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Implied Revocation of Wills in Wisconsin

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IMPLIED REVOCATION OF WILLS IN WISCONSIN

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SECTION 238 of the Wisconsin Statutes provides as follows:

No will nor any part thereof shall be revoked unless by tearing, burning, concelling or obliterating the same with the intention of revoking it by the testator or by someone in his presence or by his direction or by some other will signed, attested and subscribed in the manner provided in this chapter for the execution of a will, excepting only that nothing contained in this section shall prevent the revocation implied by law from the subsequent changes in the conditions or circumstances of the testator. The power to make a will implies the power to revoke the same.

This paper will concern itself shortly with the exceptions contained in the above statute and will seek to show what consideration should be placed upon this exception.

It is quite generally held that the methods provided in the first clause of the statute for the positive revocation of a will by some act of the testator are exclusive and that the act proposed as a revocation must fall clearly within one of the means provided in the section. Also, on the theory of *res gestæ,* it is held in this state as elsewhere that no declaration of the testator in reference to the revocation is admissable to show such revocation unless the statement or declaration relied upon is so connected with one of the acts of revocation mentioned in the statute as to become a part of this act. Under these rules of law one is led to inquire whether or not all possible cases are taken care of.

When a case of revocation is not attempted to be made from a positive act of the testator it is often possible to show a revocation by changes in the conditions and circumstances of the testator. Such doctrine of revocation is as old as the common law. It is based upon a presumed change of intention by the testator due to changes which have taken place in his conditions and circumstance since the date of the execution of his will. The law takes into consideration the changes which have taken place and from these changes argues that the intentions of the testator have necessarily become different and therefore implies that the will has been revoked. The question of what changes of conditions or circumstances will warrant the implication that the will has been revoked by operation of law has been raised in several cases in this State which will later be examined.

Before the Wisconsin cases are discussed let us first propose a

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set of facts and try to determine whether or not the statute would cover. Let us make the assumption that A makes a will in 1901 at which time he is forty years of age and his wife thirty. He has three children, aged seven, five, and three respectively. His approximate worth is $50,000 composed of real estate of the value of about $35,000 and personal property of the value of about $15,000. His will makes a bequest of $6,000 in money to his wife and $2,000 in money to each of his three children. It further provides that all the real estate owned by the testator at his decease shall be held in trust for the lives of his three children to be given in fee to his grandchildren at the death of his own children. It will be noted that the terms of the will are in violation of the statute prohibiting unlawful suspension of the power of alienation for the reason that the Wisconsin statute regulating such suspension then in force made unlawful any suspension of alienation for a period longer than two lives in being. Testator several years afterwards placed this will in a box of old discarded papers. This box was placed away in the bottom drawer of his desk and was forgotten. On several occasions during his later life he said to his wife and to his children that the old will was no longer any good, that it was drawn in violation of the statute and that he wished his property to descend in accordance with the laws regulating descent, but he never destroyed the will; he never tore it; he never obliterated it; canceled it; or did any physical injury to it. His only act of revocation was to file it away with his old almanacs and calendars. In 1928 he died. Between the time of the execution of his will and the date of his death his estate had grown from $50,000 to $650,000. His real estate at the time of his death was worth about $200,000 and the balance of the estate consisted of mortgages and promissory notes of the value of about $450,000. The real estate consisted mostly of old dilapidated buildings all of which were unfortunately situated right next to a street-widening project then being conducted by the city in which he died. Being so situated the property was subjected to a very heavy assessment for the purpose of such improvement and, in addition, in order that the property could yield an income sufficient to carry the investment it would be necessary to improve the same by the erection of new buildings thereon which would cost at the very least about $50,000. The result of this situation would be that for a period of about ten years the real estate would not only not yield an income, but that the real estate would also consume the income from the personal property leaving no balance of money. The heirs of the testator during this time could have no income from the estate. It can also be noted that in 1927, the year before the testator's death, the legislature of the state of Wiscon-

sin validated the trust executed in the testator's will by providing that the power of alienation may be suspended for a period no longer than a life or lives in being. Consequently the trust which was invalid at the time was made was valid at the time of the testator's death.

