Wyoming Law Journal

Volume 10 | Number 2 Article 2

December 2019

Implied Revocation of Wills in Wyoming

Richard A. Tobin

WYOMING LAW JOURNAL

VOL. 10 WINTER, 1956 NO. 2

Published in the Fall, Winter, and Spring by the University of Wyoming School of Law and the Wyoming State Bar.
Subscription Price $2.00 per year; 75c per copy.

Mailing Address: College of Law; University of Wyoming, Laramie, Wyoming.

NOTICE

The Wyoming Law Journal was recently notified that Shepard's Citations now include citations to cases and statutes as cited in the Wyoming Law Journal. This additional service begins with volume 9 of the Wyoming Law Journal and may currently be found in the red cumulative issue of Shepard's Wyoming Citations for 1956.

NOTES

IMPLIED REVOCATION OF WILLS IN WYOMING

The law of wills early provided for their revocation by implication because of certain changes in the circumstances of the testator. The status of this doctrine of implied revocation, in the light of Wyoming's statutes and decisions, will be the purpose of this note. Our legislature, in granting the statutory right to make a will, did not set forth a complete scheme governing the exercise of that right, and where that completeness is wanting, in the field of implied revocation, the courts revert to the use of the old common law rules in order to interpret legislation and the intention of a testator. Therefore, a brief look at the common law doctrines is a point of beginning.

The common law recognized two instances wherein a testator's will was revoked when, after making his will, he had undergone certain changes in his domestic status.[1] One was marriage plus birth of issue in the case of the male testator.[2] The underlying theory was that the average male testator, in view of these changes, would be presumed to have desired a different disposition of his property from that indicated in his will.[3] The courts of that day were finally to hold this presumption to be a conclusive presumption because at that time other forms of revocation were being subjected to a strict interpretation of the law, and also the enactment of the Statute of Frauds gave the courts some difficulty in justifying implied revocation.[4] Marriage of the testator alone, after he executed his will, would not revoke it as the wife was not an heir and anyhow the wife's security was provided for in the form of dower.[5] Nor would birth of issue by itself work a revocation of the father's will executed subsequently to his marriage, since after marriage he must be presumed to have contemplated the birth of children and to have made his will with reference thereto.[6]

The other instance wherein the will was revoked at common law was in the marriage of a femme sole.[7] "This part of the doctrine was based on the theory that the same degree of capacity was required to revoke a will as to make one; that since a married woman was not able to make a will she could not revoke one made before marriage; and that, therefore, unless the marriage itself revoked the will it would be irrevocable during coverture."[8]

These two rules have frequently been spoken of as "the doctrine of implied revocation" by reason of a change in domestic relations of the testator. Though these rules might be referred to more properly as "applications" of this doctrine rather than as the doctrine itself, it is nevertheless true that they set forth in general the only changes in domestic relations which would work at common law an implied revocation of a will.[9] Courts differ in their view of the doctrine—some hold that the doctrine is restricted to the two rules because the legislature in expressly providing for implied revocation had in mind only those two rules.[10] Other courts, Wyoming included, hold the doctrine to be elastic enough to meet new changes viewing the application of the doctrine as did Chancellor Kent:[11] ". . . when the occurrence of new social relations and moral

1. Page, The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator, 5 Wis. L. Rev. 387 (1930).
2. E.g., Doe d. Lancashire v. Lancashire, 5 T.R. 49, 101 Eng. Rep. 23 (1792).
3. Lugg v. Lugg, 2 Salk. 492, 91 Eng. Rep. 497 (1700).
4. 1 Page on Wills 933 (3rd Ed. 1941).
5. Wellington v. Wellington, 4 Burr. 2165, 98 Eng. Rep. 129 (1768).
6. Doe d. White v. Barford, 4 Mau. & Sel. 10, 105 Eng. Rep. 739 (1815).
7. Hadsden v. Lloyd, 2 Bro. C.C. 534, 29 Eng. Rep. 293 (1789).
8. 1 Page on Wills 948 (3rd Ed. 1941).
9. 1 Page on Wills 930 (3rd Ed. 1941).
10. Vanek v. Vanek, 104 Kan. 624, Pac. 240 (1919).
11. 4 Kent, Commentaries on American Law 521 (12th Ed., Holmes, 1873).

duties raises a necessary presumption of a change of intention in the testator."

