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The Ohio Supreme Court<sup>35</sup> now has an opportunity to re-examine its decision in *Miller v. Hammond* and perhaps take cognizance of the logic of the dissent, or the time may indeed have arrived for the legislature to declare the public policy of the state of Ohio on this matter.<sup>36</sup>

CHARLES PERELMAN

## *Implied Revocation of Wills by Divorce*

**F**IRMLY IMBEDDED in the English common law is the principle that a will is revoked by implication when subsequent events produce a radical change in the circumstances of the testator.<sup>1</sup> A change in the marital or parental status of an individual was thought to be of such a profound nature that it would cause a prior will to be revoked by operation of law. Thus, the subsequent marriage of a feme sole<sup>2</sup> or the subsequent marriage and birth of issue for a man<sup>3</sup> was held to revoke a prior will on the grounds that the testator would have revoked it had he the opportunity of doing so during his lifetime.

The early English cases made no mention of a divorce subsequent to the execution of a will as a basis for implied revocation.<sup>4</sup> This was probably due to the rarity of divorce in that period and the disfavor with which it was looked upon in social and ecclesiastical circles.

Today with the increasing frequency of divorce the legislatures of the various states have become concerned with this problem. The overall issue of revocation of wills is governed by statutes which differ from state to state; however, the provisions concerning the effect of a divorce generally fall into one of three categories.

First, there are statutes which affirmatively state that a subsequent divorce revokes the testamentary provisions in favor of the testator's spouse. This means that when the spouse is sole legatee and devisee the entire will is revoked, but if other heirs are present the will is valid as to them. Only nine states<sup>5</sup> are included in this group. The explicit language of the statutes presents few other problems of interpretation.

<sup>1</sup> ROLLISON, WILLS 237 (1939)

<sup>2</sup> *Hodsen v. Lloyd*, 2 Bro. C.C. 535 (1789)

<sup>3</sup> *Brush v. Wilkens*, 4 Johns. Ch. 506 (1820)

<sup>4</sup> ATKINSON, WILLS 431 (2d ed. 1953)

<sup>5</sup> E.g., PA. STAT. tit. 20, § 180.7(2) "If the testator is divorced from the bonds of matrimony after making a will, all provisions in the will in favor of his spouse so divorced shall be thereby revoked." ALA. CODE ANN. tit. 61 § 9(1) (Supp. 1951); ARK. STAT. ANN. tit. 60, § 60-404 (Supp. 1953), GA. CODE ANN. § 113-408 (1949); IND. STAT. ANN. § 59-610 (1949); MINN. STAT. ANN. § 525.191 (1944); N.C. Code § 31-5.4 (1943)

The second group is composed of twenty-eight jurisdictions whose statutes make no provision for revocation<sup>6</sup> by divorce and do not affirmatively preserve the common law doctrine of implied revocation.<sup>7</sup> The statutes of these states usually prescribe certain methods of revocation, such as burning or tearing of the will, or the publication of a later one. In construing these provisions most courts hold that the statutory methods are exclusive and no type of implied revocation is permitted.<sup>8</sup> Usually, in these jurisdictions, a divorce even when coupled with a property settlement will not revoke a prior will.<sup>9</sup> A few courts, however, adopt the view that such a statute is only applicable to intentional revocations and does not prevent revocation by operation of law.<sup>10</sup> Yet they seem reluctant to imply a revocation solely on the grounds of divorce.<sup>11</sup>

In the last group are twelve states whose statutes affirmatively preserve the common law doctrine of implied revocation but make no mention of divorce as such.<sup>12</sup> In these jurisdictions it is usually held that a divorce alone will not revoke a prior will,<sup>13</sup> but that a divorce coupled with a property settlement will do so.<sup>14</sup>

<sup>6</sup> In order to avoid an anesthetizing redundancy the terms "revocation of will" etc., will henceforth refer to the revocation of the testamentary provisions in favor of the testator's spouse.