This situation was rendered very unfortunate by the fact that the two sons of the testator, now aged thirty-seven and thirty-three years respectively had spent their entire business careers in caring for the interests of the tetator's estate. For some fifteen years he had been inactive and retired and the business of taking care of his interests had fallen upon his two sons. They devoted their entire time to this work and developed no business, trade, profession or occupation of their own. They were entirely dependent upon the income from the testator's estate for their very existence. Upon his death they were brought fâce to face with this situation that after devoting some fifteen years to building up their father's estate they would be now unable to draw one penny of income from it for the reason that the trust contained in the will was valid and such trust due to the peculiar circumstances of the estate was a trust which yielded not one cent of income.

When this situation is examined in the light of the first provision of the statute above quoted the following facts will be discovered. In the first place the testator never destroyed, burned, tore, canceled or obliterated the will in accordance with the provisions of the section. Because of this none of the declarations or statements which he made during his life time concerning the revocation of his will would be admissable in an action to set aside the will for the reason that they were not connected in time and place with any of the positive acts of revocation set forth in the statute. It is fairly clear that the testator had not revoked his will in accordance with the statutory means provided and yet it seems hardly fair to his widow and children that after their careful family interest in the preservation and accumulation of their father's estate that they should be deprived of an income for a number of years in order that the will could be maintained as valid.

At this point in the consideration of this peculiar set of circumstances it was natural that the cases construing the exceptions provided in this section should have been examined. It was considered as elementary that a change of conditions or circumstances sufficient to warrant the implication that the will had been revoked by operation of law was not supplied by a mere increase in the size of the testator's estate. Such has been the law for a long period of time and yet in this case the increase in the testator's estate was the only visible change which could be found in the conditions and circumstances of the testator.

In 28 Ruling Case Law, paragraph 145, we find the following statement:

It is generally held that the revocation of a will may be implied from certain changes in the testator's circumstances from which the law infers or presumes that he intended a change either total or partial in the disposition of his property. Such implied revocation may take place from a material alteration in the testator's property or from a change in his family or in the beneficiaries of his will. The doctrine that revocation of a will may be implied from certain changes in the condition and circumstances of the testator is of very ancient origin and is based upon the theory that by reason of such changes new moral duties and obligations have accrued to the testator subsequent to the date of the will.

The question in this article is whether or not the set of facts given above would not give rise to such new moral responsibilities and family obligations as to imply that the will had been revoked.

Upon examination of the Wisconsin statute involved it will be found that the legislature has made no provisions as to just what changes of circumstances must take place in order to warrant the implied revocation of the will. The statute merely provides that the statutory means of revocation enumerated in the first several clauses of the section shall not be construed to prohibit revocation of the will by subsequent changes in the conditions and circumstances of the testator. Clearly it is for the court to say what changes will bring the instant case within the exception provided for in the statute.

Now the question occurs as to whether or not this statute merely preserves those changes of circumstances which were recognized at common law as working the revocation of a will previously made. At common law changes sufficient to revoke a will were usually limited in the case of a man to marriage and subsequent birth of issue and in the case of a woman to marriage alone.[1] In fact it is quite generally conceded that these were the only changes which were sufficient under the common law rule to revoke a will by operation of law. Now, if it were the intention of the legislature to preserve these as the only changes of circumstances sufficient for purposes of revocation it would seem that the exception in the statute would have contained a specific provision to that effect. On the contrary the statute merely provides in general that subsequent changes of circumstances or conditions may be sufficient.

