



## Notre Dame Law Review

Volume 42 | Issue 1

Article 4

1-1-1967

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### Recommended Citation

Harold J. Bliss, *Implied by Law Revocation of Wills*, 42 Notre Dame L. Rev. 59 (1967).

Available at: <http://scholarship.law.nd.edu/ndlr/vol42/iss1/4>

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## IMPLIED BY LAW REVOCATION OF WILLS

### I. Introduction

An ancient problem in Anglo-American law is the revocation of a will by other means than its physical destruction or the publication of a superseding will. As early as 1588, a woman's will was held revoked by her subsequent marriage.<sup>1</sup> Since the marriage was an extratestamentary act to which the law gave legal effect, the revocation was said to be implied by law. Subsequently, it was held that marriage and birth of issue impliedly revoked the antenuptial will of a man.<sup>2</sup> These examples illustrate the two methods of implied by law revocation, through changes in a testator's domestic relations, that were developed by the ecclesiastical and common law courts. In addition, the common law developed the doctrine of implied revocation by changes in the size and nature of the estate devised.<sup>3</sup> This note will deal primarily with the implied by law revocation of a will by changes in domestic relations and the extent to which statutes have altered or abrogated that doctrine.

Although the early law of England found implied revocation in two instances — subsequent marriage of a woman and marriage and birth of issue to a man — the theoretical basis for each was different. In the case of a single woman, marriage rendered her no longer a separate legal entity, and, hence, she was incapable of making or revoking a devise. Since an antenuptial will would then be irrevocable during coverture — a result contrary to the ambulatory nature of wills — such a will was declared revoked by the woman's marriage.<sup>4</sup> Marriage and birth of issue were thought to effect such a change in the domestic situation of a man that he was presumed to have intended a revocation.<sup>5</sup> At first this presumption was rebuttable,<sup>6</sup> but eventually the courts considered it a conclusive rule of law. It was considered less a presumed intention than "a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family."<sup>7</sup> It was necessary that both marriage and the birth of issue follow the making of the will for revocation to be implied. If marriage preceded the will and birth followed the will, there was no implied revocation because the will was considered made in contemplation of children from the marriage.<sup>8</sup> If there were a marriage and no children, the will would not be revoked because the wife, since not an heir of her husband, would not benefit from the revocation.<sup>9</sup> Furthermore, she could take her dower.

1 Case No. 16, Gouldsb. 109, 75 Eng. Rep. 1028 (1588).

2 Doe d. Lancashire v. Lancashire, 5 T.R. 49, 101 Eng. Rep. 28 (K. B. 1792).

3 See 2 PAGE, WILLS §§ 21.66—85 (Parker-Bowe rev. 1960).

4 Case No. 16, Gouldsb. 109, 75 Eng. Rep. 1028 (1588).

5 Lugg v. Lugg, 2 Salk. 593, 91 Eng. Rep. 497 (1696).

6 Brady v. Cubitt, 1 Dougl. 31, 99 Eng. Rep. 24 (1778).

7 Doe d. Lancashire v. Lancashire, 5 T.R. 49, 58, 101 Eng. Rep. 28, 34 (K.B. 1792).

8 Doe d. White v. Barford, 4 M. & S. 10, 105 Eng. Rep. 739 (1815); see 2 PAGE, *op. cit.* *supra* note 3, § 21.93.

9 Wellington v. Wellington, 4 Burr. 2165, 98 Eng. Rep. 129 (1768); see 2 PAGE, *op. cit.* *supra* note 3, § 21.89.

In 1677 Parliament enacted the Statute of Frauds,<sup>10</sup> part of which treated the revocation of wills. After indicating that revocation shall be effected by either a subsequent writing or physical act done to the will, such as burning, tearing, cancelling, or obliterating it, the statute declared: "any former law or usage to the contrary notwithstanding."<sup>11</sup> Although this phrase appears to abrogate the doctrine of implied revocation, it was soon held that the phrase applied only to express revocations and that implied revocation remained strong.<sup>12</sup> The Wills Act of 1837 accomplished what the Statute of Frauds evidently attempted: the abolition of revocation by other than statutory means.<sup>13</sup> Section 19 of that statute specifically provides "that no will shall be revoked by any Presumption of an Intention on the Grounds of an Alteration in Circumstances."<sup>14</sup>

## II. The Current Statutes

### A. Statute of Frauds

As mentioned above, the final phrase of the Statute of Frauds, "any former law or usage to the contrary notwithstanding," was held not to affect revocations implied by law. A recent and typical example of this construction was provided by the District of Columbia. Until January 1, 1966, its statute was the same as the original Statute of Frauds, containing the same concluding phrase.<sup>15</sup> Under that statute, *McGowan v. Elroy*<sup>16</sup> and *Morris v. Foster*<sup>17</sup> rejected the doctrine of revocation by implication. In the latter case, the United States Court of Appeals for the District of Columbia referred to the *McGowan* decision as follows: "This ruling, made more than 15 years ago, accorded to the quoted words of the Code their plain and ordinary meaning, and a different conclusion now would require very cogent reasons."<sup>18</sup> Twenty-three years later this court considered for the first time whether the will of a man was revoked by his subsequent marriage and the posthumous birth of a child. By answering in the affirmative

10 Statute of Frauds, 1676, 29 Car. 2, c. 3, § 6, provided:

[N]o devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

11 *Ibid.*

12 *Christopher v. Christopher*, Dick. 445, 21 Eng. Rep. 343 (1771).

13 Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 19. Section 2 of the statute repealed the provisions of 29 Car. 2, c. 3 that dealt with wills and their revocation, including § 6. In the latter's stead, Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 20 provides:

[N]o Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the Testator, or by some Person in his Presence and by his Direction, with the Intention of revoking the same.

14 Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 19.