Even after the enactment of the Statute of Frauds,[12] which declared that no devise should be revocable except by certain acts, "any former law or usage to the contrary notwithstanding," the common law courts continued to apply the doctrine of implied revocation on the ground the statutes applied only to intentional revocation, and did not preclude revocation by operation of law.[13] Then in 1837 the Statute of Wills[14] cut short the life of this doctrine by expressly forbidding its use in England.

Modern statutes in the various jurisdictions have met some of the problems of implied revocation and, depending upon the language, may take the particular circumstances so legislated upon out of the application of implied revocation and allow that change to effect an absolute revocation. According to a recognized authority on wills, "These statutes have been divided into five general classes, viz.: (1) those dealing with the effect of marriage; (2) those dealing with the effect of birth of issue; (3) those dealing with the effect of divorce; (4) those which expressly exclude any common-law doctrine of revocation; and (5) those which contain express saving clauses as to implied revocation."[15]

Wyoming, with eleven other states,[16] expressly recognizes the doctrine in its statute in this typical language: ". . . 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."[17] Many jurisdictions without any statutory expression allowing for implied revocation, yet providing that wills shall be revoked by such acts as burning, tearing, etc., have resorted to implied revocation on the same reasoning that permitted its use under the Statute of Frauds, viz., the statute was intended to cover only intentional revocation, and does not preclude the use of the doctrine of implied revocation.[18] Therefore, statutory approval of the doctrine has apparently not been necessary to its application.

However, other statutory provisions have altered the application of the doctrine. Statutes which conferred upon married women the capacity to make a will and also to hold property, have by such enactments abolished the reasons which justified the common law rule that a woman's will was revoked upon her marriage, and by so destroying the reason for the rule

12. 29 Car. II, c. 3, § 6 (1677).
13. 40 Mich. L. Rev. 406, 407 (1942).
14. 7 Wm. IV & I Vict., c. 26, § 20 (1837).
15. Page, The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator, 5 Wis. L. Rev. 387, 400 (1930).
16. Del. Rev. Code § 3715 (1935); Me. Rev. Stat. c. 155, § 3 (1944); Mass. Gen. Laws c. 191, § 8 (1932); Mich. Comp. Laws § 702.9 (1948); Minn. Stat. § 525.19 (1949); Nebr. Rev. Stat. § 30-209 (1943); Nev. Comp. Laws § 9912 (1929); N. H. Rev. Laws c. 350, § 14 (1942); Ohio Code § 10504.47 (1936); Vt. Rev. Stat. § 2829 (1947); Wis. Stat. § 238.14 (1951).
17. Wyo. Comp. Stat. § 6-306 (1945).
18. Pascucci v. Alsop, 82 App. D. C. 12, 147 F.2d 880 (1945); cert. den. 325 U.S. 868.

they have destroyed the rule itself.[19] Also, statutes dealing with the pretermitted child and/or the afterborn or posthumous child are expressions of the policy of that particular jurisdiction, and in such jurisdictions, the court, not being burdened with the problem of protecting such child, can look to the other circumstances of the case to determine whether or not the doctrine of implied revocation should be applied.

Today, with the increasing frequency of divorce, the legislatures and courts are vitally concerned with the problem of the effect that divorce has on the doctrine of implied revocation. On account of the infrequency of divorce, there was no early common law decision on whether a divorce revoked a will.[20] Divorce, in most states, does not of itself operate as a revocation,[21] but where it is coupled with a property settlement there is a conflict of authority. Where a property settlement accompanies the divorce and the wife gets her share the court need not be concerned with a desire to protect her from disinheritance and can give more attention to other circumstances that may be present, i.e., whether or not the decree of divorce caused the parties to become as strangers to each other.[22] When courts are concerned over the length of time between divorce and the death of the testator, as affecting the application of implied revocation of a will executed prior to the divorce,[23] the cases reflect a modern trend in that courts will now consider competent evidence to prove the testator's actual intent. Divorce is the only change in circumstances that will revoke a will in the Model Probate Code.[24]

To further pursue the various statutory limitations in vogue today in other states on the use of this doctrine is beyond the scope of this article, yet the statutes referred to do form a background in presenting the doctrine of implied revocation as it is applied in Wyoming.

