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# Wills -- Application of Doctrine of Dependent Relative Revocation to Subscribing Witness-Legatees

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# WILLS—APPLICATION OF DOCTRINE OF DEPENDENT RELATIVE REVOCATION TO SUBSCRIBING WITNESS-LEGATEES

The testatrix executed her will naming the appellant sole residuary beneficiary. Later, the testatrix in a new will revoked her prior will, again naming the appellant[1] residuary beneficiary. The appellant-legatee in the last will was one of three subscribing witnesses;[2] one of whom was not a beneficiary.[3] After the death of the testatrix, the will was admitted to probate. Subsequently, the legal heirs of the decedent filed a petition for an order adjudging the bequest to the appellant void. The court invalidated the legatee's residual interest and disposed of the residue by statutory intestacy.[4] On appeal, *held*, affirmed: the bequest was invalid and the doctrine of dependent relative revocation will not validate a bequest to a subscribing witness in the absence of two disinterested witnesses to the will.[5] *In re Lubbe's Estate*, 142 So.2d 130 (Fla. App. 1962).

It was held under the English Statute of Frauds that a beneficial interest under a will would disqualify an attesting witness,[6] voiding the entire will. Parliament remedied this hardship in 1752[7] by allowing the witness-legatee to testify, but voiding the devise to him. English common

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1. The suits of the co-executors, Florida National Bank of Jacksonville and Brantley Burcham, the residuary beneficiary, were consolidated for this appeal. The latter beneficiary is the only significant party for the purposes of this note, and attention shall be directed solely towards him.

2. FLA. STAT. § 731.03(16) (1961). The words "attesting witnesses" and the words "subscribing witnesses" as used in these statutes have the same meaning, and no witness is considered an attesting or a subscribing witness to a will unless he actually signs his name to the will.

3. FLA. STAT. § 731.07(5) (1961). "All devises and bequests to subscribing witnesses are void unless there are at least two other disinterested subscribing witnesses to the will."

4. FLA. STAT. § 731.23 (1961) (order of succession). See also Reimer v. Smith, 105 Fla. 671, 142 So. 603 (1932). The term heirs ordinarily is a word of inheritance which refers to a class of persons who take by succession, and means persons legally entitled to inheritance. See also Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930). Heirs are those who are appointed by law to succeed to a person's estate in event of intestacy.

5. Two other issues were raised by the appellants. The court held that the witness could not take under the "savings clause" in FLA. STAT. § 731.07(5) (1961), because this saved only heirs, and they would take only up to their intestate share as if testatrix had died intestate. The court also said that where a subscribing witness was a legatee, bequest to him was void, when the second of three witnesses to the last will was also a legatee in the will. FLA. STAT. § 731.07(5) (1961) requires "two other disinterested subscribing witnesses to the will," not to the legatee's individual bequest.

6. Holdfast v. Dowsing, 2 Stra. 1253, 93 Eng. Rep. 1164 (1748).

7. 25 Geo. II. c. 6 (1752), provided that any attesting witness to whom a beneficial devise, gift or interest, (except charges on lands for payment of debts) was thereby made or given, should be admitted as a witness to the will; and "such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void . . . ," and that charges of debts upon lands should not render the creditor an incompetent witness.

law had reached this stage of development when it was adopted in Florida,[8] approximately a century[9] before it was ultimately changed by the Florida Legislature.[10] Several states[11] have enacted statutes which provide that witnesses may be compelled to testify concerning the validity of the will, while other jurisdictions distinguish between types[12] of interested[13] witnesses to a will. Florida allows executors to be competent witnesses.[14] Thus, an attesting witness who receives an interest under a will as a legatee or devisee is held to be a competent witness,[15] but the legacy or devise to him is void unless there are two other disinterested subscribing witnesses to the will.[16] The purpose of the statute is to preserve as much of the will as possible while continuing to discourage efforts to establish fraudulent wills. Most jurisdictions[17] have further mitigated the harshness of invalidating the share of an interested witness in the will, by the "savings clause" provision[18] which permits one who would take a share

8. FLA. STAT. § 2.01 (1961).

9. "And this is the law in Florida now as to wills executed prior to October 1, 1933, by reason of the fact that the common and statute law of England, down to July 4, 1776, is still in force in Florida except where it conflicts with the Constitution and laws of the United States and the acts of the Legislature of the state of Florida." 1 REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 114 (3d ed. 1957).

10. Fla. Laws 1933, ch. 16103, § 8(e). Now part of the probate laws of Florida. FLA. STAT. § 731.07(5) (1961).

11. The states include Arkansas, Colorado, Illinois, Indiana, Kentucky, New York, North Carolina, Rhode Island, Texas, Vermont, Virginia, and West Virginia. 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION § 41 (3d ed. 1923).