15 Act of March 3, 1901, ch. 854, § 1626, 31 Stat. 1433.

16 28 App. D.C. 188 (1906).

17 278 Fed. 321 (D.C. Cir.), *cert. denied*, 259 U.S. 582 (1922).

18 *Id.* at 324-25.

in *Pascucci v. Alsop*,<sup>19</sup> the District of Columbia Circuit joined the other American jurisdictions that have interpreted similar statutes to arrive at this same result. In reaching its conclusion, the court stated:

In England, as we have seen, at the time of the Revolution, the Statute of Frauds, which is today, and by adoption always was, the law in the District of Columbia, had been held as not affecting the then existing common law that marriage and the birth of issue, taken together, amount to an implied revocation of a previously executed will of the husband and father.<sup>20</sup>

In February 1966 this same court answered the further question of whether a divorce and property settlement are sufficient to constitute an implied revocation of a will made during a marriage. In *Luff v. Luff*,<sup>21</sup> the court, over vigorous dissent, again found an implied revocation of the will. After reviewing its decision in *Pascucci* and recognizing the import of a recent congressional amendment to the District's revocation statute,<sup>22</sup> the court followed the majority view among states recognizing implied by law revocation, and it included divorce and property settlement within the changes in a testator's condition or circumstances that constitute an implied revocation.<sup>23</sup>

Judicial treatment of the final phrase of the original Statute of Frauds has caused penitent legislation. In *Pascucci*, the court, while discussing the history of its revocation statute, pointed out that the Maryland legislature, in 1860, struck the final phrase from its statute, not to effect a change, but because the provision was meaningless and ineffectual.<sup>24</sup> The United States Congress amended the District's statute to include "by implication of law" as a method of revocation.<sup>25</sup> Apparently, Congress, too, passes amendatory legislation, not to change meaning, but to conform to judicial gloss on prior statutes. With the 1966 amendment to the District of Columbia Code, no jurisdiction within the scope of this note retains the phrase "any former law or usage to the contrary notwithstanding."

## B. Statute of Wills

Under this heading are all the statutes which are exclusive as to the methods

19 147 F.2d 880 (D.C. Cir.), cert. denied, 325 U.S. 868 (1945); see Mersch, *Implied Revocation of Wills Revived in the District of Columbia*, 33 GEO. L.J. 182 (1945).

20 *Pascucci v. Alsop*, 147 F.2d 880, 882 (D.C. Cir. 1945).

21 359 F.2d 235 (D.C. Cir. 1966).

22 D.C. CODE ANN. § 18—109 (Supp. V, 1966). The new enactment provides:

(a) A will or codicil, or a part thereof, may not be revoked, except by implication of law, otherwise than by

(1) a later will, codicil, or other writing declaring the revocation, executed as provided by section 18—103 or 18—107; or

(2) burning, tearing, cancelling, or obliterating the will or codicil, or the part thereof, with the intention of revoking it, by the testator himself, or by a person in his presence and by his express direction and consent.

(b) A will or codicil, or a part thereof, after it is revoked, may not be revived otherwise than by its re-execution, or by a codicil executed as provided in the case of wills, and then only to the extent to which an intention to revive is shown.

The previous statute included "any former law or usage to the contrary notwithstanding."<sup>23</sup> *Luff v. Luff*, 359 F.2d 235, 239 (D.C. Cir. 1966). The consideration of divorce, and divorce and property settlement, is dealt with in text accompanying notes 64-76 *infra*.

24 *Pascucci v. Alsop*, 147 F.2d 880, 882 (D.C. Cir. 1945).

25 D.C. CODE ANN. § 18—109 (Supp. V, 1966).

of revoking wills. Aside from the original English Statute of Wills,<sup>26</sup> which is still in force, only Rhode Island provides: "No will shall be revoked by any presumption of intention on the ground of an alteration in circumstances."<sup>27</sup> Five other states specifically exclude implied revocation by any means other than those contained in their statutes.<sup>28</sup> Thirty-seven jurisdictions exclude implied revocation, either by statute without mentioning the doctrine,<sup>29</sup> or by case law.<sup>30</sup>

Not only are many of these exclusionary statutes extremely different from the English Statute of Wills, but seventeen states list divorce as either a complete or *pro tanto* revocation.<sup>31</sup> The rarity of divorce and the attendant difficulties in obtaining one in England have been offered as reasons for the difference between British and American attitudes towards its effect on prior wills.<sup>32</sup>

Opposed to the thirty-seven jurisdictions<sup>33</sup> that silently exclude implied revocations are three states that have judicially recognized the doctrine.<sup>34</sup> Two of

26 Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 19.

27 R.I. GEN. LAWS ANN. § 33-5-11 (1956).

28 ARK. STAT. ANN. § 60-407 (Supp. 1965); ILL. ANN. STAT. tit. 3, § 46 (Supp. 1965); IND. ANN. STAT. § 6-508 (repl. 1955); MO. ANN. STAT. § 474.420 (1956); N.C. GEN. STAT. § 31-5.7 (Supp. 1965).

