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Wills - Revocation by Operation of Law - Effect of Subsequent Marriage - Retroactivity of Statutes Governing Wills

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DISCUSSION OF RECENT DECISIONS

WILLS—REVOCATION BY OPERATION OF LAW—EFFECT OF SUBSEQUENT MARRIAGE—RETROACTIVITY OF STATUTES GOVERNING WILLS. In the case of *In re Estate of Stolte*, 37 Ill. 2d 427, 226 N.E.2d 615 (1967), the Supreme Court of Illinois was called upon to answer the question of whether a will executed before marriage was either revived or retroactively changed by the 1965 amendment to section 46 of the Probate Act.[1] The court held that the 1965 amendment did not revive a will previously revoked by operation of law.

The testator of the will in question, Frank G. Stolte, executed a will in 1955 and a codicil thereto in 1956. The pertinent provisions of section 46 of the Probate Act, then in effect, provided that, "marriage by the testator shall be deemed a revocation of any existing will executed by the testator prior to the date of marriage."[2] The testator married the respondent, Viola Neff in 1957, at which time the provisions of the Probate Act had been amended to read that, "unless the will expressly provides to the contrary, (1) marriage of the testator revokes a will executed by the testator before the date of marriage. . . ."[3]

Stolte was informed in 1958 by his attorney that his subsequent marriage revoked the will, but the testator died in 1966 without re-executing the will. In 1965, the Probate Act had been amended to provide that, "no will or any part thereof shall be revoked by any change in circumstances, condition, or marital status of the testator. . . ."[4]

On petition by the named executor, the will was admitted to probate over objections of the respondent widow. The respondent then appealed to the Supreme Court of Illinois, basing the direct appeal on the grounds that a retroactive statute on wills would be an unconstitutional impairment of contractual relations.

The respondent contended that a will once revoked cannot be revived by subsequent legislation, and that the 1965 amendment was not intended to be retroactive. In maintaining that the 1965 amendment was controlling, the executor first argued that revocation of a will, like the will itself, is ambulatory and dependent upon the law in force at the time the rights vest.

1 Ill. Rev. Stat. ch. 3, § 46 (1965).

2 Ill. Rev. Stat. ch. 3, § 197 (1941).

3 The statute further provides, "No will which is in any manner revoked shall be revived otherwise than by the re-execution thereof, or by an instrument in writing declaring the revival and signed and attested in the manner prescribed in this Article for the signing and attestations of a will." Ill. Rev. Stat. ch. 3, § 197 (1957).

4 The statute further provides, "A will which is totally revoked in any manner shall not be revived other than by its re-execution, or by an instrument in writing declaring revival, and signed and attested in the manner prescribed by the Article for the signing and attestation of the will. . . . This amendatory Act of 1965 applies to wills of decedents dying after Dec. 31, 1965." Ill. Rev. Stat. ch. 3, § 46 (1965).

The petitioner further maintained that the intent of the legislature was to make the amendment retroactive.

The Supreme Court of Illinois, in rejecting both of the executor's contentions, reversed the decision of the lower court and held that the 1965 amendment did not revive a will previously revoked by operation of law. In discussing the first contention of the petitioner, the court cited, *Cyclopedia of Law and Procedure*, which states:

> Where a will is revoked in toto by act of the testator, or by operation of law, it is dead for all purposes, and no difficulty in determining the operation and effect can arise.[5]

In answering the petitioner's second contention, concerning the intent of the legislation, the court stated:

> Even if such language [1965 amendment][6] were to show an intent to make the amendment retroactive, it could only apply to wills in existence. . . . At the time of the 1965 amendment the will was totally revoked.[7]

There are two theories as to the effect of a subsequent amendment upon a will previously revoked by operation of law.[8] The first theory, adopted by a majority of the few states deciding the narrow issue, holds that the law in force at the time of death controls.[9] This theory is based on the premise that rights can be regulated only after they vest, and since rights in a will vest only upon the death of the testator, the law in force at the time of death is controlling. The second theory, and the theory advocated by the court in the present case, holds that the intent of the legislature to govern future conduct outweighs the importance of the application of the theory of vested rights.

The Supreme Court of Illinois had previously considered several cases involving the retroactive effect of a statute and had rejected the vested rights theory. In *In re Will of Tuller*[10] the court was called upon to decide the question of whether an 1872 act which provided that a will would be revoked upon marriage applied retroactively to an 1869 will and subsequent marriage where the testator died in 1874. In rejecting the argument of vested rights, the court stated:

> The question is not so much whether the statute affects rights vested before its passage, as what was the intention of the legisla-

5 40 CYC. *Wills* § VIII (1912).

6 The pertinent provision states, "This amendatory Act of 1965 applies to wills of decedents dying after Dec. 31, 1965." Ill. Rev. Stat. ch. 3, § 46 (1965).

7 37 Ill. 2d at 434, 226 N.E.2d at 619.