Under the Wisconsin decisions several other changes have been added to the list of those which were sufficient at common law. The common law rule that marriage alone was sufficient to revoke the will of a woman which will had been made previous to

[1] *In re Ward's will,* 70 Wis. 251. *In re will of Lyons,* 96 Wis. 339. *Gailey* v. *Brown,* 169 Wis. 44. *In re Read's will,* 180 Wis. 497.

marriage and not in contemplation thereof has been revoked in accordance with the Married Women's Enabling Acts and the rule is now the same in the case of a woman as in the case of a man, namely, that she must marry and have issue.[2] To suit modern conditions the rule is now in force that the adoption of a child has the same effect as the birth of issue, with this effect that marriage plus the subsequent adoption of children is sufficient to revoke a will made previous to marriage and not in contemplation thereof.[3] In some states it is now held that a divorce plus a complete property settlement are such changes as will revoke a will by operation of law. On this question there is quite a decided division in the authorities, but Wisconsin holds that this change is sufficient.[4]

In the case of *In re estate of Wilkins.*[5] The question before the Court was whether or not one K who was named as a beneficiary in the will of Edith Wilkins, deceased, could take under this will when he had previously murdered the testatrix without knowledge that he was named as a beneficiary in her will. The court held and properly so that he could not take under the will. It is true that the court puts its decision on two grounds on which we are not concerned in this paper, namely, first, that by murdering the testatrix he deprived her of a right which the statute gave her of revoking her will and second, that it is the general rule in equity that one cannot be seen to profit from his own wrong. However, it was argued by the respondent in the Wilkins case that under the provisions of Section 238.14 it might be held that this will was revoked as to the provision contained therein for the benefit of K. The court says:

We are not prepared to say that this exception could not logically be construed to operate as an implied revocation of the provisions of the will in the instant case so far as they affect K. The language of the statute appears to be broader than the rule as above collected from the Battis case, for it says, "excepting only that intention contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." The sudden and unexpected killing of the testator by K not merely effected a change in the condition of the testator, it deprived her of a valid and sacred right, namely, the right to change or modify her will. Here it must be reiterated that it was K who deprived the testatrix of this sacred right to revoke her will thus producing a changed condition not contemplated by the testatrix.

In other words the court in this case chose to place the decision upon different ground, but the dicta in the case would seem to indicate that

[2] *In re Will of Lyons, supra.*

[3] *Glascott* v. *Bragg,* 111 Wis. 605.

[4] See 25 A.L.R. 39. Also *In re Battis,* 143 Wis. 234.

[5] 192 Wis. 111.

had the changed circumstances of the testator been strongly urged as the grounds upon which the decision should have been placed that the court would have had no hesitancy in adding the set of facts contained in Wilkins against those exceptions which at common law were sufficient to warrant the revocation of the will.

In this connection we might refer to the case *In re Estate of Bartlett.*[6] This case was concerned with the interpretation of the statute containing precisely the same exception with which we are concerned in our own statute. One of the questions before the court was whether or not this exception was intended merely to preserve those changes in conditions or circumstances which were known and recognized at common law or whether or not new changes arising with the newer economic social conditions now present could not be added as the court saw fit.

The statute specifying the methods by which a will may be revoked and providing that nothing contained in the Section "shall prevent the revocation of a will implied by law from the subsequent changes, the conditions or circumstances of the testator" was not intended to preserve implied revocation in those cases only where the particular facts were found to be such as warranted a revocation at common law for what were considered to be controlling conditions then had become changed at the time of the enactment of the statute, but rather the statute was intended to preserve and perpetuate the principle upon which these revocations were based.

It cannot reasonably be argued that the only change of conditions which would give rise to new moral duties and obligations on the part of the testator would be marriage and subsequent birth of issue. In this day and age when the accumulation of a large fortune between marriage and death is no longer an uncommon occurrence it may be strongly urged that the difference between possession of a large estate at death and a small estate at marriage is such a change of circumstances as to give rise not only to new financial and social responsibilities, but to new family, moral and legal duties and obligations as well. If the statute is interpreted in line with the language quoted from the Wilkins and Bartlett cases *supra* it would seem that the exception would cover a situation such as was proposed above. Certainly to interpret the statute strictly in accordance with the common law rule would work great hardship and injustice under the set of facts above mentioned and it is submitted that in order to work substantial justice this statute should be liberally construed.

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[6] Nebraska 1922, 189 Northwestern 390, 25 A.L.R. 39.