29 ALA. CODE tit. 61, § 26 (recomp. 1958); ALASKA STAT. § 13.05.160 (1962); ARIZ. REV. STAT. ANN. § 14-126 (1956); CAL. PROB. CODE § 74; C.Z. CODE tit. 7, § 81 (1963); COLO. REV. STAT. ANN. § 153-5-3 (1963); CONN. GEN. STAT. ANN. § 45-162 (1958); GUAM PROB. CODE § 74 (1953); IDAHO CODE ANN. § 14-307 (1947); IOWA CODE ANN. § 633.284 (1964); KAN. GEN. STAT. ANN. § 59-611 (1963); KY. REV. STAT. ANN. § 394.080 (1963); MONT. REV. CODES ANN. § 91-122 (1947); N.J. STAT. ANN. § 3A:3-3 (1953); N.Y. DECED. EST. LAW § 34; N.D. CENT. CODE § 56-04-01 (1960); OKLA. STAT. ANN. tit. 84, § 101 (1951); ORE. REV. STAT. § 114.110 (repl. 1963); PA. STAT. ANN. tit. 20, § 180.5 (1950); P.R. LAWS ANN. tit. 31, § 2232 (1955); S.C. CODE ANN. § 19-221 (1962); S.D. CODE § 56.0217 (1939); TEX. PROB. CODE § 63 (1956); UTAH CODE ANN. § 74-1-19 (1953); V.I. CODE ANN. tit. 15, § 26 (1964); WASH. REV. CODE ANN. § 11.12.040 (1963); W. VA. CODE ANN. § 4045 (1961).

30 Parker v. Foreman, 252 Ala. 77, 39 So. 2d 574 (1949); Mosely v. Mosely, 217 Ark. 536, 231 S.W.2d 99 (1950); *In re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374 (1923), *error dismissed*, 266 U.S. 594 (1924); Davis v. Davis, 57 So. 2d 8 (Fla. 1952); Facetti v. Rowinski, 169 Ga. 602, 150 S.E. 910 (1929); Gartin v. Gartin, 371 Ill. 418, 21 N.E.2d 289 (1939); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Hertrais v. Moore, 325 Mass. 57, 88 N.E.2d 909 (1949), MASS. ANN. LAWS ch. 191, § 8 to the contrary notwithstanding (The court stated that the situation in § 9, covering revocation by marriage, constitutes the subsequent changes in the conditions and circumstances of the testator referred to in § 8); Robertson v. Jones, 345 Mo. 828, 136 S.W.2d 278 (1940); Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 390 P.2d 657 (1964) (In declaring the statutory manner of revocation exclusive, the court made no reference to two earlier cases, *In re Roeder's Estate*, 44 N.M. 578, 106 P.2d 847 (1940) and *In re Lewis' Will*, 41 N.M. 522, 71 P.2d 1032 (1937), which allowed revocation by implication of law); *In re Crounse's Will*, 168 Misc. 359, 6 N.Y.S.2d 32 (Surr. Ct. 1938); *In re Darrow's Estate*, 164 Pa. Super. 25, 63 A.2d 458 (1949); *In re Nenaber's Estate*, 55 S.D. 257, 225 N.W. 719 (1929); Swann v. Swann, 131 W. Va. 555, 48 S.E.2d 425 (1948). Virginia, although not excluding the doctrine by its statutes, does not favor implied revocation. Bradshaw v. Bangle, 194 Va. 794, 75 S.E.2d 609 (1953).

31 ALA. CODE tit. 61, § 9(1) (recomp. 1958); ALASKA STAT. § 13.05.120(b) (Supp. 1965); ARK. STAT. ANN. § 60-407 (Supp. 1965); COLO. REV. STAT. ANN. § 153-5-3 (1963) (unless made in contemplation of divorce); FLA. STAT. ANN. § 731.101 (1963); GA. CODE ANN. § 113-408 (rev. 1959) (unless made in contemplation of divorce); ILL. ANN. STAT. tit. 3, § 46 (Supp. 1965); IND. ANN. STAT. § 6-508 (repl. 1953); IOWA CODE ANN. § 633.271 (1964); KAN. STAT. ANN. § 59-610 (1964); MO. ANN. STAT. § 474.420 (1956); N.C. GEN. STAT. § 31-5.4 (Supp. 1965); OKLA. STAT. ANN. tit. 84, § 114 (Supp. 1965); ORE. REV. STAT. § 114.130 (1963); PA. STAT. ANN. tit. 20, § 180.7(2) (Supp. 1965); TEX. PROB. CODE § 69 (1956); WASH. REV. CODE ANN. § 11.12.050 (1963). All provide for *pro tanto* revocation except Georgia and Oregon.

32 *Comment*, 15 ALA. L. REV. 331, 332-33 (1962).

33 See notes 28 and 29 *supra*.

34 Maryland, Mississippi, and Tennessee.

these have statutes dealing with revocation, while the third does not have a revocation statute.

The Mississippi statute begins: "A devise so made, or any clause thereof, shall not be revocable but by . . . [Statute of Frauds methods and provisions for pretermitted children]."<sup>35</sup> Although such language appears to exclude any other method, the courts have held the section inapplicable to implied revocation,<sup>36</sup> thus, affirming the vitality of the doctrine in that state.<sup>37</sup>

Maryland has had an interesting history on this question spanning 120 years. The early statute was the original Statute of Frauds. Under this statute, the Maryland Supreme Court, consistent with early English law, held a will impliedly revoked by marriage and birth of issue.<sup>38</sup> Subsequently, the court broadened its view, stating that it was not restricted by the decisions of the ecclesiastical and common law courts of England but was empowered to determine what changes in circumstances should constitute revocation.<sup>39</sup> In one case the court emphasized the nonexclusivity of the statutory methods by recognizing that wills can be impliedly revoked whenever the subject matter devised is not the property of the testator at the time of his death, or whenever the testator marries and has children unprovided for in his will.<sup>40</sup>

Apparently, Maryland's most recent statute puts to rest much of the debate over revocation by implication. This statute provides:

No will or codicil . . . shall be revoked otherwise than . . . [Statute of Frauds methods] . . . by the marriage of the testator coupled with the birth, adoption or legitimation of a child by him . . . [or] by a final decree of absolute divorce of a testator and his spouse. . . .<sup>41</sup>

With the sole exception of alienated, devised property, there is no longer room for the operation of implied revocation in Maryland, since all the changes in condition or circumstances of the testator, recognized at common law, have been included in this statute.<sup>42</sup>

Tennessee is the third state recognizing implied revocation. In the absence of a revocation statute, one appellate court held that marriage and birth of issue create a conclusive presumption of revocation.<sup>43</sup> A subsequent court broadened this holding in *Rankin v. McDearmon*:

We hold that by analogy to the rule that subsequent marriage and birth of child will revoke former written will; that a divorce and property settlement also works such a change in testator's life as to impliedly revoke his will made during his marriage.<sup>44</sup>

35 Miss. CODE ANN. § 658 (recomp. 1956).

36 *Hoy v. Hoy*, 93 Miss. 732, 48 So. 903 (1909).

