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WILLS-DEPENDENT RELATIVE REVOCATION WHEN REVOCATORY CODICIL CONTAINS INEFFECTIVE SUBSTITUTED BEQUEST

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WILLS—DEPENDENT RELATIVE REVOCATION WHEN REVOCATORY CODICIL CONTAINS INEFFECTIVE SUBSTITUTED BEQUEST—Testator's will, executed in 1926, provided a trust fund for his adopted daughter, then a minor, and named his wife as residuary legatee. By the terms of the will the daughter was to receive the trust income after she became twenty-one and the principal when she reached the age of thirty-five. In 1942, when the daughter was thirty-one, married, and the mother of two children, the testator added a codicil which included the following provision: "I hereby revoke the Trust Fund in favor of my Daughter Mildred, and substitute a lump sum of _____ dollars in cash." The testator died in 1946 without having completed the blank space in the codicil. The probate court held [1] that the revocation was ineffective. On appeal by the widow, *held*, affirmed. Since the dispositive part of the codicil failed because of an intrinsic defect of the instrument, the doctrine of dependent relative revocation applies. *In Re Braun's Estate*, (Pa. 1948) 56 A. (2d) 201.

The term "dependent relative revocation" has been used as a catch-all for a number of situations in which the courts have felt that the effectiveness of an attempted revocation of a will should depend upon some other fact or act to which the revocation was related.[2] In general, the cases have fallen into two broad groups: revocations contingent on the happening of an express or implied condition, and revocations made under a mistake of law or fact.[3] There should be little difficulty in applying the doctrine if the revocatory act is truly conditional; for example, a testator might destroy his will intending to revoke it only if he later executed a new one. The cases of such clear conditions, however, are rare. More often, it will be evident from the facts that the testator did not intend the revocation to be conditional, but that he acted under a mistake. Thus he may destroy a later will because he anticipates that this act will revive an earlier instrument,[4] or change his plan of disposition under the erroneous belief that certain beneficiaries are dead.[5] Largely because of traditional unwillingness

[1] Braun's Estate, (Orphan's Court of Philadelphia County, No. 539, 1947) 59 Pa. D. & C. 563.

[2] In general, see 1 PAGE, WILLS, § 478 et seq. (1941); ATKINSON, WILLS, § 162 (1937); Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337 (1920); Evans, "Testamentary Revocation by Subsequent Instrument," 22 KY. L.J. 469 (1934).

[3] Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337 (1920).

[4] Powell v. Powell, L.R. 1 P. & D. 209 (1866).

[5] Campbell v. French, 3 Vesey Jr. 321, 30 Eng. Rep. 1033 (1797).

to grant relief in will cases for mistake in inducement,[6] the courts have tended to treat a revocation made under mistake as equivalent to a conditional revocation, even though it is apparent that the condition is a fiction.[7] Nevertheless, the application of the doctrine of dependent relative revocation, whether in cases of condition or mistake, is doubtless desirable insofar as it aids in carrying out the testator's probable intention. The danger, however, is that the indiscriminate and mechanical use of the doctrine may result in defeating rather than in effectuating the testator's intention.[8] The present case poses just such a danger, although it is very largely ignored by the court. The wording of the codicil, says the court, makes it evident that the testator's primary purpose was not revocation but substitution, since his "plain desire was to lift his benefaction to his daughter out from under the trust which the will had imposed." [9] The court notes that this interpretation of the codicil accords with the testator's presumed intent to provide for his heir and with the fact that the daughter was approaching the age at which she would be entitled to receive the trust principal.[10] This interpretation is persuasive. Yet it seems equally plausible, in view of the daughter's age and marriage, that the testator may have intended to revoke the trust fund absolutely, reserving the question whether he would later substitute any cash bequest at all.[11] The court suggests that if a codicil or subsequent will includes an express revocation as well as a new disposition, and the disposition fails, the effectiveness of the revocation should depend upon the reason for failure of the dispositive clause. An extrinsic reason, such as incapacity of the beneficiary to take, furnishes "no implication as to the testator's intent with respect to the revocation in case the accompanying disposition should fail," [12] and, therefore, the revocation will be given effect. If, however, the failure is due to an intrinsic defect in the execution of the instrument, the revocation may be considered conditional and thus ineffective. This distinction between extrinsic and intrinsic defects seems of questionable usefulness in seeking a testator's intent. The distinction, however, is not essential to the decision in this case; and there is good authority for the court's position that dependent relative revocation may be used to nullify a revocatory clause where the instrument has been defectively executed and the defect goes only to the dispositive provisions.[13]

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[6] 1 PAGE, WILLS, §§ 170, 172 (1941).

[7] The use of the doctrine to cover both revocations made under mistake and conditional revocations has been criticized. Warren, "Dependent Relative Revocation," 33 HARV. L. REV. 337 at 338 (1920). But compare Cornish, "Dependent Relative Revocation," 5 So. CAL. L. REV. 273 (1932).

[8] 1 PAGE, WILLS, §§ 478, 481 (1941) and cases cited.

[9] Principal case at 204.

[10] Ibid.

[11] Destruction of will is effective revocation in spite of unfulfilled intent to make a new will at a later date. ATKINSON, WILLS, § 162 (1937); In Re Olmstead's Estate, 122 Cal. 224, 54 P. 745 (1898); In re Bonkowski's Estate, 266 Mich. 112, 253 N.W. 235 (1934).

[12] See also In Re Melville's Estate, 245 Pa. 318, 91 A. 679 (1914); ATKINSON, WILLS, § 162 (1937).

[13] The leading case is Onions v. Tyrer, 2 Vern. 742, 23 Eng. Rep. 1085 (1716).