<sup>7</sup> *E.g.*, CONN. REV. GEN. STAT. § 6959 (1949) " No will or codicil shall be revoked in any other manner except by burning, cancelling, tearing, or obliterating it by the testator or by some person in his presence, by his direction, or by a later will or codicil." ARIZ. CODE ANN. § 41-103 (1939); CAL. PROB. CODE § 70 (1949); COLO. STAT. ANN. c 126, §40 (1935); D.C. CODE § 19-103 (1940); FLA. STAT. ANN. § 731.14 (1944); IDAHO CODE ANN. tit 14, § 14-307 (1949); ILL. STAT. ANN. c. 3, § 197 (1941); IOWA CODE ANN. § 633.10 (1949); KY. REV. STAT. § 394.080 (1948); LA. STAT. ANN. art. 1692 (1952); MD. ANN. CODE GEN. LAWS art. 93, § 349 (1951); MISS. CODE ANN. § 658 (1942); MO. REV. ANN. STAT. tit. 31, 468.20 (1949); MONT. REV. CODES ANN. § 91-122 (1947); N.J. STAT. ANN. § 3A:3-3 (1951); N.M. STAT. ANN. § 32-108 (1941); N.Y. DEC. ESTATE LAW § 34 (1949); N.D. REV. CODE § 56-0401 (1943); OKLA. STAT ANN. tit. 84, § 101 (1951); ORE. COMP. LAWS ANN. § 18-301 (1940); R.I. GEN. LAWS c. 566 § 18 (1938); S.C. CODE ANN. § 19-221 (1952); S.D. CODE § 56.0217 (1939); TEX. STAT. art. 8285 (1941); UTAH CODE ANN. § 74-1-19 (1953); VA. CODE ANN. § 64-59 (1950); W. VA. CODE ANN. § 4045 (1949)

<sup>8</sup> *In re Brannon's Estate*, 111 Cal. App. 38, 295 Pac. 83 (1931); *Sperioni v. Sperioni*, 406 Ill. 28, 92 N.E.2d 63 (1950); *In re Silberstein's Will*, 108 N.Y.S.2d 88 (Surr. 1951); *In re Nardo's Will*, 268 App. Div. 865, 50 N.Y.S.2d 561 (1944).

<sup>9</sup> *Re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374 (1923); *error dis'm*, 266 U.S. 594, 45 Sup. Ct. 225 (1925); *Ireland v. Terwilliger*, 54 So.2d 52, (Fla. 1952); *Robertson v. Jones*, 345 Mo. 278 (1940).

<sup>10</sup> *Pascucci v. Alsop*, 147 F.2d 880 (D.C. 1945); *McGuire v. Luckey*, 129 Iowa 559, 105 N.W. 1004 (1906).

<sup>11</sup> *In re Brown's Estate*, 139 Iowa 376, 117 N.W. 260 (1908).

<sup>12</sup> *E.g.*, NEV. COMP. LAWS ANN. § 9912: "No will in writing shall be revoked unless by burning, tearing, cancelling, or obliterating the same but nothing con-

The better-reasoned cases involving statutes which preserve the doctrine of implied revocation but make no mention of divorce hold that the only motives for which a man would leave property to his wife are (1) his affection for her and/or (2) his obligation to support her. When there is a divorce or annulment coupled with an alimony award or a property settlement, it would seem that these motives have vanished, and therefore the law will presume that the testator intended to revoke his will. This argument becomes more apparent when either of the parties subsequently remarries.<sup>15</sup>

Frequently courts in following this reasoning will treat the implied revocation as an irrebuttable presumption and evidence of the testator's contrary intention will not be allowed unless it amounts to a republication.<sup>16</sup>

Where the presumption is not conclusive, the elapsed time between the divorce and the death of the testator has been taken into account by some courts. A long period of time is evidence negating the intention of the testator to revoke his will, while a short period of time is not.<sup>17</sup> However, this point is a make-weight factor and of itself seldom controlling.

Where the will was made prior to but not expressly contingent upon a marriage between the testator and a named beneficiary under the will, a later divorce and property settlement between the two does not invalidate the bequest. Since many other factors unrelated to the marriage could have motivated the gift, an implied revocation is unwarranted.<sup>18</sup>

If the will grants to the spouse on condition that she still be the testator's spouse at the time of his death, a subsequent divorce revokes the will regardless of the statutory provisions involved.<sup>19</sup> But where the will states "to my

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tained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." DEL. CODE ANN. ut. 12, § 109 (1953); ME. REV. STAT. c. 155, § 3 (1944); MASS. ANN. LAWS c. 191, § 9 (1932); MICH. STAT. ANN. § 27.3178 (1949); N.H. REV. LAWS c. 350, § 14 (1942); OHIO REV. CODE § 2107.33 (OHIO GEN. CODE § 10504-47); TENN. CODE ANN. § 8097 (Williams 1934); VT. REV. STAT. § 2829 (1947); WIS. STAT. § 238.14 (1951); WYO. COMP. STAT. ANN § 6-306 (1945)

<sup>15</sup> Charlton v. Miller, 27 Ohio St. 298 (1875); Baacke v. Baacke, 50 Neb. 18, 69 N.W. 699 (1896).

