University of Miami Law Review

Volume 2 | Number 1 Article 9

10-1-1947

Will -- Divorce as Affecting a Previously Executed Will

(1) that prompt action will be taken on all applications for occupational licenses;
(2) that only in cases where there is a real and immediate danger to public health or welfare, will any administrative agency revoke or suspend any license except after hearing;
(3) to insure a right of judicial review in proper cases;
(4) to require that a different section of the administrative agency rule on the evidence, than that section which secures information against the licensee in any revocation or suspension proceeding;
(5) to provide that no license issued to businesses of a continuing nature shall expire until determination has been made of any timely application for renewal;
(6) to require the various administrative commissions to establish uniform procedures and make and publish their rules.

WILLS—DIVORCE AS AFFECTING A PREVIOUSLY EXECUTED WILL

The average person gaining freedom from matrimonial difficulties gives too little thought to certain lingering effects of the dissolved marital relationship. Considerable difficulty has arisen in the Courts as to whether or not divorce revokes the provisions of a pre-existing will as concerns the ex spouse.

This question to date has not been authoritatively settled in Florida. The Florida Supreme Court in a recent case[1] had an opportunity to pass upon that point but declined affirmatively to do so, ruling instead upon another ground. However, it is believed that by necessary implication Florida now holds that divorce standing alone will not revoke a pre-existing will.

On appeal by the divorced wife for construction of the will, the Court determined that it was the intent of the testator, as gleaned from the four corners of the instrument, that the bequest to the wife was conditioned upon her surviving him as wife. The portion of the will which strongly influenced the Court in determining the testator's intention was; "Unto my beloved wife, Pauline Iles, in case she survives me, and not otherwise, I give, devise, and bequeath, etc." In addition the Court emphasized the fact that should the first bequest lapse, the gift would go to his lawful issue, and if this too failed, then to the testator's brother. From the above the Court concluded it was clearly the testator's intention to provide for only those who had a legal or moral claim to his estate, and since at his death the testator had neither wife nor bodily issue, the estate therefore passed to the testator's brother.

In this interpretation of the testator's intent, the Court ruled contrary to the weight of authority.[2] The majority rule is that when the words,

1 Iles v. Iles, ...Fla....., 29 So. (2d) 21 (1946).

2 Lavender v. Roseheim, 110 Md. 150, 72 Atl. 669 (1909); In re Jones, 211 Pa. St. 364, 60 Atl. 915 (1905); Bell v. Smelly, 45 N. J. Eq. 478, 18 Atl. 70 (1889); 27 Ohio St. 299, 22 Am. Rep. 387 (1875); Murphy v. Markie, 98 N. J. Eq. 153, 130 Atl. 840 (1920). In re Simpson's Will, 280 N. Y. S. 705, 155 Misc. 866 (1935).

"beloved wife," plus the individual's name are used in a will, such words are merely *descriptio personae,* and the wife takes as name beneficiary despite a prior divorce. There are *dicta* in the Florida case of Kuchmsted v. Hewitt[3] to that effect. In the Kuchmsted case, the heirs of the deceased testatrix sought to invalidate a marriage upon the ground of lack of mental capacity of the testatrix and thus to defeat the provisions of a will leaving the lion's share of the decedent's estate to the husband. The Court ruled that the marriage was void *ab initio,* but went on to say that as the testatrix had left the estate to her husband, Hewett, that the defendant Hewitt took under the will despite the void marriage, since he was a name beneficiary and the word "husband" was merely *descriptio personae.*

As for the Court's solution of the problem of the Iles case upon the basis of the testator's intent, it is suggested that in such a situation the test of intention is a poor one. The average person executes a will intending to provide for his wife as his helpmeet and of that time there is surely no thought of the possibility of divorce. Certainly a divorce may work a subsequent change in this intention, but the fact remains that the testator's intention at the time of drawing the will is controlling. It would seem that the effect of divorce upon a previously executed will should be determined solely upon principles of implied revocation, unless the will specifically provides for such a contingency.

