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TESTAMENTARY REVOCATION BY DIVORCE

ALVIN E. EVANS

Various methods of testamentary revocation have been discussed elsewhere by the present writer. For this occasion, consideration is given to revocation by divorce.¹

It is not strange that there should be so little common law on the matter in view of the traditional English attitude on divorce,² and the problem from the standpoint of Anglo-American law is to be regarded largely as our own. In only two American states has the legislature spoken positively and these have declared that the will is revoked by divorce.³ In some other states the opposite result has been reached in the decisions interpreting a statute which purports to enumerate exclusively all the methods of revocation.⁴

In still other jurisdictions, we may assume that the problem of revocation by divorce is not clearly settled by statute. It may arise (a) where the testator is divorced from his spouse; and (b) where divorce arises between a beneficiary and his spouse.

(a) The divorce of the testator from a beneficiary spouse.

The question of the validity of a legacy may arise

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¹ See 22 Ky. Law Jour. 469 (1934), Testamentary Revocation by Subsequent Instrument; ib. 600 (1934), Revocation by the Adoption of a Child; 23 Ky. Law Jour. 600 (1935), Testamentary Revocation by Act to the Document and Dependent Relative Revocation.


³ See General Laws of Minnesota (1923), Sec. 8472; Donaldson v. Hall, infra, n. 19; Pierce's Code of Washington (1929), Sec. 10026; Ziegler's Estate, 264 P. 12 (Wash. 1928); Peiffer v. Old Nat. Bank, 6 P. (2d) 386 (Wash. 1932). (Statute operates retroactively.) See 14 Ia. L. Rev. 1, 301 (1929).

⁴ See Cal. Prob. Code (Deering 1931), Sec. 74; Patterson v. Patterson, 64 Cal. App. 643, 222 P. 374 (1922); Brannon's Estate, 295 P. 83 (Cal., App. 1931); General Statutes of Connecticut (1930), Sec. 4880;
where there is a divorce simply or it may appear where there has been a divorce accompanied by a property settlement.

There is no American case which holds that divorce alone suffices as a revocation either of the entire will, or of the provision for the wife, save those based directly upon a statute. An annuity in lieu of dower had been given the wife and if she should refuse it, she was to have nothing under the will. It was the view of the court that she should take and though divorce removed the possibility of dower, yet the gift was not conditioned upon the existence of the right of dower. No earlier authorities were cited and the case was decided independently of the statute.

An earlier case from Ohio differs in that the will was executed on the day of marriage, but before that event took place. The court, in holding that divorce did not revoke the gift, laid stress upon the proposition that the divorced wife neither lost nor gained by the marriage, as the relation at the time of testator's death was the same as it was when the will was executed. This argument, however, seems to be without significance. If any condition is to be read into a will by which the testator provides for his spouse, that she shall continue to be his spouse until his death, the same condition should be read into this will. In

(In Card v. Alexander, infra, n. 6 there is no reference to a statute but the present Connecticut statute clearly prevents revocation in this manner); Annotated Code of Ga. (Park 1914), Secs. 3918, 3919, 3921, 3923; Pacetti v. Rowinski, 169 Ga. 602, 160 S. E. 910 (1930); La. Civil Code Annotated (Dart. 1932), Sec. 1691; Successor of Cunningham, 142 La. 701, 77 So. 506 (1913); Texado v. Spence, 156 La. 1920, 118 So. 130 (1928); 4 Compiled Statutes of N. J. (1910), pp. 5661-5770; Murphy v. Markis, 98 N. J. Eq. 153, 130 A. 840 (1923)—Affirmed (132 A. 923); Pa. Statutes (1920), Secs. 8332, 8333; In Re Jones, 211 Pa. 354, 60 A. 915, 69 L. R. A. 940, 107 A. S. R. 581 (1905); Compiled Laws of So. Dakota (1929), Sec. 623; Nenaber's Estate, 225 N. W. 719 (S. D. 1929); 5 Wis. L. R. 377 (1930). Morris' Estate, 22 Pa. Dist. R. 466 (1913), contra. Cf. Brown v. Grand Lodge, 208 Pa. 101, 57 A. 176 (1904) (Insurance policy proceeds payable "to my wife M," proceeds go to divorced wife, though insured had remarried); but see Re Lee's Estate, 207 Pa. 218, 55 A. 235 (1903) (a trust created for T's daughter, to terminate on the death of her husband, was held to terminate on divorce from him).
many states there is no statute which necessarily stands in the way of revocation by divorce. If, instead of divorce, the marriage is avoided for impotency or other reason, still a legacy to testator's wife is not revoked by the avoidance of the marriage. There appears to be no valid distinction between annulment of the marriage and a divorce.