37 *Caine v. Barnwell*, 120 Miss. 209, 82 So. 65 (1919).

38 *Sedwick v. Sedwick* (Md. 1844), unreported but cited in *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295 (1886); *Baldwin v. Spriggs supra*.

39 *Karr v. Robinson*, 167 Md. 375, 173 Atl. 584 (1934).

40 *Rabe v. McAllister*, 177 Md. 97, 8 A.2d 922 (1939).

41 MD. ANN. CODE art. 93, § 351 (repl. 1964).

42 Properly speaking, revocation by alienation is not really revocation, but ademption. See text accompanying notes 77-81 *infra*.

43 *Hailey v. Hailey*, 27 Tenn. App. 496, 182 S.W.2d 127 (1943).

44 *Rankin v. McDearmon*, 38 Tenn. App. 160, 163, 270 S.W.2d 660, 663 (1953).

One year later, the *Rankin* court took a narrower view of the doctrine of implied revocation, refusing to apply it after a separation agreement coupled with a property settlement.<sup>45</sup>

### C. Statutes Including Implied Revocation

In addition to the three states that judicially accepted revocation by implication, fourteen jurisdictions expressly recognize the doctrine by statute.<sup>46</sup> However, the statutes are not uniformly applied. Massachusetts, for example, has construed two statutory provisions together to abrogate the doctrine.<sup>47</sup> In *Graves v. Sheldon*,<sup>48</sup> Vermont held that implied revocation occurs only as a result *ex necessitate rei*.

In *Graves*, the court construed a statute modeled after the English Statute of Frauds. It commented on the interpretation of the English statute as follows:

This construction obviously renders the important provisions of the section in relation to revocations, altogether nugatory, except as to a particular mode of effecting an express revocation; whereas, the plain sense of the statute is, that *no* revocation, except as results *ex necessitate rei*, shall be effected otherwise than expressly. . . .<sup>49</sup>

Good reason was found for denying implied revocation by change in the domestic circumstances of the testator. Since Vermont protects unprovided-for widows and posthumous children by statute, the court found no justification for following the English approach.<sup>50</sup> If this interpretation controls the present Vermont statute, the doctrine remains dormant in that state.<sup>51</sup>

The three changes in the circumstances of the testator which former English law recognized as impliedly revoking a prior will were: (1) marriage of a single woman; (2) marriage and birth of issue to a man; and (3) change in the nature and size of the estate devised.<sup>52</sup> Today, however, the changes that are recognized are somewhat different.

In the fourteen jurisdictions recognizing implied revocation, not one regards marriage alone as a sufficient change in the condition or circumstances of the testator to imply a revocation. If a statutory provision does not specifically declare that a subsequent marriage revokes a will,<sup>53</sup> the courts will not imply a

45 *Price v. Price*, 37 Tenn. App. 690, 269 S.W.2d 920 (1954).

46 DEL. CODE ANN. tit. 12, § 109 (1953); D.C. CODE ANN. § 18—109 (Supp. V, 1966); HAWAII REV. LAWS § 322-8 (1955); ME. REV. STAT. ANN. tit. 18, § 8 (1964); MASS. ANN. LAWS ch. 191, § 8 (recomp. 1955); MICH. COMP. LAWS § 702.9 (1948); MINN. STAT. ANN. § 525.19 (1945); NEB. REV. STAT. § 30—209 (reissue 1964); NEV. REV. STAT. § 133.120(2) (1957); N.H. REV. STAT. ANN. § 551:14 (1955); OHIO REV. CODE ANN. § 2107.33 (Page 1953); VT. STAT. ANN. tit. 14, § 11 (1959); WIS. STAT. ANN. § 238.14 (1957); WYO. STAT. ANN. § 2—51 (1957).

47 As mentioned in note 30 *supra*, *Hertrais v. Moore*, 325 Mass. 57, 88 N.E.2d 909 (1949), stated that § 8 covers no case of revocation not expressly covered by § 9 (revocation by marriage).

48 2 D. Chip. 71 (Vt. Bennington County Ct. 1824). The current statute provides: "A will shall not be revoked, except by implication of law, otherwise than . . ." VT. STAT. ANN. tit. 14, § 11 (1959).

49 *Graves v. Sheldon*, 2 D. Chip. 71, 74 (Vt. Bennington County Ct. 1824).

50 *Id.* at 75.

51 See note 48 *supra*.

52 See notes 1-3 *supra*.

53 Four of these states declare that marriage revokes a prior will. HAWAII REV. LAWS §§ 322-10, -11 (1955); MASS. ANN. LAWS ch. 191, § 9 (recomp. 1955); MINN. STAT. ANN. § 525.191 (1945); NEV. REV. STAT. § 133.110 (1957).

revocation.<sup>54</sup> In the ten jurisdictions of this group that do not provide for implied revocation by marriage, the surviving spouse is allowed an intestate share.<sup>55</sup> In the thirty-seven jurisdictions which do not recognize implied revocation, twenty-three include marriage as a statutory method of revocation,<sup>56</sup> and fourteen provide intestate shares for surviving spouses.<sup>57</sup>

The children of testators are as much the object of the law's protection as are surviving spouses. Eleven jurisdictions provide that marriage and birth of issue effect an implied revocation.<sup>58</sup> Four jurisdictions provide that birth of issue alone is sufficient.<sup>59</sup> In addition, thirty-seven other jurisdictions provide that after-born or pretermitted children shall take intestate shares.<sup>60</sup> The District of

54 *E.g.*, *In re Wehr's Will*, 247 Wis. 98, 18 N.W.2d 709 (1945).