12. In Georgia a distinction was drawn between an attesting witness and a subscribing witness; and the statute making a provision for the latter void was held not to apply to a witness to a noncupative will. Smith v. Crotty, 112 Ga. 905, 38 S.E. 110 (1901).

13. *In re* Koop's Estate, 143 So.2d 693 (Fla. App. 1962). The court held that a bequest to a bank-trustee was valid under FLA. STAT. § 731.07(5) (1961), although two bank officers and one employee were the subscribing and attesting witnesses and two of these were also stockholders in the bank. Since the bank as trustee did not receive any beneficial interest from the estate the bequest was allowed. *But see* Hodgman v. Kittredge, 67 N.H. 254, 32 Atl. 158 (1892). The interest disqualifying a devisee or a legatee is a beneficial interest; thus a devise to the husband or wife of an attesting witness renders the witness incompetent.

14. Meyer v. Fogg, 7 Fla. 292 (1857). An executor is not an incompetent witness to the will or devise, unless he is a legatee or devisee, or has an interest in the estate bequeathed to him. Whether a person nominated in the will as executor is a competent attesting witness to prove the will is affirmed either on the ground that the commissions to which he is entitled constitute no beneficial legacy, but are given as compensation for services rendered, or because he is rendered incompetent to assume the office. 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION § 41 (3d ed. 1923).

15. Hays v. Ernst, 32 Fla. 18, 13 So. 451 (1893).

16. See note 3 *supra*.

17. Manoukian v. Tomasian, 237 F.2d 211 (D.C. Cir. 1956); In the Matter of Estate of Hernon, 166 Cal. App. 2d 55, 332 P.2d 788 (1958); *In re* Hunt's Estate, 122 N.Y.S.2d. 765 (Surr. Ct. 1953); *In re* Ehrlich's Estate, 158 Misc. 540, 287 N.Y. Supp. 313 (Surr. Ct. 1936); *In re* Reichenberger's Estate, 272 Wis. 176, 74 N.W.2d 740 (1956).

18. "If a subscribing witness would be entitled to any share of the estate of the testator in case the will were not established, he shall take such proportion of the devise or bequest made to him in the will as does not exceed the share of the estate which would be distributed to him, if the will were not established." FLA. STAT. § 731.07(5) (1961).

of the estate were it to pass by intestacy, to take an amount no greater than his intestate share.

An important device that an interested witness under a will may employ to retain his testate interest is the doctrine of dependent relative revocation.[19] The doctrine is designed to carry out the presumed intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative.[20] When a testator repeats the same plan of disposition in a new will, revocation of the prior one is deemed inseparably related to and dependent upon the legal effectiveness of the subsequent will.[21] The purpose of a testator in making a will is to dispose of his property according to his choice, and to avoid the laws of intestate succession.[22] Therefore, the doctrine of dependent relative revocation implements a testator's obvious preference to dispose of his property by will, rather than leave its disposition to the laws of descent and distribution. Early common law has recognized this preference.[23]

The majority of jurisdictions hold that the doctrine of dependent relative revocation applies to a *partial* as well as to an entire revocation. The rule is that when *portions*[24] of a will are cancelled or stricken in order to change the will in part and the attempt fails for want of due attestation or other reasons, the effort to revoke is treated as relative and dependent upon the validity of the disposition to be substituted. This has been further emphasized in two cases involving charitable bequests where portions of a prior will were reinstated after efforts to

19. The Doctrine is well stated as follows: "And here it may be observed, that, where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force." 1 JARMAN, WILLS 166 (5th ed. 1893). See also, *In re* Kaufman's Estate, 25 Cal.2d 854, 155 P.2d 831 (1945); *In re* Marx's Estate, 174 Cal. 762, 164 Pac. 640 (1917); Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940); *In re* Bonhowski's Estate, 266 Mich. 112, 253 N.W. 235 (1934); *In re* Smalley's Estate, 131 N.J. Eq. 175, 24 A.2d 515 (1942); *In re* Roeder's Estate, 44 N.M. 578, 106 P.2d 847 (1940).

20. See note 19 *supra.*

21. *In re* Thompson's Estate, 185 Cal. 763, 198 Pac. 795 (1921); Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940); Blackford v. Anderson, 226 Iowa 1138, 286 N.W. 735 (1939).

22. Coon v. Coon, 187 Ind. 478, 118 N.E. 820 (1918); Purdy's Adm'r v. Evans, 156 Ky. 342, 160 S.W. 1071 (1913); Cuthbert v. Laing, 75 N.H. 304, 73 Atl. 641 (1909).