While the Wyoming statute expressly recognizes revocation implied by law from subsequent changes in the condition or circumstances of the testator, it does not specify the changes that will effect a revocation. Nor are the changes as set out at common law controlling because the common law "as modified by judicial decision" and "not inconsistent with the laws of this state" was adopted as "the rule of decision of this state" as of the year 1607[25]—about one hundred years before the first decision (according to our Supreme Court) implying a revocation.[26] Consequently, Wyoming's court is "at liberty to follow any of them (the common law decisions) or

19. In re Smith's Estate, 55 Wyo. 181, 97 P.2d 677 (1940).
20. Atkinson on Wills, 431 (2nd Ed. 1953).
21. In re McGraw's Estate, 228 Mich. 1, 199 N.W. 686, 37 A.L.R. 308 (1924); Baacke v. Baacke, 50 Neb. 18, 69 N.W. 303 (1896).
22. Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699, 35 Am. St. Rep. 545 (1893).
23. E.g., in re Arnold's Estate, 60 Nev. 376, 110 P.2d 204 (1941).
24. Simes and Basye, Problems in Probate Law 83 (1946). The editors feel that marriage should not constitute a revocation since a surviving spouse can elect to take against the will and afterborn children are deemed to be fully protected by statutes giving them an intestate share in their model probate code.
25. Wyo. Comp. Stat. § 16-301 (1945).
26. Overbury v. Overbury, 2 Show. 242, 89 Eng. Rep. 915 (1694).

rest our decision upon the fundamental principle underlying all of them."[27]

The changes that worked a revocation at common law have been held to be the only changes by some states,[28] while the majority have extended the doctrine to other circumstances,[29] interpreting the doctrine as being an elastic rule of law allowing a conclusive presumption of revocation to arise whenever new social obligations are created in the domestic situation of the testator.[30] The conclusiveness of the presumption of revocation depends on the reason behind the application of the doctrine. If, in the case of marriage, or birth of issue, the reason for revoking the will is to protect the spouse or child from disinheritance, then the presumption must be made conclusive in order to effectuate this policy.[31] In the case of divorce and property settlement there is no need to protect the spouse and so where such changes in circumstances have occurred they have been declared to work an absolute revocation. Any evidence that the testator meant his will to stand as written will not be received.[32] So once a court concedes that a particular change is, in a particular case, sufficient to work a revocation of a prior will, it is bound to say that this change of circumstances will constitute revocation in all cases. This has led to extreme applications.[33]

In the seventy-five years that the Wyoming court has had statutory permission to revoke wills by operation of law, only three different circumstances have been presented to it for judicial decision. Said decisions do not reflect a disposition on the part of the court to establish set rules as were developed in the common law. Rather each case depended upon the circumstances, and from consideration of those circumstances the court did not strictly adhere to the common law doctrine. This leaves the testator in a quandry as to what "change of circumstances" will effect a revocation of his expressed intention.

The effect of a subsequent marriage on a will was considered in *Naab v. Smith.*[34] The circumstances there prompted the holding that marriage of a woman following execution of her will devising her property to her children of a previous marriage did not, by implication, revoke it. The decision, noting our statutory provisions granting to married women the right to hold and devise property, has followed the majority rule on this subject. The will of a male testator followed by his second marriage was revoked in *Johnston v. Laird,*[35] but the circumstances there also involved an annulment of his first marriage coupled with a property settle-