55 DEL. CODE ANN. tit. 12, §321 (1953); D.C. CODE ANN. § 19-102 (Supp. V, 1966); ME. REV. STAT. ANN. tit. 18, § 1056 (1964); MICH. COMP. LAWS § 702.69 (1948); NEB. REV. STAT. § 30-226 (reissue 1964); N.H. REV. STAT. ANN. §§ 560:10 - 13 (1955); OHIO REV. CODE ANN. § 2107.39 (Page 1953); VT. STAT. ANN. tit. 14, §§ 401-02 (1959); WIS. STAT. ANN. §§ 233.01, .23 (Supp. 1966); WYO. STAT. ANN. § 2-47 (1957).

56 Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 18; ALA. CODE tit. 61, § 10 (recomp. 1958) (woman's will); ALASKA STAT. § 13.05.110(a) (Supp. 1965); ARIZ. REV. STAT. ANN. § 14-134 (1956); CAL. PROB. CODE § 70; C.Z. CODE tit. 7, § 84 (1963); CONN. GEN. STAT. ANN. § 45-162 (1959); GA. CODE ANN. § 113-408 (1959); GUAM PROB. CODE § 70 (1953); IDAHO CODE ANN. § 14-312 (1947); KY. REV. STAT. ANN. § 394.090 (1963); MONT. REV. CODES ANN. § 91-128 (1947); N.Y. DECED. EST. LAW § 35; N.C. GEN. STAT. § 31-5.3 (Supp. 1965); N.D. CENT. CODE § 56-04-10 (1960); ORE. REV. STAT. § 114.130 (repl. 1963); R.I. GEN. LAWS ANN. § 33-5-9 (1956); S.C. CODE ANN. § 19-222 (1962); S.D. CODE § 56.0223 (Supp. 1960); UTAH CODE ANN. § 74-1-25 (1953); WASH. REV. CODE ANN. § 11.12.050 (1963); W. VA. CODE ANN. § 4044 (1961). It has been held in New Mexico that marriage revokes the will of a man or woman. *In re Lewis' Will*, 41 N.M. 522, 71 P.2d 1032 (1937).

57 ARK. STAT. ANN. § 60-501 (Supp. 1965); FLA. STAT. ANN. § 731.14(2) (1963); IND. ANN. STAT. § 6-301 (repl. 1955); IOWA CODE ANN. § 633.266 (1964); KAN. GEN. STAT. ANN. § 59-603 (1963); ME. ANN. STAT. § 474.160 (1956); MD. ANN. CODE art. 93, § 329 (1957); N.J. STAT. ANN. §§ 3A:35-1, -2 (1953); OKLA. STAT. ANN. tit. 84, § 44 (1951); PA. STAT. ANN. tit. 20, § 180.7(3) (1950); V.I. CODE ANN. tit. 15, § 10(a); VA. CODE ANN. § 64-16 (1950); see *Dunn v. Vinyard*, 251 S.W. 1043 (Tex. Com. App. 1923).

58 CAL. PROB. CODE § 71; C.Z. CODE tit. 7, § 85 (1963); GUAM PROB. CODE § 71 (1953); HAWAII REV. LAWS § 322-10 (1955); IDAHO CODE ANN. § 14-311 (1947); KAN. GEN. STAT. ANN. § 59-610 (1963); MD. ANN. CODE art. 93, § 351(c) (repl. 1964); MONT. REV. CODES ANN. § 91-127 (1947); N.D. CENT. CODE § 56-04-09 (1960); S.D. CODE § 56.0223 (Supp. 1960); UTAH CODE ANN. § 74-1-24 (1953).

Maine, where implied revocation is recognized, has held that marriage and birth of issue does not constitute such change in condition and circumstances of the testator to justify revocation because statutory provision is made for the surviving spouse and children. *Appeal of De Mendoza*, 141 Me. 299, 43 A.2d 816 (1945).

59 ALA. CODE tit. 61, § 10, (recomp. 1958); CONN. GEN. STAT. ANN. § 45-162 (1958); GA. CODE ANN. § 113-408 (1959); LA. CIV. CODE ANN. art. 1705 (West 1952).

