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Wills - Revocation by Operation of Law - Divorce with a Property Settlement

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serves to satisfy the provisions of the policy as to change of beneficiary, thereby avoiding results which often seem harsh.[14]

Additional support is given to the minority view by the theory that interpleader of the insurance company and payment into court of the proceeds of the policy constitute a waiver of the policy requirements.[15] It is considered the provisions for change of beneficiary are for the benefit of the insurer, it alone may question the eligibility of beneficiaries and insist upon strict compliance; and, for those reasons, it alone can waive compliance.[16] This theory is rejected by the majority of courts, however, which follow the rule that the filing of an action of interpleader by the insurer cannot operate as a waiver of the policy's requirement as to change of beneficiary and thereby effectuate an otherwise defective substitution of beneficiaries.[17] The rights of the named beneficiary become vested on the death of the insured and cannot thereafter be affected by a subsequent act of the insurer.[18]

In disallowing the last declared intent of the insured, the decision of the instant case conforms to the rule exercised in most jurisdictions in regard to such expressions by will and, of course, less formal means. The rule is consonant with the ideal of certainty required in the public interest of insurance rights and liabilities.[19] Yet, no less attention is required or paid to certainty in the execution and administration of wills. There is compelling reason, therefore, to recognize the overriding factor of the last declaration of intent by the insured when made by will and to allow distribution of insurance proceeds accordingly.

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WILLS — REVOCATION BY OPERATION OF LAW — DIVORCE WITH A PROPERTY SETTLEMENT. — Plaintiff's former wife died leaving a will which contained a bequest to him of $1000. Subsequent to the making of this will she had obtained a divorce with a property settlement. The court *held* that a divorce with a property settlement did not act as a revocation by operation of law of a previously executed will. *Ireland v. Terwilliger,* 54 So.2d Fla. 1951).

The general doctrine of revocation by operation of law was developed in England.[1] Two events which would act as such a revocation were the subsequent marriage of a feme sole [2] and the subsequent marriage and birth

14. In war risk insurance cases involving change of beneficiary, courts brush aside legal technicalities to effectuate the insured's manifest intention. See Roberts v. United States, 157 F.2d 906 (4th Cir. 1946). *But cf.* Owens v. Owens, 305 Ky. 460, 204 S.W.2d 580 (1947).

15. Arrington v. Grand Lodge of Brotherhood of Trainmen, 21 F.2d 914 (5th Cir. 1927).

16. Provident Life & Accident Ins. Co. v. Dotson, 93 F. Supp. 538 (S.D. W. Va. 1950).

17. Equitable Life Assurance Society v. McClelland, 85 F. Supp. 688 (W.D. Mich. 1949) (insurance company was a party to the action).

18. Rasmussen v. Mutual Life Ins. Co. of New York, 70 N.D. 295, 293 N.W. 805 (1940); Dogariu v. Dogariu, 306 Mich. 392, 11 N.W.2d 1 (1943); Knights of Macabees of the World v. Sackett, 34 Mont. 357, 86 Pac. 423 (1906) any waiver regarding a change of beneficiary must occur during the lifetime of the insured. After the death of the insured, the insurer cannot waive anything to the prejudice of the beneficiary).

19. The controlling factor in Wannamaker v. Stroman, 167 S.C. 484, 166 S.E. 621 (1932) seemed to be the policy consideration of prompt payment to properly designated beneficiaries without incurring liability.

1. Atkinson, Wills 397 (1937).

2. *E.g.* Vandeveer v. Higgins, 59 Neb. 333, 80 N.W. 1043 (1899); Colcord v. Conroy, 40 Fla. 97, 23 So. 561 (1898); Nutt v. Norton, 142 Mass. 242, 7 N.E. 720 (1886) (marriage and birth of issue to a woman revoked her will).

of issue for a man.[3] The early English cases do not contain any references which indicate that a divorce, with or without a property settlement, would operate under the doctrine,[4] the lack of decisions being due, for the most part, to the infrequency of divorce in England at that time. The doctrine was inaugurated on the ground that changed conditions or circumstances are of such a nature that the testator would have wanted his will altered whether he had the chance to it himself or not.[5] This appears to have become an irrebutable presumption.[6] Courts which allow divorce, with or without a property settlement, to revoke a will by operation of law, do so on the same ground of presumed testamentary intent.[7]

Judicial reference to the problem in regard to divorce alone was first made in the case of *Carlton v. Miller*,[8] where the court stated, through dictum, that a divorce would not act as a revocation. The great majority of courts seem to follow this view.[9]

The first case to adjudicate the question, in regard to divorce with a property settlement, was *Lansing v. Haynes*.[10] Here the court discussed the reasons behind the doctrine and concluded that a divorce with a property settlement constituted such a change in the testator's circumstances as to imply a revocation. This has become a leading case in favor of the proposition that divorce and property settlement work a revocation of a will by operation of law.

Since *Lansing v. Haynes*, the decisions on this point appear to have turned upon statutory construction and interpretation. The statutes of the various states follow three general types: (1) a definite statement in the statute as to the effect of a divorce upon a will;[11] (2) a statutory provision such as, "Except in the cases in this chapter mentioned, no written will, nor any

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3. *E.g.* Shorten v. Judd, 60 Kan. 73, 55 Pac. 286 (1898); Glascott v. Bragg, 111 Wis. 605, 87 N.W. 853 (1901) (adopted child operated to revoke will previously made); Milburn v. Milburn, 60 Iowa 411, 14 N.W. 204 (1882) (birth of an illegitimate child, recognized and acknowledged by the father, held to revoke a will made before the birth of the child).

4. Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699 (1893); Atkinson, Wills 405 (1937).

5. *E.g. In re* Culp's Estate, 122 Neb. 157, 239 N.W. 636 (1931) (sale of lands acted as a revocation of a bequest in a will); *In re* Battis' Estate, 143 Wis. 234, 126 N.W. 9 (1910) (divorce held to revoke a will in favor of former wife).

6. *In re* McGraw, 233 Mich. 440, 207 N.W. 10 (1926); *In re* Battis' Estate, 143 Wis. 234, 126 N.W. 9 (1910); Nutt v. Norton, 142 Mass. 242, 7 N.E. 720 (1886); *See In re* Hall's Estate, 106 Minn. 502, 119 N.W. 219, 220 (1909) "At common law certain changes . . . worked a revocation by implicaiton, and it was formerly held that this was prima facie only . . . The rule . . . by all modern authorities, is that the prseumption of law . . . is conclusive, and no evidence is admissible to rebut it."

7. Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699 (1893); *In re* Hall's Estate, 106 Minn. 502, 119 N.W. 219 (1909); *In re* Bartlett's Estate, 108 Neb. 681. 190 N.W. 869 (1922).

8. 27 Ohio St. 298, 305 (1875) "The procuring of a divorce by the testator does not necessarily imply a revocation of the will, for it is entirely consistent with an intent to annul her right of dower only . . ."

9. Baacke v. Baacke, 50 Neb. 18, 69 N.W. 303 (1896); *In re* Brown's Estate, 139 Iowa 219, 117 N.W. 260, 263 (1908) "The divorce decree simply satisfied the property rights between the parties as they existed at that time, and had no reference . . . to any disposition . . . by will."

10. 95 Mich. 16, 54 N.W. 699 (1893).

11. *E.g.* Kan. Gen. Stat., §59-610 (1949); Remington's Wash Rev. Stat., §1399 (1922); Minn. Stat. Ann., §525.191 (1945) ". . . If after making a will the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked."

part thereof, can be revoked or altered otherwise than . . .",[12] followed by a list of statutory methods of revocation;[13] and (3) a statutory provision to the effect, ". . . excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." [14]

States having a statute such as type (1) are obviously bound by its explicit language in allowing or disallowing a divorce to operate as a revocation.[15] Type (2) statutes are the most numerous, and their exclutionary nature—*i.e.* (except as otherwise provided) has been interpreted to disallow implied revocation by operation of law.[16] By its language, the North Dakota statute would be categorized under this type.[17] The great majority of cases, in states possessing type (3) statutes, have held that although mere divorce alone was insufficient, divorce and property settlement constituted such a change in testator's position as to invoke an implied revocation by operation of law.[18]

The statutes of Florida and Georgia provide that marriage of the testator, or the birth of issue, subsequent to the making of a will, shall constitute a revocation of an existing will.[19] Neither statute contains an exclusionary phrase, such as, "except as is otherwise provided," commonly associated with a type (2) classification. Also absent is an expression that, "nothing herein contained shall prevent revocation implied by law," typically used with the type (3) statutes. The jurisdictions lacking the aforementioned phrases have held that the absence of the type (3) expression prevents them from applying the doctrine of implied revocation by operation of law.[20]

In the instant case the court was influenced by the fact that a provision of type (3) had been in the Florida statutes until the revision of 1933. The court interpreted the failure to include this provision in the later codes as indicating a legislative intent quite averse to the doctrine of implied revocation. It appears that the Supreme Court of Florida, in the instant case, has confined the doctrine of revocation within the stringent bounds prescribed by the state statute, thereby following the precedents established in many courts of this country.

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12. Idaho Code, §14-307 (1947); S.D. Code, §56.0217 (1939); *accord,* Smith-Hurd Ill. Ann. Stat., c.3, §197, (1941); Cal. Probate Code, §74 (Deering 1949).

13. *Ibid.*

14. Mich. Comp. Laws, §702.9 (1948); *accord,* Neb. Rev. Stat., §30-209, (1943); Mass. Gen. Laws, c.191, §8 (1932); Wis. Stats., §238.14 (1949).

15. *In re* Ziegner's Estate, 146 Wash. 537, 264 Pac. 12 (1928).

16. *In re* Patterson's Estate, 64 Cal. App. 643, 222 Pac. 374 ,1923); Gartin v. Gartin, 371 Ill. 418, 21 N.E.2d 289 (1939; Speroni v. Speroni, 406 Ill. 28, 92 N.E.2d 63 (1950); *In re* Nenaber's Estate, 55 S.D. 257, 225 N.W. 719 (1929).

17. N.D. Rev. Code §56-0401 (1943) "Except as otherwise provided in this chapter, a written will, in whole or part, can be revoked or altered only . . ."

18. *In re* Bartlett's Estate, 108 Neb. 681, 190 N.W. 869 (1922); Lansing v. Haynes, see note 10, *supra; In re* McGraw, 233 Mich. 440, 207 N.W. 10 (1926); Donaldson v. Hall, 106 Minn. 502, 119 N.W. 219 (1909) (case was decided before the passage of the statute cited in note 11); *In re* Batis' Estate, 143 Wis. 234, 126 N.W. 9 (1910); *Contra:* Hertrais v. Moore, 325 Mass. 57, 88 N.E.2d 909 (1949); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Dart's La. Civ. Code §1691 (1945) defines revocation ". . . is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will." (divorce and property settlement not considered tacit revocation).

19. Fla. Stat., §§731.10, 731.11 (1951); Ga. Code §3923 (1910).

20. Pacetti v. Rowlinski, 169 Ga. 602, 150 S.E. 910 (1929).