### Property Settlement

Many states hold, however, that a different result accrues where the divorce is accompanied by a property settlement or where alimony is granted on divorce. In one case it was held that when the wife failed to demand alimony, such failure was equivalent to a settlement or grant of alimony at the time of the divorce. The first decision relied upon the statutory provision, "Nothing herein shall be construed to prevent revocation implied at law." It was a case where the equities favored revocation, the wife having received one-half of the estate at the settlement. The court declared, in effect, that an implication of revocation was not limited by the circumstances that had developed in England prior to the American revolution and that changed social and moral relations may still develop additional conditions of implied revocation. This precedent has been consistently followed. Nebraska, having a similar statute, has held that the divorce alone does not entirely revoke a will.

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*Baacke v. Baacke, 50 Nebr. 18, 69 N. W. 303 (1896)*; *In Re Brown's Estate, 139 La. 219, 117 N. W. 260 (1908)* (divorce and alimony); *Charlton v. Miller, supra, n. 8*; *Pardee v. Grubiss, 34 Oh. App. 474, 171 N. E. 375 (1929).*

*In Re Boddington, L. R. 22, Ch. D. 597, 25 Ch. D. 635 (1883).* (But an annuity to her during widowhood never vests in her as she never became testator's widow).


*Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893).*

*Wirth v. Wirth, 149 Mich. 587, 113 N. W. 306 (1907)* (Settlement in lieu of alimony); *McGraw's Estate, supra, n. 11* (No settlement and no alimony, the court having no power to grant it, but fact that it was not asked for regarded as equivalent to a grant of alimony and no distinction made between settlement and alimony).

*Baacke v. Baacke, supra, n. 9* (question of revocation of legacy not before the court); *Barlett's Estate, 108 Neb. 681, 190 N. W. 869 (1922)*; *Martin's Estate, 109 Neb. 239, 190 N. W. 872 (1922)* (revocation).
But where the wife, on divorce, received a lump sum and the household furniture, which may be regarded as a property settlement, and also a monthly allowance in the nature of alimony, the testamentary provision for her was revoked.\textsuperscript{15} Revocation accords here with testator’s presumed intent.\textsuperscript{16} The court thought, also, that the principle of revocation by implication was elastic and should be applicable where new duties had arisen and the wife was no longer an heir. The amount of the settlement was said to have been affected by the fact that she was an heir. This recalls the early view in Illinois, that without statutory provision, marriage alone revokes a man’s will because his wife is an heir.\textsuperscript{17}

If the statute is construed to cut off the possibility of revocation by methods other than those expressly named, it follows that where divorce is not included, divorce accompanied by a settlement is not included,\textsuperscript{18} but where divorce alone works a revocation, it follows that divorce accompanied by a property settlement works a revocation.\textsuperscript{19} While alimony is sometimes regarded as the equivalent of a settlement,\textsuperscript{20} it is, in its nature, essentially different and at least one jurisdiction denies revocation where the payment of alimony was under compulsion of the court and not by way of agreement.\textsuperscript{21}

Whether divorce and a property settlement accomplish an implied revocation or not, it seems that the determination of the issue is not based upon the supposed intention of the testator, but depends upon a rule of law and added facts are generally not pertinent.\textsuperscript{22} In some cases, however, certain extrinsic facts