60 ALASKA STAT. § 13.05.170 (1962); ARIZ. REV. STAT. ANN. §§ 14-131, -132 (1956); ARK. STAT. ANN. § 60-507 (Supp. 1965); COLO. REV. STAT. ANN. § 153-5-6 (1963), as amended, Laws, 1965, ch. 323, § 1(1); DEL. CODE ANN. tit. 12, §§ 301, 310 (1953); FLA. STAT. ANN. § 731.11 (1963); IDAHO CODE ANN. § 14-319 (1947); ILL. ANN. STAT. ch. 3, 48 (Smith-Hurd 1961); IND. ANN. STAT. § 6-308 (repl. 1953); IOWA CODE ANN. § 633.267 (1964); KY. REV. STAT. ANN. § 394.380 (1963); ME. REV. STAT. ANN. tit. 18, §§ 1004-05 (Supp. 1965); MASS. ANN. LAWS ch. 191, § 20, (recomp. 1955); MICH. COMP. LAWS § 702.12 (1948); MINN. STAT. ANN. §§ 525.20, .201 (1945); MISS. CODE ANN. §§ 658-59 (recomp. 1956); MO. ANN. STAT. § 474.240 (1956); MONT. REV. CODES ANN. §§ 91-135, -136 (1947); NEB. REV. STAT. §§ 30-225, -226 (reissue 1964); NEV. REV. STAT. §§ 133.160, .170 (1957); N.H. REV. STAT. ANN. §§ 551:10, 561:17 (1955); N.J. STAT. ANN. §§ 3A:3-10, -11 (1953); N.Y. DECED. EST. LAW § 26; N.C. GEN. STAT. § 31-5.5 (Supp. 1965); N.D. CENT. CODE §§ 56-04-16, -17 (1960); OHIO REV. CODE ANN. § 2107.34 (Page 1953); OKLA. STAT. ANN. tit. 84, §§ 131-32 (1951); ORE. REV. STAT. § 114.250 (repl. 1963); PA. STAT. ANN. tit. 20, § 180.7(4) (1950); S.C. CODE ANN. § 19-222 (1962); TEX. PROB. CODE §§ 66-67 (1956); UTAH CODE ANN. §§ 74-1-31, -32 (1953); VT. STAT. ANN. tit. 14, §§ 555-56 (1958); V.I. CODE ANN. tit. 15, § 18 (1964); VA. CODE ANN. §§ 64-69, -70 (1950); WASH. REV. CODE ANN. § 11.12.090 (1963); WIS. STAT. ANN. §§ 238.10 -11 (1957).



Columbia,<sup>61</sup> Tennessee,<sup>62</sup> and Wyoming<sup>63</sup> judicially recognize revocation by marriage and birth of issue.

The major area of dispute today concerns the effect of divorce on wills.<sup>64</sup> From only two states with statutory provisions for divorce as a method of revocation in 1928,<sup>65</sup> and three in 1942,<sup>66</sup> the number increased to fourteen in 1960,<sup>67</sup> and fifteen in 1962.<sup>68</sup> At this writing, nineteen states have such statutory provisions.<sup>69</sup> Of the jurisdictions recognizing implied revocation, six (five of whom are not among the nineteen mentioned immediately *supra*) have increased the scope of the changes in condition or circumstances of the testator to include divorce and property settlement.<sup>70</sup> On the other hand, Massachusetts, which has virtually eliminated implied revocation, refuses to recognize divorce and property settlement as effecting an implied revocation.<sup>71</sup> Nevada insists it recognizes the same changes as recognized in seventeenth-century England, thereby excluding divorce and property settlement.<sup>72</sup> In an article in 1942,<sup>73</sup> Elizabeth Durfee, while foreseeing the demise of implied revocation in general, predicted the survival of revocation by divorce and property settlement. A renowned authority on wills, Professor Atkinson agrees with this prediction. He has stated: "In the light of present provisions allowing the spouse and the after-born children to take against the will, divorce probably presents the strongest case today for revocation by operation of law."<sup>74</sup> The doctrine not only has survived in five jurisdictions by common law,<sup>75</sup> but has spread to twenty-four states by statute, nineteen implying revocation by divorce alone.<sup>76</sup>

Aside from changes in the domestic relations of the testator, changes in the

61 *Pascucci v. Alsop*, 147 F.2d 880 (D.C. Cir. 1945).

62 *Hailey v. Hailey*, 27 Tenn. App. 496, 182 S.W.2d 127 (1943).

63 See *Johnston v. Laird*, 48 Wyo. 532, 52 P.2d 1219 (1935).

64 See generally 2 PAGE, WILLS § 21.101 (Parker-Bowe rev. 1960); Evans, *Testamentary Revocation By Divorce*, 24 Ky. L.J. 1 (1935).

65 Bordwell, *The Statute Law Of Wills*, 14 IA. L. REV. 283, 301 (1929).

66 Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406, 417 (1942).

67 Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 885 (1960).

68 *Comment*, 15 ALA. L. REV. 331, 335 (1962).

69 ALA. CODE tit. 61, § 9(1) (recomp. 1958); ALASKA STAT. § 13.05.110(b) (Supp. 1965); ARK. STAT. ANN. § 60—407 (Supp. 1965); COLO. REV. STAT. ANN. § 153-5-3 (1963); FLA. STAT. ANN. § 731.101 (1963); GA. CODE ANN. § 113—408 (1959); ILL. ANN. STAT. ch. 3, § 46 (Supp. 1965); IND. ANN. STAT. § 6—508 (repl. 1955); IOWA CODE ANN. § 633.271 (1964); KAN. GEN. STAT. ANN. § 59—610 (1963); MD. ANN. CODE art. 93, § 351(d) (repl. 1964); MINN. STAT. ANN. § 525.191 (recomp. 1956); MO. ANN. STAT. § 474.420 (1956); N.C. GEN. STAT. § 31—5.4 (Supp. 1965); OKLA. STAT. ANN. tit. 84, § 114 (Supp. 1965); ORE. REV. STAT. § 114.130 (repl. 1963); PA. STAT. ANN. tit. 20, § 180.7(2) (Supp. 1965); TEX. PROB. CODE § 69 (1956); WASH. REV. CODE ANN. § 11.12.050 (1963). Except for Georgia and Oregon, the statutes provide that the revocation shall be *pro tanto*.

In Wisconsin it has been held, under the statute recognizing implied revocation, that a divorce decree revokes provisions as to a divorced spouse. *In re Kant's Estate*, 260 Wis. 621, 51 N.W.2d 501 (1952).

70 *Luff v. Luff*, 359 F.2d 235 (D.C. Cir. 1966); *Lansing v. Haynes*, 95 Mich. 16, 54 N.W. 699 (1893); *Donaldson v. Hall*, 106 Minn. 502, 119 N.W. 219 (1909); *In re Bartlett's Estate*, 108 Neb. 681, 189 N.W. 390 (1922); *Yunker v. Johnson*, 160 Ohio St. 409, 116 N.E.2d 715 (1954); *In re Battis*, 143 Wis. 234, 126 N.W. 9 (1910).

