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Article 5

Wills - Revocation of the Will of a Childless Man

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RECENT DECISIONS

Wills — Revocation of the Will of a Childless Man — The testator executed a will making provisions for two of his brothers and two sisters at a time when he was a widower without issue. He was married about one and one-half years later. He died several years later without issue, survived by three brothers, a sister and his widow. The widow contested the admission of the will to probate. *Held,* marriage without subsequent issue is not sufficient to operate as a revocation of a will of a testator executed prior to that marriage and at a time when he was without issue. *In re Wehr's Will, Wehr et al. v. Wehr,* 247 Wis. 98, 18 N.W. (2d) 709.

One contention of the widow, of interest here, was that in Wisconsin the will of an unmarried man having no issue is revoked by his marriage,[1] particularly in view of the rule which makes the widow the sole heir of her husband in the event of his death without issue. She sought to prove that in no cases where the question was directly involved, did a court ever hold that the will of an unmarried man having no issue was not revoked by marriage. No English case was found to support this contention. Further, the court found the subject mentioned in dicta of two early American cases[2] and said that a rule contrary to the widow's contention was established by implication, stated in dicta, and understood to exist by the bench, bar and legal writers.

Another contention of the widow was that "assuming there was a common law rule that marriage alone would not revoke a will in the circumstances involved here, the rule had its foundation in the fact that the wife, so far at least as the real property of the husband was concerned, had no heritable interest[3] until the birth of a child; that the rule that marriage plus birth of a child revoked the will had

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[1] Wis. Stat. (1943) Sec. 238.14. "Wills, how revoked. No will nor any part thereof shall be revoked unless by burning, tearing, * * * 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."

[2] Shepherd v. Shepherd, 5 T. R. 51 (1770). "Upon the whole, therefore, I am of opinion, 1st, that a will is revoked by subsequent marriage and issue. 2dly, that marriage alone, or birth of children alone, is not sufficient to operate a revocation." Brush v. Wilkins, N. Y., 4 Johns. Ch. 506. Chancellor Kent, after a review of the English cases, reached the conclusion that the following was the settled rule of the English common law as early as 1775. "* * * that marriage and a child taken together, (though neither of them taken separately was sufficient) did amount to an implied revocation, * * *" This statement is repeated in 4 Kent, Commentaries (14th ed.) 521, 522.

[3] Was dower a heritable interest, or, was inheritance subordinate to dower? Blackstone, Commentaries, Lewis Ed., 1900, II: 129, "Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies: in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life."

its foundation in a change of circumstances creating new heritable rights, as well as new moral and legal obligations, this being considered enough (1) to warrant the assumption that the testator, had he adverted to the matter, would have changed his will, and (2) to call for a rule of law based on the equities of the situation treating the new circumstances as effecting a revocation." To support this point the widow cited the *Battis* case,[4] wherein the court found that a divorce was such a change in the condition and circumstances of the testator as to revoke his will or part thereof by implication. From this the widow argued that implied revocation can never be governed by a fixed rule of common law unchangeable except by legislative enactment. And she concluded that when in Wisconsin, husband and wife, in the absence of issue, were made heirs of each other, that was such a fundamental change in property rights, such a radical increase in the rights of the wife, such an enlargement of the legal and moral obligations of the husband, as to bring into operation an implication of revocation.

After examination of several cases presenting a conflict of authority in sister states on the rule in controversy,[5] and finding that the great weight of authority had been against the widow's position, the court reached the conclusion that "the rule of the common law is not so fixed as to be within the constitutional protection of Article XIV, sec. 13, Wisconsin Constitution;[6] that being a rule of implication, it is necessarily one which changes of circumstances can change specific application of it. It should be pointed out, however, at this stage, that whatever application of the rule to specific situations has been made must be held to be an important rule of property and one that should not be disturbed unless clearly wrong."[7]

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[4] Will of Battis, 143 Wis. 234 at 239, 126 N. W. 9, 11, 139 Am. St. Rep. 1101 (1910). "The change in the condition and circumstances of a testator incident to a divorce and distribution of the husband's estate operates to produce a complete destruction of their legal and moral relations and consequent obligations and duties."