23. Onions v. Tyrer, 2 Vern. 742, 23 Eng. Rep. 1085 (1716).

24. *In re* McKay's Estate, 347 Mich. 153, 79 N.W.2d 597 (1956); *In re* Thomas' Will, 76 Minn. 237, 79 N.W. 104 (1899); Gardiner v. Gardiner, 65 N.H. 230, 19 Atl. 651 (1890); Smith v. Runkle, 86 N.J. Eq. 257, 98 Atl. 1086 (1916); *In re* Roeder's Estate, 44 N.M. 578, 106 P.2d 847 (1940); *In re* Love's Estate, 186 N.C. 714, 120 S.E. 479 (1923); Billington v. Jones, 108 Tenn. 234 (24 Pickle) 66 S.W. 1127 (1901); *In re* Knapen's Will, 75 Vt. 116, 53 Atl. 1003 (1903); *In re* Bank's Estate, 56 Wash.2d 139, 351 P.2d 531 (1960); *In re* Appleton's Estate, 163 Wash. 632, 2 P.2d 71 (1931); *In re* Marvin's Will, 172 Wis. 457, 179 N.W. 508 (1920).

defeat the devises to a charitable residuary beneficiary named in prior and subsequent wills[25] and charities administered by a new executor[26] failed. Florida followed this trend by legislation[27] and decision when the court stated in *In re Blankenship's Estate*,[28] that the doctrine would apply to a portion of a prior will which was written at least six months before the testator's death, if the subsequent will to the same charitable beneficiary was declared void because the bequest was made within the six month statutory period. This overruled *In re Pratt*,[29] in which the court had previously refused to apply the doctrine.

The "savings clause"[30] used solely to preserve a subscribing witness' interest under the will, to the extent of his intestate interest, has been adopted in many jurisdictions.[31]

The court declared that it had not found any Florida cases applying the doctrine of dependent relative revocation to a portion of a prior will. However, it did allude to two[32] foreign cases involving charitable

25. Two prior wills contained residuary devises identical with that in the latest will, which was drawn within one month of testatrix's death. A statute rendered invalid testamentary gifts for the benefit of any religious sect made within one month of the testatrix's death. The court held religious sects could receive devises from portions of prior wills under the doctrine of dependent relative revocation. Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950).

26. The testator revoked a prior will in order to have a California executor named, otherwise prior and subsequent wills were the same. A statute required the testator to live thirty days for the charitable bequests to be valid. The court held the charitable bequests valid in a prior will under the doctrine of dependent relative revocation. *In re* Kaufman's Estate, 25 Cal.2d 854, 155 P.2d 831 (1945).

27. After the decision in *In re* Pratt's Estate, 88 So.2d 499 (Fla. 1956), the statute pertaining to charitable bequests was amended to the present § 731.19 (1961). *In re* Blankenship's Estate, 122 So.2d 466 (Fla. 1960), interpreted the amended FLA. STAT. § 731.19 (1957). Now, charitable bequests made within six months of the testator's death would be valid if such bequests were also included in his immediate prior will executed more than six months prior to his death and were in substantially the same amounts and to the same beneficiary. The doctrine of dependent relative revocation allows the next prior will to count towards time needed to satisfy the statute.

28. 122 So.2d 466 (Fla. 1960). The decedent's last will and her next to last will were both executed within the six months prior to her death. The court held the charitable bequest void under the statutory requirements; but stated that if the earlier of the last two wills had been executed more than six months before the testator's death the doctrine of dependent relative revocation would apply to the portion of the prior will to fulfill the six months statutory requirement.

29. 88 So.2d 499 (Fla. 1956), where the court refused to compel the attorney for the executor to produce the prior will validly executed six months before testator's death. A subsequent will written within six months of death was valid but a charitable bequest not fulfilling the six months statutory requirement was void and the doctrine of dependent relative revocation was not applied because the intent of the testator is given effect only to the extent that it is not inconsistent with the law.

30. FLA. STAT. § 731.07(5) (1961).

31. In the Matter of Estate of Hernon, 166 Cal. App. 2d 55, 332 P.2d 788 (1958); Cromwell v. Stevens, 212 Ky. 209, 278 S.W. 555 (1925); *In re* Hunt's Estate, 122 N.Y.S.2d 765 (Surr. Ct. 1953); *In re* Ehrlich's Estate, 158 Misc. 540, 287 N.Y.S. 313 (Surr. Ct. 1936); *In re* Dwyer, 192 App. Div. 72, 182 N.Y.S. 64 (1920); *In re* Reichenberger's Estate, 272 Wis. 176, 74 N.W.2d 740 (1956).

32. See notes 25 and 26 *supra*.

bequests which emphasized this principle. These cases sustained the application of the doctrine to a portion of a prior will, but the court distinguished these cases from the instant case and held *In re Pratt*[33] controlling although it apparently was overruled. Significantly, the court then noted that the statute which served as the basis for the *Pratt* decision was subsequently amended.[34]

Proceeding on the assumption "that the *Pratt* case does not rule out the possibility of applying the doctrine to only a portion of a will," the court suddenly changed direction by ruling that the degree of *intent*[35] necessary to apply the doctrine was lacking.