71 *Hertrais v. Moore*, 325 Mass. 57, 88 N.E.2d 909 (1949).

72 *In re Arnold's Estate*, 60 Nev. 376, 110 P.2d 204 (1941); *In re Walters' Estate*, 60 Nev. 172, 104 P.2d 968 (1940).

73 Durfee, *supra* note 66.

74 ATKINSON, WILLS § 85, at 432 (2d ed. 1953).

75 See note 70 *supra*.

76 See note 69 *supra*.

nature and size of the estate resulted in an implied revocation at common law.<sup>77</sup> Where the entire estate has been alienated after the devise, there is nothing left at the testator's death upon which the devise can operate. Necessarily, the will is revoked.<sup>78</sup> However, personalty that was alienated and then reacquired could pass under a previous bequest. Hence, the alienation and reacquisition of personalty had no effect upon a prior bequest,<sup>79</sup> whereas the alienation and reacquisition of realty did revoke a prior will.<sup>80</sup> Where the property — realty or personalty — had been alienated and not reacquired, the devise or bequest was not revoked, but rather, adeemed.<sup>81</sup>

Property which has been devised, although not alienated, may have a charge or encumbrance attached to it at the testator's death, such as a mortgage or contract to convey. At least twenty-three jurisdictions have taken the view that the encumbrance does not revoke the devise, but that the devise passes under the will subject to the encumbrance.<sup>82</sup>

### III. Testamentary Policy and the Model Probate Code

The difficulty in implied revocation is the battle between the competing policies of the desire to implement the presumed intention of the average testator and the need for certainty in validly executed devises.

As previously noted, implied revocation by marriage and birth of issue was a rebuttable presumption that became a conclusive rule of law.<sup>83</sup> Where the rights of the widow and children are involved, the courts are most outspoken in their behalf.<sup>84</sup> In summarizing this concern, one authority has said:

This doctrine has been said to rest upon a presumed change of testamentary intent, but a more tenable ground is that there is such a radical change in the testator's situation that the law should regard the will as revoked regardless of the wishes of the individual testator. Accordingly, his intention is immaterial and parol evidence is inadmissible to show that testator did not intend that his will should be revoked by his marriage followed by birth of issue.<sup>85</sup>

77 See 2 PAGE, WILLS §§ 21.66-85 (Parker-Bowe rev. 1960).

78 This is assuming that the estate had not been reacquired before the testator's death. At common law, even if it had been reacquired, realty could not pass under the former will. *Id.* § 21.69.

79 *Id.* § 21.68.

80 *Ibid.*

81 "The term 'ademption' is used with reference to the loss of a bequest by alienation or destruction of the thing bequeathed." *Id.* § 21.68, at 474.

82 *E.g.*, Conveyances Act, 1838, 1 & 2 Vict. c. 69; ALA. CODE tit. 61 §§ 13, 14 (recomp. 1958); ALASKA STAT. § 13.05.130 (1962); ARK. STAT. ANN. §§ 60-412, -413 (Supp. 1965); CAL. PROB. CODE §§ 77, 78; C.Z. CODE tit. 7, §§ 87, 88 (1963); GUAM PROB. CODE §§ 77, 78 (1953); IDAHO CODE ANN. §§ 14-314 to -316 (1964); MICH. COMP. LAWS § 702.10 (1948); MONT. REV. CODES ANN. §§ 91-130 to -132 (1947); NEV. REV. STAT. §§ 133.140-.150 (1957); N.Y. DECED. EST. LAW §§ 37, 39; N.C. GEN. STAT. § 31-5.6 (Supp. 1965); N.D. CENT. CODE §§ 56-04-11 to -13 (1960); OHIO REV. CODE ANN. § 2107.35 (Page Supp. 1965); OKLA. STAT. ANN. tit. 84, §§ 109-11 (1951); ORE. REV. STAT. §§ 114.140-.150 (repl. 1963); S.D. CODE §§ 56.0225, .0226, .0228 (1939); UTAH CODE ANN. §§ 74-1-26 to -28 (1953); V.I. CODE ANN. tit. 15, §§ 28-30 (1964); VA. CODE ANN. § 64-61 (1950); WASH. REV. CODE ANN. §§ 11.20.060-.070 (1963); W. VA. CODE ANN. § 4047 (1961).

83 See text accompanying notes 5-7 *supra*.

84 *E.g.*, *In re Haselbud's Estate*, 26 Cal. App. 2d 375, 79 P.2d 443 (1938); *In re Van Hoecke's Will*, 197 Misc. 339, 93 N.Y.S.2d 19 (Surr. Ct. 1949), *aff'd.*, 227 App. Div. 832, 97 N.Y.S.2d 920, *appeal denied*, 277 App. Div. 945, 98 N.Y.S.2d 664 (1950).