27. Johnston v. Laird, 48 Wyo. 532, 52 P.2d 1219, 1220 (1935); In re Smith, 55 Wyo. 181, 97 P.2d 677, 681 (1940).
28. Hertrias v. Moore, 325 Mass. 57, 88 N.E2d 909 (1949).
29. Karr v. Robinson, 167 Md. 375, 173 Atl. 584 (1934), afterborn issue alone; In re Martin's Estate, 109 Neb. 289, 190 N.W. 872 (1922), divorce and property settlement.
30. 40 Mich L. Rev. 406, 409 (1942).
31. 40 Mich. L. Rev. 406, 416 (1942).
32. In re Battis, 143 Wis. 234, 126 N.W. 9 (1910).
33. Nutt v. Norton, 142 Mass. 242, 7 N.E. 720 (1886).
34. NAAB v. Smith, 55 Wyo. 181, 97 P.2d 677 (1940).
35. Johnston v. Laird, 48 Wyo. 532, 52 P.2d 1218 (1935).

ment, so it cannot be said that the Wyoming court considered marriage of a male testator to be a sufficient basis for revocation by operation of law. However, the proposition that marriage alone is not sufficient is well supported by courts in other jurisdictions.[36]

As the difference between a divorce and an annulment of marriage is too small for the application of a different principle,[37] the *Johnston* case may possibly be cited as holding that when a divorce is coupled with a settlement of property rights between the parties, the change of circumstances is such as to impliedly revoke the husband's will. It is indicated by the court in this case that they will consider every fact that seems relevant in showing the changed circumstances in each case.[38]

All states, except Wyoming, have statutes which provide either for the afterborn or for the pretermitted child. In *Burns v. Burns*[39] the testator provided for his wife and three children, subsequently a son was born and the will remained in effect without change for 42 years thereafter. The after-born son was not allowed to share equally with the other children. Our Supreme Court, after considering both the common law rule that birth of issue alone would not revoke a prior will and the pretermitted heirship laws of other states, decreed that in view of the particular facts of this case, the pretermitted heirship policy did not apply in the State of Wyoming. There was a pretermitted heir in *In re: Ray's Estate*[40] who was not allowed to share in his father's estate, and the court refers to the *Burns* case as holding that a pretermitted child in a will was not entitled under existing Wyoming law, to any part of the estate of its father. The court in these two cases does not distinguish between a child born after the will was executed and the child who was born before. In either case the child was not allowed to share, and the court based its decisions on the right of the testator to bestow his bounty upon anyone he may choose, subject only to statutory limitations, and the court specifically pointed out that Wyoming has no such limitations as regards these children.

The adopted minor child in Wyoming has the same rights of person and property as a natural child or heir at law of the person adopting him, unless the adoption agreement provides otherwise.[41] The adopted child will inherit as if he were in the blood stream of the family into which he is adopted, and therefore may inherit from other members of the family in addition to inheriting from his foster parents.[42] Should the adoption

36. Ward's Will, 70 Wis. 251, 35 N.W. 731, 5 Am. St. Rep. 174 (1887); Hoitt v. Hoitt, 63 N.H. 475, 3 Atl. 604 (1885); In re Hunt, 81 Me. 275, 17 Atl. 68 (1889); Hutlett v. Carrey, 66 Minn. 327, 69 N.W. 31, 34 L.R.A. 384 (1896); contra, Morgan v. Ireland, 1 Idaho 786 (1880).
37. Johnston v. Laird, 48 Wyo. 532, 544, 52 P.2d 1219 (1935).
38. Johnston v. Laird, 48 Wyo. 532, 546, 52 P.2d 1219 (1935).
39. Burns v. Burns, 67 Wyo. 314, 224 P.2d 178 (1950).
40. In re Ray's Estate, 287 P.2d 629 (Wyo. 1955).
41. Wyo. Comp. Stat. § 58-216 (1945).
42. In re Cadwell's Estate, 26 Wyo. 412, 186 Pac. 499 (1920).

be subsequent to the will of the adopting parent, it is likely that the adopted child would be viewed as a natural child in the application of the doctrine of implied revocation.