[5] Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419 (1896); Hoy v. Hoy, 93 Miss. 732, 48 So. 903, 25 L. R. A., N. S., 182, 136 Am. St. Rep. 548, 17 Ann. Cas. 1137 (1908); Hoitt v. Hoitt, 63 N. H. 475, 3 A. 604, 56 Am. Rep. 530 (1886); Goodsell's Appeal from Probate, 55 Conn. 171, 10 A. 557 (1887); Bowers v. Bowers, 53 Ind. 430 (1876); In re Adler's Estate, 52 Wash. 539, 100 P. 1019 (1909); Vanek v. Vanek, 104 Kan. 624, 180 P. 240 (1919); Herzog v. Trust Co. of Easton, 67 Fla. 54, 64 So. 426, Ann Cas. 1917A. 201 (1914); Fleming v. Blount, 202 Ark. 507, 151 S. W. (2d) 88 (1941); Scherrer v. Brown, 21 Colo. 481, 42 P. 668 (1895); Tyler v. Tyler, 19 Ill. 151 (1857); Toepfer v. Kaeufer 12 N. M. 372, 78 P. 53, 67 L. R. A. 315 (1904).

[6] Wis. Const. Art. XIV, Sec. 13, "Common law continued in force. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislaure."

[7] Wisconsin Power & Light Co. v. Beloit, 215 Wis. 439, 254 N. W. 119 (1934), "Under the principle of *stare decisis*, a rule of law in the nature of a rule of property once established and acquiesced in without change by the legislature

What happens when a testator does not bother to draft a new will after his marriage? He could have done so. He could have cut his widow down to her statutory rights or he could have given her all of his property. In such a situation it is a great deal more important to have a certain and understandable rule than to have one that appears at the moment to be logically more sound. The court considered the Wisconsin cases bearing on the point[8] and stated that it recognized the general principle asserted by the widow in the present case, but would refuse to make the specific application of it here demanded. Thus the court has followed the majority rule in this country; a rule based in part on the fact that sufficient protection to the wife has been given by statutes securing a portion of the spouse's estate to her regardless of his will, and in part upon the opinion that the real basis of the common law rule was that the wife did have dower rights and certain rights in personalty, even under the common law rules of property, and the modern changes are not so fundamental as was asserted by the widow.

JOSEPH A. BETHEL

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should be adhered to." State ex rel. Gisholt Mach. Co. v. Norsman, 168 Wis. 442 at 445, 169 N. W. 429 (1919). "This doctrine is so firmly written into the decisions of this court as to have become a rule of property in this state, which it is our duty to respect and protect." Will of Butter, 239 Wis. 249, at 255, 1 N. W. (2d) 87 (1941). "If a change is to be made in this rule, which has now become a rule of property, it should be done by an act of the legislature and not by judicial decision."

[8] Will of Ward, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174 (1887). During her second marriage a woman made a will giving her property to the children of her first marriage. She afterwards married again, and died leaving her third husband surviving. She had no issue by either the second or third marriages. Held, under the statutes giving to married women the absolute right to dispose of their property, the will was not revoked by the third marriage. Will of Lyon, 96 Wis. 339, 71 N. W. 362, 363, 65 Am. St. Rep. 52 (1897). A woman made her will, later married and died without issue. Headnote: "The marriage of a woman does not revoke a will previously made by her, the common-law rule in that regard having been changed by the statutory removal of her disabilities in respect to the disposition of her property." Glascott v. Bragg, 111 Wis. 605 at 607, 87 N. W. 853, 56 L. R. A. 258 (1901). A man made his will, later married. He and his wife thereafter adopted a child. "The earlier cases seemed to go upon the theory that such a marriage and birth raised a mere presumption of an intent to revoke, but the rule held in the earlier cases was finally confirmed in the Privy Council in Israell v. Roden, 2 Moore, P. C. 51, where it was expressly held that 'marriage and birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an absolute revocation of a will made previous to the marriage but not in contemplation of it." Gailey v. Brown, 169 Wis. 444 at 448, 171 N. W. 945, 946 (1919). Testator domiciled in Illinois made a will, married and died without issue, leaving real estate in Wisconsin. "This interpretation of our statutes excludes the idea that marriage alone, as the Illinois statutes provide, shall be deemed a revocation of a prior will."