85 ATKINSON, *op. cit. supra* note 74, at 428-29.

For exactly the opposite reason, the law in many jurisdictions holds divorce and property settlement,<sup>86</sup> or divorce alone,<sup>87</sup> as revoking a prior will. The Wisconsin Supreme Court stated the rationale well:

The change in the condition and circumstances of a testator incident to a separation of the parties and a division and distribution of the husband's estate operates to produce a complete destruction of their legal and moral relations and consequent obligations and duties. It is difficult to conceive of a condition and circumstances which are pregnant with as strong an intent to annul the testamentary provision made for the benefit of a testator's wife and from which he would be led to conclude that the wife's claim upon his estate and his bounty had been fully discharged. These changed conditions and circumstances of a testator are of a nature which naturally implies a different intent respecting his wife as the object of his bounty. The decree divorcing them and awarding a final division and distribution of his estate makes them strangers to each other, and the bestowal on her of such a portion of his estate as he ought in justice and right under the conditions and circumstances to bestow on her operates to discharge all his moral and legal duties toward her. It was upon such considerations that courts acted in establishing the doctrine of implied revocation of wills. The changed condition and circumstances of a testator thus brought about are of a nature, and, in effect, of such probative force, as to imply that the testator intended that the testamentary provisions theretofore made for the wife should become revoked thereby.<sup>88</sup>

One counterargument is presented by the dissent in *Luff v. Luff*.<sup>89</sup> Of the divorced testator's intent, Judge Leventhal said:

A man who wishes to disinherit a divorced wife has the option to do so in case of a property settlement, or wherever disinheritance does not violate the decree or an agreement. He can accomplish any intention of disinheritance by following the simple procedures outlined in D.C. Code § 19—103 [now § 18—109]. A man who intends to disinherit a divorced wife is more likely to speak up to his counsel at once, and have it taken care of. A man who has decided not to disinherit his divorced wife is less likely to bring the matter up even assuming he is aware of the little-known statutory technique of republication of a will. He may be hesitant to expose and enlarge the wound to his ego by admitting the depth of his affection for the former wife.<sup>90</sup>

It is also felt that where there has been a significant time lapse between the act which would cause the implication of revocation and the testator's death, courts should not speculate as to a presumed intent negated by prolonged inaction.<sup>91</sup> Adding to this argument, a dissent in *Younker v. Johnson*<sup>92</sup> pleaded for certainty in wills:

86 See note 70 *supra*.

87 See note 69 *supra*.

88 *In re Battis*, 143 Wis. 234, 237, 126 N.W. 9, 12 (1910).

89 359 F.2d 235 (D.C. Cir. 1966).

90 *Id.* at 242 (dissenting opinion).

91 *E.g.*, *In re Lans's Estate*, 29 Misc. 2d 758, 210 N.Y.S.2d 611 (Surr. Ct. 1960); *Burns v. Burns*, 67 Wyo. 314, 224 P.2d 178 (1950).

92 160 Ohio St. 409, 116 N.E.2d 715 (1954).

For at least 123 years, the policy of this state as determined by the General Assembly has been to prescribe specifically by statute the steps which one must take to avail himself of the privilege of disposing of his property by will. . . . These [formalities] have been prescribed to avoid the uncertainty which would be involved in giving effect to any supposed intention of a decedent with regard to the disposition of his property. No effect is ordinarily given to his intention in that regard where it has not been expressed in accordance with the requirements of the statutes relating to wills.<sup>93</sup>

The American Law Institute has drafted the Model Probate Code to cope with these policy considerations. It provides for election by surviving spouses,<sup>94</sup> and intestate shares for after-born and pretermitted children (unless the omission appears intentional).<sup>95</sup> The methods of express revocation found in the Wills Act of 1837 are included.<sup>96</sup> Section 53 recognizes divorce as a revocation but states that aside from this exception no implied revocation results from changes in condition and circumstances of the testator.<sup>97</sup> To emphasize this point, the Code states in the next section: "No will, nor any part thereof, can be revoked except as specifically provided in sections 51 to 53 hereof."<sup>98</sup>

Even though section 53 indicates acceptance of the presumed intention argument, the drafters clearly express concern for the certainty of executed wills.

93 *Id.* at 428, 116 N.E.2d at 724 (dissenting opinion).

94 MODEL PROBATE CODE § 32 (Simes 1946), which provides:

When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

(a) The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [\$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [\$5,000], one-half the estate that would have passed to him had the testator died intestate.

(b) When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.

95 MODEL PROBATE CODE § 41 (Simes 1946), which provides:

(a) When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse.

(b) If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

96 MODEL PROBATE CODE § 51 (Simes 1946), which provides:

A will, or any part thereof, can be revoked

(a) By a written will; or

(b) By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the fact of such injury or destruction must be proved by two witnesses.

97 MODEL PROBATE CODE § 53 (Simes 1946), which provides:

If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

98 MODEL PROBATE CODE § 54 (Simes 1946).

After discussing the result of the judicial treatment of the final phrase of the Statute of Frauds,<sup>99</sup> the Comment to section 53 concludes:

[S]uch a doctrine is sometimes implied in the absence of any statement to the contrary in the statute. In either case, the result is believed to be unsatisfactory. Such a doctrine introduces an undesirable element of uncertainty into the question of validity of a duly executed will. No revocation by circumstances should be permitted except on such grounds as are specifically named in the statute and these grounds should be as few as possible.<sup>100</sup>

#### IV. Conclusion

Although the statutes vary greatly in origin and form, most jurisdictions reach the same results. It is uniformly held that surviving spouses and children are not to be deprived of benefits due them at the testator's death, whether the protection results from the doctrine of implied revocation or statutory provisions for intestate shares. Although fewer than half of the states provide for implied revocation by divorce, the number is continuing to increase. The trend appears to favor the adoption of the provisions of the Model Probate Code promulgated over twenty years ago. During those twenty years, the number of jurisdictions with statutes recognizing the revocatory nature of divorce increased sixfold. The trend toward certainty appears in three states judicially recognizing implied revocation. The statutes of Maryland and Mississippi cover the condition and circumstances of the testator with an exclusive implication. Massachusetts has construed the vitality out of the implied revocation provision in its statutes. At the other end of the spectrum, this year, the District of Columbia joined those jurisdictions in which revocation by implication reigns supreme. As the strenuous dissent in *Luff* indicates, the debate rages on.

*Harold J. Bliss*

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<sup>99</sup> See text accompanying notes 10-12 *supra*.

<sup>100</sup> MODEL PROBATE CODE § 53, comment (Simes 1946).