. (2d) 8 (the section of the Florida statute last cited, note 3 supra, had not yet taken effect); *Merritt v. Merritt*, (Tex. Civ. App. 1941) 158 S.W. (2d) 116. *Contra*, *Matter of Gilmour*, 146 Misc. 113, 260 N.Y.S. 761 (1932). That this opinion is highly questionable, see *Matter of Sussdorff*, 182 Misc. 69, 43 N.Y.S. (2d) 762 (1943). The earlier cases are collected in the annotation, 18 A.L.R. (2d) 697 at 708 (1951).

¹³ But see *In re Estate of Brown*, 139 Iowa 219, 117 N.W. 260 (1908). Further, several states lacking the saving clause will allow revocation of a will due to a change in circumstances when the change is of early common law heritage, i. e., marriage or marriage plus birth of issue. *Durfee*, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 MICH. L. REV. 406 at 408-412 (1942).

¹⁴ *Titus v. Bassi*, 182 App. Div. 387, 169 N.Y.S. 49 (1918); *Matter of Crouse*, 168 Misc. 359, 6 N.Y.S. (2d) 32 (1938), *affd.* 261 App. Div. 77, 24 N.Y.S. (2d) 568 (1941); *Matter of Cote's Will*, 195 Misc. 410, 87 N.Y.S. (2d) 555 (1949); *Estate of Crane*, 6 Cal. (2d) 218, 57 P. (2d) 476 (1936); *Bennett v. Forrest*, 24 Cal. (2d) 485, 150 P. (2d) 416 (1944); *In re Bartolo's Estate*, 124 Cal. App. (2d) 727, 269 P. (2d) 30 (1954); *Swann v. Swann*, note 8 supra; *Merritt v. Merritt*, note 12 supra.

¹⁵ See *In re Brown's Estate*, note 13 supra; *Swann v. Swann*, note 8 supra; *Matter of Swords*, 120 Misc. 427, 199 N.Y.S. 672 (1923), *affd.* 208 App. Div. 852, 204 N.Y.S. 952 (1924); *Rash v. Bogart*, 226 Ala. 284, 146 S. 814 (1933). Language approved in *Berg v. Berg*, 201 Minn. 179 at 189, 275 N.W. 836 (1937), suggests that this might be the issue involved even under a statute with a saving clause.

doubtedly be based on the voluntary and more often temporary nature of separation as compared to judicially decreed divorce. But a distinction strictly along such lines is not entirely satisfactory, for the primary basis of the decisions in the divorce cases is the presumed intent of the testator, rather than a judicial policy determination against disinheritance as in the cases of marriage or marriage and birth of issue.¹⁶ And it is certainly not unreasonable to presume, in cases like the instant one, that the intent of the testator would be to revoke the provisions for his spouse in his will. To the objection that such an intent ought not to be conclusively, nor even as readily, presumed as in an instance of divorce,¹⁷ the possibility of relying on a rebuttable presumption of revocation may be suggested.¹⁸

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¹⁶ Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 MICH. L. REV. 406 at 416 (1942). Compare the thinking of the court in *Will of Battis*, 143 Wis. 234, 126 N.W. 9 (1910), with that in *Hoy v. Hoy*, 93 Miss. 732, 48 S. 903 (1908).

¹⁷ *Rankin v. McDearmon*, note 9 supra; *Estate of Kort*, note 9 supra. See annotation, 18 A.L.R. (2d) 697 at 700 (1951). See also 23 UNIV. CIN. L. REV. 277 at 279-280 (1954), where it is suggested that some language in *Yunker v. Johnson*, note 9 supra, implies a contrary view.

¹⁸ This solution has been urged for cases involving divorce with a property settlement. Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 MICH. L. REV. 406 at 416 (1942); 50 COL. L. REV. 531 at 534 (1950).