<sup>16</sup> Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699 (1853); Younker v. Johnson, 160 Ohio St. 409, 116 N.E.2d 715 (1954); *In re Battis*, 143 Wis. 234, 126 N.W. 9 (1910); Johnston v. Laird, 48 Wyo. 532, 52 P.2d 1219 (1935)

<sup>17</sup> *In re Gilmour s Estate*, 146 Misc. 113, 260 N.Y. Supp. 761 (Surr. 1932).

<sup>18</sup> *In re McGraw s Estate*, 233 Mich. 440, 207 N.W. 10 (1926); *In re Kort's Estate*, 260 Wis. 621, 51 N.W.2d 501 (1952); *In re Battis*, 143 Wis. 234, 126 N.W. 9 (1910)

<sup>19</sup> Card v. Alexander, 48 Conn. 492 (1881) (five year interval); Murphy v. Markis, 98 N.J. Eq., 153 Atl. 840 (1925), *aff'd* 99 N.J. Eq. 888, 132 Atl. 923 (1925) (seven year interval) In both cases the long period of time was considered as evidence that the deceased did not intend to change his will.

<sup>20</sup> Codner v. Caldwell, 156 Ohio St. 197, 116 N.E.2d 594 (1951)

husband" or "to my wife" followed by that person's proper name, a subsequent divorce does not cut off the gift.<sup>20</sup> Courts are prone to construe this language as descriptive rather than conditional.

### OHIO

The common law doctrine of implied revocation of wills has been preserved in Ohio by statute.<sup>21</sup> In accordance with other states which have similar statutes, the Ohio courts have held that a subsequent divorce of itself does not impliedly revoke a will,<sup>22</sup> but that a divorce coupled with a property settlement will do so.<sup>23</sup>

Although the precise question has not arisen in this jurisdiction, the authorities cited in Ohio cases would seem to indicate that the revocation is treated as an irrebuttable presumption.<sup>24</sup> In at least one instance the court has taken note of the long period of elapsed time between the divorce and death of the testator as evidence negating any intention to change his will.<sup>25</sup>

Where the will is made prior to the marriage of the testator and a beneficiary under the will but not contingent upon it, a subsequent divorce and property settlement does not revoke the will.<sup>26</sup> But if under similar circumstance the will is contingent upon the ensuing marriage, a later divorce does invalidate it.<sup>27</sup>

### CONCLUSION

It is interesting to note that of the nine statutes which expressly provide that a subsequent divorce revokes a will, six have been enacted since 1947.<sup>28</sup> This is largely due to the influence of the Model Probate Code, which holds that a divorce is the only grounds on which a will may be impliedly revoked.<sup>29</sup> Undoubtedly, more statutes of this type will appear in the future.

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<sup>20</sup> *Goorman v. McMillan*, 258 Ala. 125, 61 So.2d 55 (1952), *cert. denied*, 345 U.S. 929, 73 Sup. Ct. 789 (1953), *rehearing denied*, 345 U.S. 1004, 73 Sup. Ct. 942 (1953); *Iles v. Iles*, 158 Fla. 493, 29 So.2d 81 (1947).

<sup>21</sup> *In re Cournoiser's Will*, 55 N.Y.S.2d 277 (Surr. 1944); *Charlton v. Miller*, 27 Ohio St. 298 (1875); *In re Jones Estate*, 211 Pa. 364, 60 Atl. 915 (1905)

<sup>22</sup> OHIO REV. CODE § 2107.33 (OHIO GEN. CODE § 10504-47).

<sup>23</sup> *Charlton v. Miller*, 27 Ohio St. 298 (1875).

<sup>24</sup> *Younkers v. Johnson*, 160 Ohio St. 409, 116 N.E.2d 715 (1954) *Contra: Sutton v. Bethell*, 116 N.E.2d 594 (Ohio App. 1953).

<sup>25</sup> *Younkers v. Johnson*, 160 Ohio St. 409, 116 N.E.2d 715 (1954) *Contra: Sutton v. Miller*, 27 Ohio St. 298 (1875) (five year interval)

<sup>26</sup> *Codner v. Caldwell*, 156 Ohio St. 197, 116 N.E.2d 594 (1951).

<sup>27</sup> *Charlton v. Miller*, 27 Ohio St. 298 (1875).

<sup>28</sup> Ala. (1951); Ark. (1949); Ga. (1952); Ind. (1953); N.C. (1953); Pa. (1947)

<sup>29</sup> MODEL PROBATE CODE § 53.