In Wyoming, the illegitimate child will inherit from the mother, but in order that he may inherit the same as one born in wedlock the parents must subsequently intermarry, and the child must be recognized after such marriage by the father to be his illegitimate child.[43] Applying this statute to a set of facts wherein the testator has executed a will prior to birth of the illegitimate child and the child is later made an heir by fulfilling the requirements of this statute, there would be such a change of circumstances as would at common law and by a majority of the states be sufficient to impliedly revoke the father's will. If the father executed his testament in this situation after the marriage but prior to his recognition of the child, then the will would not be revoked as the recognition factor would be analogous to a birth of issue, and by applying the rule of the *Burns* case such is not considered a sufficient change to revoke a will by operation of law.

The doctrine of implied revocation has full play in Wyoming, and in the absence of legislation the court has the power to decide what subsequent changes in the testator's "circumstances," whether they be pertinent to domestic, moral, or other heretofore unrecognized legal duties, shall be held to revoke his will. In the *Ray* case we are said to have adopted the common law rule that a pretermitted heir will not be allowed a share in the estate against the will. The court, noting Wyoming's uniqueness in not having some statutory provision regarding the pretermitted or afterborn child, proceeded with caution in proclaiming that rule, though it is contra to the overwhelming authority of other states. However, the court did follow the majority of states in holding that in Wyoming a woman's will is not revoked by her marriage. The court, after considering the numerous changes in the testator's circumstances in the *Johnston* case, the first case of implied revocation in Wyoming, closed that decision with these words: "We do not hold that every new moral obligation has the effect of revocation. The rule is not as broad as that. It has its limitations. It depends on the circumstances." Yet a testator in executing his will is obliged at his peril to conform to the word of the statute,[44] but such compliance may be in vain if the circumstances, of which he had no premonition, are found to effect an implied revocation. This uncertainty, in a realm where certainty is needed, can be made certain by legislative action. Such action should define what change of circumstances will or will not revoke a testament by the operation of those statutes. Or, the legislation may direct what persons should be entitled to share in the testator's estate regardless of the intent expressed in the will. Legislation of such a nature would remove the undesirable element of uncertainty and would guide

43. Wyo. Comp. Stat. § 6-2507 (1945).
44. Wyo. Comp. Stat. § 6-304 (1945).

both the advising attorney and the testator when questions arise regarding implied revocations. No revocation should be permitted except on such grounds as are specifically named in the statutes and these grounds should be as few as possible.

RICHARD A. TOBIN

SOME ASPECTS OF THE LAW OF FIXTURES IN WYOMING

Fixtures are chattels annexed to real property which retain their separate identity and become realty, but which under certain circumstances may become personalty again.[1] Generally the annexation is in permanent form and the chattel becomes an integral part of the real estate. However, physical permanency is not always required to allow the chattel to become a part of the realty.[2]

Although the first paragraph above will serve the purpose of a broad general statement it would be well to consider a quote from a 1931 Nebraska case:[3] "Perhaps there are no subjects in law more difficult to deal with than the questions raised as to fixtures. . . . The cases are legion; and each new case seems only the more to disturb any fixed or certain rule that seemed deductible from former cases." Fixtures are not exclusively a landlord-tenant problem but can also arise in controversies between heir and executor; owner and his vendee; owner and mortgagee; owner and trespasser; and owner or mortgagee and a conditional vendor.

The rule of the common law was that whatever is once annexed to the freehold becomes part of it and cannot be removed except by the party entitled to the inheritance.[4] This rule was never strictly followed in America, and the following tests were laid down in an early American case to determine whether the property be a fixture or not:[5]

1. Actual annexation to the realty, or something appurtenant thereto.
2. Appropriation to the use or purpose of that part of the realty with which it is connected.
3. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the purpose or use for which the annexation has been made.

But no precise rule can be laid down which will govern all cases as to whether it is a chattel or a fixture. This can vary with the intention of

1. Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659, 77 A.L.R. 1381 (1931).
2. Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.Dec. 634 (1851).
3. Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659, 77 A.L.R. 1381 (1931).
4. Van Ness v. Pacard, 2 Pet. 137.
5. Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.Dec. 634 (1851).