Passing to the question of the effect of divorce alone upon a pre-existing will and as to whether or not this is an implied revocation due to the changed circumstances of the testator, the authorities are not in accord. The great weight of authority is that there is no revocation by the mere fact of divorce,[4] but there is some authority *contra.*[5]

The cases illustrating the majority rule[6] base their conclusions upon various theories to the effect that the person named as legatee did not die in the lifetime of the testator, nor did any event occur in the lifetime of the testator which under the language of the will would render the testamentary gift inoperative. The donee is alive, and has both capacity and willingness to take under the will; the words beloved wife, etc., are not conditional or words of limitation, but merely descriptive; and

---

3 103 Fla. 1177, 138 So. 778 (1932).

4 Re Brown, 139 Iowa 219, 117 N. W. 260 (1908); Pacetti v. Rowlinski, 169 Ga. 602, 150 So. 910 (1929); In re Nenaber's Estate, 55 S. D. 257, 225 N. W. 719 (1929); Cord v. Alexander, 48 Conn. 492, 40 Am. Rep. 187 (1881); Cunningham's Succession, 142 La. 701, 77 So. 502 (1918); Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303 (1896); Jones Estate, 211 Pa. 364, 69 L. R. A. 940 (1905). In re Brannon's Estate, 111 Cal. App. 38, 295 P. 83 (1931).

5 Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219 (1905); Battis v. Montana, 143 Wis. 234, 126 N. W. 9 (1910); Bartlet v. Lahr, 108 Neb. 681, 190 N. W. 869 (1922); Martin v. Martin, 109 Neb. 289, 190 N. W. 872 (1922); Re McGraws Estate, 228 Mich. 1, 199 N. W. 686 (1924).

6 Note 4, *supra.*

since the testator has not by some affirmative act revoked the will clearly, his intention was not to do so.

The minority cases, as typified by McGraws Estate[7], reach a contrary conclusion in the identical situation upon the theory that in an ordinary divorce proceeding there is much ill will and rancour. Some courts admit that where there are infant children the result might be different. A few courts hold by divorce the wife becomes a stranger and that the estate should be maintained within the testator's family. Other courts hold that the common law rule was that divorce was an implied revocation of a previously executed will, but the argument is specious since the common law courts until the latter part of the nineteenth century had no jurisdiction over divorce, jurisdiction being vested in the Ecclesiastical courts.

It is of interest to note that the majority of Courts agree that when there is a property settlement, divorce does revoke a pre-existing will[8] upon the theory that such things represent a change in the testator's circumstances which makes the doctrine of implied revocation applicable. Certainly, it is more rational to assume that where the decedent has made a property settlement, his intention, were he alive to express it, would be to revoke the provisions in his will concerning his ex-spouse.

In the Iles case,[9] although appellant's counsel raised the question of whether divorce alone revoked a pre-existing will, the Court stated that there was no authority in Florida upon this matter and proceeded to base the decision solely upon the testator's intention. However, the conclusion seems inescapable that the Court's premise must have been that divorce alone will not revoke a pre-existing will and therefore we must turn to the instrument itself to determine what was the testator's intention. Despite the ingenuity of judicial reasoning upon this question, it seems that the better solution would be for the Legislature to enact a statute definitely stating what the rule in this state shall be. Mr. Redfearn has advocated[10] such a step. Pennsylvania by a recent statute[11] has declared that divorce will revoke all provisions in a pre-existing will in favor of the former spouse, while Minnesota and Washington have had similar statutes for some time.

---

7 228 Mich. 1, 199 N. W. 686 (1924).

8 Re Crane, Cal, 57 P. 2d 47 (1936); Gartin v. Gartin, 296 Ill. App. 330, 16 N. E. 2d 184 (1938); Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893); Pardee v. Grubiss, 34 Ohio App. 474, 171 N. E. 375 (1929); Johnston v. Laird, 48 Wyo. 532, 52 P. 2d 1219 (1935) (annulment with property settlement); Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306 (1907); Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219 (1909); Bartlett's Estate, 108 Neb. 681, 898 N. W. 390 (1922).

9 Note 1, *supra*.

10 Redfearn, "Wills and Administration of Estates in Florida", (2d Ed., 1946), p. 136.

11 Wills Act of April 24, 1947, sec. 7 (2).