\textsuperscript{15}Barlett’s Estate, supra, n. 14.
\textsuperscript{16}Martin’s Estate, supra, n. 14 (The idea of intention was rejected and revocation became a rule of law).
\textsuperscript{17}Tyler v. Tyler, 19 Ill. 151 (1857).
\textsuperscript{18}Brannon’s Estate, 295 P. 83 (Cal. App. 1931); Pacetti v. Rowiński, supra, n. 4; In Re Brown’s Estate, 139 Ia. 219, 117 N. W. 260 (1908); Suc. of Cunningham, 142 La. 701, 77 So. 506 (1918); Nenaber’s Estate, supra, n. 4. In any event, a property settlement accompanied by an action for divorce which action is discontinued could scarcely work a revocation; Re Blanchard’s Estate, 267 Mich. 189, 255 N. W. 190 (1934).
\textsuperscript{19}Hall’s Estate, 106 Minn. 502, 119 N. W. 219, 16 A. C. 541 (1909); Battis Will, 143 Wis. L. Rev. 234; 126 N W. 9 (1910), 8 Ia. L. R. 281.
\textsuperscript{20}Wirth v. Wirth, supra, n. 13.
\textsuperscript{21}In Re Brown’s Estate, supra, n. 9.
\textsuperscript{22}Lansing v. Haynes, supra, n. 12; McGraw’s Estate, supra, n. 11; Baacke v. Baacke, supra, n. 9; Martin’s Estate, supra, n. 14; Battis Will, supra, n. 18.
have been admitted in evidence and their bearing upon testator's intent has been considered by the court.23

It has been pointed out24 that there are, in fact, four classes of cases: (a) Those where the decisions are based upon a statute interpreted as excluding divorce as a method of revocation; (b) Those where the statute expressly provides for revocation by divorce; (c) Those where implied revocation is not limited to such circumstances as were sufficient at common law, and the statute expressly recognizes implied revocation;25 and (d) Those where nothing is said about implied revocation and so divorce is not necessarily excluded,26 or included among circumstances which imply revocation.

**REVOCATION ENTIRE OR PARTIAL**

In those states where divorce and a property settlement constitute an implied revocation, is the entire will to be regarded as revoked, or is the revocation applicable only to the provision for the divorced spouse? It is to be recalled that at common law revocation by implication arising from circumstances affected the entire will. Also, those statutes which declare the will is revoked of either a man or a woman by subsequent marriage, apply to the entire will.

On the other hand, if there is any analogy between such a settlement and an advancement, it would seem that only the legacy to the spouse is revoked, whether entirely or pro tanto. Thus, where statutory provision is made for pretermitted children and for those subsequently or posthumously born, it does not cause an entire revocation, but rather it makes up to the child what he would have received if there had been no will by cutting down the shares of others. There is no sufficient reason why the other provisions of the will should fail of effect just because of the circumstances of the divorce of one beneficiary

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23 Bartlett's Estate, supra, n. 14 (court considered facts that there was no issue of the marriage and the property was largely inherited and testator had near relatives); Pardee v. Grubbis, supra, n. 9 (question of revocation left to the jury).
24 5 Wis. L. Rev. 377 (1930).
25 Lansing v. Haynes, supra, n. 12; Wirth v. Wirth, supra, n. 13; McGraw's Estate, supra, n. 11; Baacke v. Baacke, supra, n. 9; Martin's Estate, supra, n. 14; Battis Will, supra, n. 18; Bartlett's Estate, supra, n. 14.
26 In Re Brown's Estate, supra, n. 9; Card v. Alexander, supra, n. 6.
and it is believed that the statutes in the two states declaring an entire revocation of the will are ill conceived. The cases which hold that the entire will is revoked are all cases where the whole estate was left to the divorced spouse, with the possible exception of one, and even here such an inference may reasonably be drawn. In *Re Battis Will*, only the legacy to the divorced spouse was revoked.

**The Settlement as a Satisfaction**

It is arguable that although divorce and a property settlement should not, apart from statute, be regarded as a revocation of a gift to a spouse now divorced, still the settlement should be a satisfaction of the gift, at least *pro tanto*. This suggestion has not been followed, but the difficulty in the case which considered the matter arose in applying the doctrine of satisfaction to residuary gifts. Much, however, may be said in behalf of a settlement as a satisfaction. It is true that as regards strangers, a gift *inter vivos* is not regarded as a satisfaction unless such was the intention. In most cases, however, it seems fair to assume that the gift to the spouse was occasioned by the relationship of husband and wife. The settlement was brought about because of the severing of that relationship. There is reason, accordingly, to assume, a connection between the testamentary provision and the *inter vivos* provision. The nature of a residuary provision prevents it from being satisfied by an *inter vivos* gift, but there is no sufficient reason why it should not be satisfied by a settlement on divorce, at least *pro tanto*.