8 95 C.J.S *Wills* § 300 (1957), 57 Am. Jur. *Wills* § 53 (1948).

9 Reynolds v. Love, 191 Ala. 218, 68 So. 27 (1915); In re Ziegner's Estate, 146 Wash. 537, 264 Pac. 12 (1928); Friedman v. Cohen, 215 Ga. 859, 114 S.E.2d 24 (1960).

10 79 Ill. 99 (1875).

> ture. A law is a rule of civil conduct, and the principle is, that it is a rule for the regulation of future conduct.[11]

The Supreme Court of Illinois again considered the impact of the vested rights theory upon wills in *Champaign County Bank and Trust Co., v. Jutkins.*[12] In that case, the testator executed a will when divorce did not effect a revocation. He was divorced in 1959 after a 1957 statute had been enacted which provided for revocation upon divorce. The court held that the law did not apply retroactively and rejected any extension of the vested rights theory.

The court in the instant case relied heavily on *In re Berger's Estate.*[13] In that case, the California court was presented with the issue of whether a will could be revived by statute after having been revoked by operation of law. The testatrix executed a will at a time when the statute provided that a will is revoked by subsequent marriage and is not revived upon the death of the testator's spouse. She then married and her husband died shortly thereafter. The pertinent statute was then amended to provide for revocation only upon survival of the husband.

The California court, relying on *McAnnulty v. McAnnulty,*[14] held that the will could not be revived by the subsequent statute. The court stated:

> The revocation is as complete as if made by the act of the testatrix, and the will cannot be given life and validity except by some testamentary writing executed and attested in the manner prescribed by law.[15]

On the strength of the above decisions, the Supreme Court of Illinois held that the will of the decedent was totally revoked and remained so after passage of the 1965 amendment.

This decision has significant theoretical and practical impact. The court's decision is consistent with the theory that the intent of the testator rules. Indeed there were similar instances, as in the present case, where testators in Illinois relied on intestate succession to provide for their spouses upon learning of the revocation of their wills. If the court would have followed the opposite line of reasoning, wills executed under similar circumstances before the 1965 amendment would be susceptible to revitalization.

If the vested rights theory were used, the theory of the intent of the testator would have been distorted into an implication that the testator's in-

11 *Id.* at 107.

12 29 Ill. 2d 253, 193 N.E.2d 779 (1963).

13 198 Cal. 103, 243 Pac. 862 (1926).

14 20 Ill. 26, 11 N.E. 397 (1887), wherein the Supreme Court of Illinois characterized its holding in the *Tuller* case by stating, "The court, after discussing at some length the question whether the act cited should be extended to a will executed before its passage, finally held that it did not."

15 *Supra* note 13, at 109, 243 Pac. at 864.

action evidenced an intention to abide by the will. While this line of reasoning may be sound where circumstances remain constant, it is fallacious where the testator married and is aware of statutory provisions revoking the will. The more logical assumption is that upon learning of the revocation of the will, the testator relied on intestate succession.

The court's decision can best be considered as an advocation of the principle that a testator acts in light of knowledge of both the law then in effect, and the important circumstances which he foresees. Certainly, this guarantees the certainty under which the testator believed he drafted his will and rejects the theory that renders a will an amorphous entity susceptible to future fluctuations.

CHARLES W. STAUDENMAYER

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—DISMISSAL OF TEACHER WHO PUBLISHED LETTER CRITICAL OF SCHOOL OFFICIALS WITHIN POWER OF SCHOOL BOARD.—In the recent case of *Pickering v. Board of Education*, 36 Ill. 2d 568, 225 N.E.2d 1 (1967), the Supreme Court of Illinois was confronted with the issue of whether a local Board of Education must continue to employ a teacher who published in a local newspaper misleading and untrue statements which reflected upon the credibility and sincerity of his superintendent and Board and which were reasonably believed to be detrimental to the best interests of the school. The court held that apart from whatever freedom a private individual might possess to harm school administrators by misuse of speech, the special position which the teacher occupies in relation thereto dictates that he be no more privileged to injure his school by speech than by immorality, brutality, incompetence, or other conduct. Consequently, such behavior furnishes cause for dismissal, in the absence of a showing that the Board acted capriciously, arbitrarily, or contrary to the manifest weight of the evidence.

Marvin Pickering was a teacher in Township High School District 205, Will County. In February and December of 1961, school bond issue proposals were submitted to the voters of the school district. The February proposal was defeated; the December proposal was approved. In 1964, proposals to increase the educational and transportation tax rates were twice rejected. Five days after the second defeat, a local newspaper published a letter written by Pickering to the editor of the paper. The letter consisted of a series of complaints which its author had against the district school superintendent and Board of Education. Pickering charged that funds procured through the referendum in December of 1961 had been used to construct athletic fields and an auditorium in two local high schools although the Board had promised that no money would be expended for such facilities. He further alleged that school lunch prices were unnecessarily