The effect of the decision perpetuates Florida's position,[36] holding that the doctrine of dependent relative revocation cannot be applied to portions of a prior will. The cases representing the majority[37] opinion in applying the doctrine to a portion of a will have usually concerned inoperative cancellations and interlineations by the testator or charitable devises and bequests. Did the Florida court base its reluctance to apply the doctrine merely on the distinction that the witness-beneficiary was not the testatrix's heir and, therefore, was not able to take an intestate share of the estate?[38] Perhaps another ramification of this decision is a possible conflict between the instant case and the 1957 amendment to the Florida Statute,[39] covering charitable devises and bequests, as interpreted by the Florida Supreme Court in *Blankenship*.[40]

When the Florida Legislature amended the section[41] on charitable bequests, the clear and obvious intent was to apply the doctrine of dependent relative revocation to portions of a prior will, at least where charitable bequests were concerned. Florida's highest court, as already indicated, in *Blankenship*[42] has fully substantiated this position. Even the court in the instant case did not rule out the possibility of applying

33. See note 29 *supra*.

34. FLA. STAT. § 731.19 (1957).

35. *In re* Lubbe's Estate, 142 So.2d 130, 136 (Fla. App. 1962). The court said "the dominant purposes of Helen Lubbe's will was to dispose of her estate, name her burial place and appoint an executor and attorney for the estate. Item Three, which was the only dispositive section of the will, contained twenty-six specific bequests to named individuals. She set out what appeared to be her primary desires in those twenty-six bequests and then left the residue, if any, to appellant Brantley Burcham. It can hardly be said that the dominant purpose of *this will* was to pass the residuary estate."

Here the court arbitrarily undercuts the testatrix's obvious intent to dispose of a portion of her estate to her residuary beneficiary who was named by her in two successive wills.

36. *Id.* at 135. "Appellants have cited no cases nor have we located any Florida decision applying the doctrine to only a portion of the will where the rest of the will was valid."

37. See note 24 *supra*.

38. FLA. STAT. § 731.07(5) (1961).

39. See note 34 *supra*.

40. See note 27 *supra*.

41. FLA. STAT. § 731.19 (1957).

42. See note 27 *supra*.

the doctrine to only a portion of a will, and in effect completely circumvented the issue by resolving the case on the basis of the testatrix's dominant purpose in executing her will. Conceding that the dominant purpose of the will was to dispose of the testatrix's estate, certainly the residuary clause was in no way contradictory to that purpose. In this light, since the residuary beneficiary was expressly provided for in the prior and subsequent will, it is suggested that the effect of this decision is contrary to the twice expressed intent of the testatrix, thus possibly placing the court in the tenuous position of "rewriting a will." The court could have escaped its evident discomfort by drawing a logical analogy between charitable bequests and the situation in the instant case. Since the Florida Supreme Court has recognized the validity of applying the doctrine of dependent relative revocation to a portion of a prior will where charitable bequests are concerned,[43] the next logical extension would have been the application of those principles to the instant case, thereby mitigating the harshness of its decision with sound legal principles of Florida law.

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## MOTOR VEHICLE CONDITIONAL SALES—INAPPLICABILITY OF A STATUTORY EXCEPTION TO THE RULE OF COMITY

The plaintiff vendor entered into a conditional sales contract for the sale of an automobile in Massachusetts. Massachusetts does not require recordation of the contract. The conditional vendee defaulted and removed the automobile to Florida where he obtained a Florida title certificate noting Massachusetts as the state of previous registration. The automobile was subsequently purchased with the Florida title certificate by the defendant from the conditional vendee. The defendant had no notice of the conditional sales contract. Inquiries made by the defendant complied with the requirements of the Florida statute pertaining to foreign vehicles sold without a Florida title certificate.[1] In a replevin action the court granted defendant's motion for summary

43. *In re* Blankenship's Estate, 122 So.2d 466 (Fla. 1960).

1. FLA. STAT. § 319.27(3)(f) (1961) provides that any person "purchasing a motor vehicle upon which no certificate of title has been issued in Florida shall be deemed to be an innocent purchaser for value" if certain provisions are complied with. The statute requires the purchaser to obtain a sworn statement from the seller that no lien exists and the name and address of the owner on the date the current tag on the vehicle was acquired; that such statement be attached to the certificate of title if one has been issued; and to obtain a telegram or written statement from the proper recording officer in the state, county or city of the seller to the effect that no lien is recorded there. The latter provision need not be complied with when the purchase is made in states which do not require recordation of such contracts or liens in order for them to be enforceable against subsequent purchasers.