A problem of conflict of laws might well be expected to arise, though only one case so far has been found. Suppose a will providing for the wife is executed in Washington, a state which declares divorce alone, or divorce accompanied by a settlement is sufficient to revoke the provision. The divorce subsequently is procured in state of domicile where the will was executed and subsequently the testator becomes domiciled and dies in California, a state where this circumstance does not word

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29 Supra, n. 18.
30 *Re Brown’s Estate*, supra, n. 9.
a revocation. Shall the divorced spouse take? The answer depends upon the nature of the revocatory act, and just when it becomes such, whether at the time of performance, or at the time of death. This question is a common one where the problem of revival arises.

Some acts, when accompanied by intent, are revocatory at once, such a destruction or cancellation because the will no longer exists in its original form and nothing can restore it, not even re-execution or republication. On the other hand, revocation by a later will does necessarily take place when the later will is executed and at common law the earlier will was revised if the later revoking will happened to be itself revoked. An early distinction arose in Connecticut and spread to other states, but is now repudiated at its place of origin, to the effect that a will containing an express revoking clause took effect at once, while a will merely inconsistent was revoked only at death. It was said that in the latter case a revival of the earlier will took place if the later will was repudiated. More accurately speaking, the earlier will was not revoked by the later writing at the time the act was performed but rather its primary position was temporarily usurped and the earlier will might later be reinstated because no will really speaks till death, at which time all validly executed and existing wills not then repudiated are entitled to probate. It would seem that divorce, like cancellation or destruction, should operate at once. Certainly where divorce revokes a will it does not operate like a subsequent writing which merely usurps the place taken by the prior will. Divorce, like destruction, makes the testator intestate. If the will is subsequently revalidated it must be through a revival which operates without reference to the intention of the testator and merely by the change of domicile. It is submitted that change of domicile alone cannot, of itself, restore a revoked will. If, however, the testator had been domiciled in California at the date of the divorce but had become domiciled in Washington at the time of his death, there would be the same result but the

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*a Patterson v. Patterson, supra, n. 4. The view here expressed seems to conflict with the Restatement of Conflicts of Laws, Sec. 307.

*b James v. Marvin, 3 Conn. 576 (1819) [overruled in Whitehall v. Halbing, 98 Conn. 21, 118 A. 454 (1922)].
divorce would not operate as a revocation until the change of domicile had taken place.\textsuperscript{33}

(b) The divorce arises between a beneficiary and his spouse.

It is interesting to note that with one exception (case of annulment for impotency) all the English cases are of this class.

In all the decisions above noted it has been assumed that the gift to a wife means a gift to the individual and that "wife" or "husband" was mere \textit{descriptio personae}.\textsuperscript{34} Where a testator and his spouse are divorced, the gift to the spouse as "my wife" or "my husband" is necessarily a gift to a definite person who at the time is so described. If the gift should fail it is not because the description is a condition of the gift. In cases of the second class, there is less assurance that such term is merely descriptive. It is commonly said, however, that if the bene-

\textsuperscript{33}See No. 75 Cal. Probate Code on revival (Deering 1931) which clearly has no application. California held contra to the reasoning above in \textit{Patterson v. Patterson}, 64 Cal. App. 643, 222 P. 374 (1922). See comments in 12 Cal. L. Rev. 579 (1924), 22 Mich. L. Rev. 838 (1924). See \textit{Re Reid}, L. R. 1 P. & D. 74 (1867) (Will of T domiciled in Scotland who later married and by the local law will was not revoked. Later, he became domiciled in England, where the will otherwise would have been revoked had it not been for the Lord Kingsdown Act); \textit{Re Goburn}, 30 N. Y. S. 383 (1894) (Will by unmarried woman domiciled in New Jersey who later married there. In New Jersey later marriage does not cause a revocation. She later became domiciled in New York, where subsequent marriage does revoke a prior will. Held, will revoked. It is submitted that a correct result is reached here and that it is not analogous to the Patterson case and that the note in 12 Cal. Law Rev. 579 erroneously assumes that the only question involved is the matter of domicile. In fact, this case is the converse of the Patterson case. There was no revocatory act in New Jersey, but on reaching New York the act became revocatory by the only law that could possibly be applicable. Suppose, however, there had been a partial revocation by destructive act to the document assumed to be possible in New Jersey, then the will would still have been partially revoked to New York, even though evidence were available to establish the contents of the portion revoked, though New York does not countenance partial revocation.

\textsuperscript{34}In \textit{Re Jones}, supra, n. 4; \textit{Murphy v. Markis}, supra, n. 4. Cf. \textit{Card v. Alexander}, supra, n. 6 (Held, that gift to wife in lieu of dower and made conditional upon acceptance as such does not require the beneficiary to be in such a position as to be entitled to dower). Where, however, an annuity is given to the wife to be paid her "so long as she continues my widow and unmarried" if the marriage is subsequently avoided, the beneficiary does not take because she cannot fulfill the condition of the gift, i. e., being or continuing to be testator's widow (\textit{In Re Boddington}, supra, n. 10). In \textit{Collard v. Collard}, 67 Atl. 190 (N. J. Prerog. 1907) (held that gift to "my wife C" failed if at the time she was not testator's wife because still married to another).
ficiary be designated both by name and by the term spouse, the latter is merely descriptive. Where, however, the spouse is not mentioned by name and especially where the gift is to such person as shall be the future spouse or during widowhood of a named person (son or daughter or nephew, etc.), it is held that the term "spouse" is a condition of the gift.

We may conclude that at common law divorce of a testator was not a circumstance which revoked either the will as a whole or merely the provision for the divorced spouse. The English attitude toward divorce has undoubtedly prevented this from being a frequent ground of litigation there and in fact the only decision bearing upon the matter is one involving annulment. In this country the question of revocation arising from the circumstance of divorce has frequently occurred. It is rarely met squarely by statute. It may be argued that the possibility of a developing doctrine of revocation by implication should not be overlooked. On the other hand, a legislative policy on the matter is not difficult to formulate and such a regulation may well be left to the law-making body. One may take his choice of alternatives based upon his own views of social exigencies, whether or not divorce should, as a matter of policy, revoke a will pro tanto. Certainly it should not effect a total revocation.

Where, however, the spouses, on divorce, have agreed upon a property settlement, which is fair to both and approved by the court, legislation may well declare the provision for the divorced beneficiary revoked. In the absence of legislation, such a settlement may be regarded by the court construing the will as being in the nature of an advancement. This does not apply to

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35 Knox v. Wells, 48 L. T. N. S. 655 (1864) (Annuity to son and to son's wife, Elizabeth, jointly. Son divorced his wife prior to testator's death); Bullock v. Zilley, 1 N. J. Eq. 489 (1831) (Same, use of wife's name emphasized); Mellon's Est., 28 W. N. C. 120 (Pa. 1891) (Same, gift to T. W., husband of my daughter; provision not revoked by divorce of T. W. from his wife).

36 Re Morrison, L. R. 40 Ch. D. 30 (1889). The earlier case, Bullmore v. Syter, L. R. 25 Ch. D. 619 (1883) holding contra was not followed. Steen v. Steen, 68 N. J. Eq. 472, 59 A. 675 (1905) (gift to daughter, M, wife of my son, John. John not yet married to her at death of T, M does not take); Bell v. Smalley, 45 N. J. Eq. 478, 18 A. 70 (1888) (gift to my son and to his wife, H, if she survives him, during her widowhood. The gift is conditioned on widowhood, which is prevented by divorce. Cf. Rogers v. Hollister, 156 Wis. 517, 146 N. W. 488 (1914) (gift to husband expressly conditioned upon his being T's husband at her death, will being executed while divorce action was pending).
the case of alimony, which may not be a substantial portion of the marital acquisitions. Social theory, if not legal theory, tends to regard the wife as having an interest in the property as such, acquired during the marriage by the industry of the spouses.37

Where the gift is not to the spouse of the testator but to the spouse of a beneficiary, if such spouse is named as well as described as spouse, divorce should not avoid the gift. If the beneficiary is described only as spouse or relict of a named person there is more reason to regard the gift as conditioned upon the language used.

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37 Divorce and Married Woman’s Property Rights, Pierre Crabites, 12 A. B. A. Jour. 603 (1926). See Werner v. Werner, 59 Kan. 399 (1918) and Fuller v. Fuller, 33 Kan. 582 (1885); Krauter v. Krauter, 79 Okla. 30 (1920); Buckley v. Buckley, 50 Wash. 213 (1908); Estate of Brinchley, 96 Wash. 223 (1917); Knoll v. Knoll, 104 Wash. 110 (1918). See further, Evans, Property Interests Arising from Quasi-Marital Relations, 9 Corn. L. Quart. 247 (1924).