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# Implied Revocation of Wills in West Virginia

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# West Virginia Law Review

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## STUDENT NOTES

### Implied Revocation of Wills In West Virginia

"A man may as oft as he will make a new testament, even unto his last breath, neither is there any cautel under the sun to prevent this liberty, but no man can die with two testaments, and, therefore the last and newest is of force so that if there were a thousand testaments, the last of all is the best of all and maketh void the former."<sup>1</sup> Thus wrote Swinburn, one of the earliest writers on wills.<sup>2</sup> That the last is "best" and voids all prior wills is now a principle followed in a minority of jurisdictions in the United

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<sup>1</sup> *Kearns v. Roush*, 106 W. Va. 663, 667, 146 S.E. 729, 730 (1929); SWINBURN ON TESTAMENTS, § 14. Formerly the word "testament" referred exclusively to the final disposition of personal property. This interpretation carried over to the United States in some jurisdictions. See *Wyers v. Arnold*, 347 Mo. 413, 147, S.W.2d 644 (1941); *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336 (1885). Today, however, the common usage is to employ the words "testament," "will," and "last will and testament" interchangeably. *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27 (1937).

<sup>2</sup> 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 14 (1924). Holdsworth states that Swinburn's text was the most practically useful book of the period, having been first published in 1590.

States.<sup>3</sup> The West Virginia and more prevalent view is that a subsequent will revokes a prior instrument in toto only when totally inconsistent with the prior testament.<sup>4</sup> Subsequent testaments may, of course, alter previous wills in part, and numerous problems are raised as a consequence.

This paper will investigate the implied revocation of wills doctrine under West Virginia law. The Virginia statutes, the basis of the West Virginia statutes, and the Kentucky statutes, also a child of the Virginia statutes, will be considered along with the case law interpreting such statutes. The West Virginia cases are considered in chronological order. Due to the inextricable relationship of revocation and revival, the revival statutes of the above jurisdictions must be considered to a certain extent.

At the formation of West Virginia, many Virginia statutes were adopted verbatim, or with minor changes. This is the case with those to be discussed. The Virginia statutes regarding revocation and revival were modeled after a combination of the English Statute of Frauds<sup>5</sup> and the Statute of Victoria.<sup>6</sup> The latter was enacted to clarify the confusion which existed in revocation of personal "testaments" and real "wills" in the ecclesiastical and common law courts. The desired end, uniformity of interpretation of all testamentary instruments, was thus easily achieved in Great Britain; but West Virginia, Virginia, and Kentucky, though substantially adopting the English statutes,<sup>7</sup> have failed to adopt uniformly the English interpretation.

The West Virginia statute pertaining to revocation reads:

"No will or codicil, or any part thereof shall be revoked, unless . . . by a subsequent will or codicil, or by some writing declaring

<sup>3</sup> Pugh v. Perryman, 257 Ala. 187, 58 So.2d 117 (1952). A prior will is held revoked by the mere execution of a subsequent will unless such later will expressly negates such intention. See Annot., 59 A.L.R.2d 11, 32 (1958).

<sup>4</sup> Kearns v. Roush, *supra*. Syllabus No. 1: "A second will duly executed by the testator as his last will and testament, will revoke a prior will without express terms declaring the same revoked, where the provisions of the second instrument make a different disposition of the entire estate from that made by the prior will."

<sup>5</sup> Malone's Adm'r. v. Hobbs, 40 Va. (1 Rob.) 346, 385 (1842); Statute of Frauds, 1677, 29 Car. 2, c. 3, § 6, 22.

<sup>6</sup> Wills Act, 1937, 7 Wm. 4 & 1 Vic. c. 26, § 20.

<sup>7</sup> Francis v. Marsh, 54 W. Va. 545, 557, 46 S.E. 573, 578 (1904), wherein the court, in referring to the difference in our statute stated: "[I]t is fair to assume . . . that there was no intention to alter the sense of section 22 of 1 Victoria ch. 26 in so adopting it in different language and condensed form."

*an intention to revoke the same*, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto with the intention to revoke." (Emphasis added.)<sup>8</sup>

The statute appears to anticipate implied revocation. The distinction made between a "subsequent will or codicil" and "some writing declaring an intention" makes such interpretation plausible.

West Virginia first considered the problem of implied revocation in an 1869 case, *Carpenter v. Miller's Exr's*.<sup>9</sup> The court proceeded on the common law theory of implied revocation, failing to mention the above statute. In this case, testator executed a will, and subsequently a codicil thereto. The will gave the residue of his property to A and B and appointed them executors. The codicil, on the other hand, "requested" A and B to give the proceeds thereof to the "propagation of the Gospel in foreign lands." The bequest, or request, in the codicil was held void for uncertainty in the devisee, and the wording therein insufficient to revoke the will. Thus the property passed to A and B by the residuary clause of the will. At this point it would appear that implied revocation was excluded—the validly executed codicil having no effect, and the will being allowed to stand. However, the court by *dictum* stated:

"It is well settled that a second will, inconsistent with the first, perfect in its form and execution, but incapable of operating as a will on account of some circumstance *dehors* the instrument may nevertheless be set up as a revocation of the first."<sup>10</sup>

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<sup>8</sup> W. VA. CODE ch. 41, art. 1, § 7 (Michie 1961). This statute is the same as that of Virginia except that the word "and" following the italicized words is omitted from the Virginia statute. VA. CODE § 64-59 (Michie 1950). Kentucky has the same statute differing in the matter of organization. KY. REV. STAT. ANN. § 394.080 (1963).

The elipses of the quotation are in place of the words "under the preceding section." The preceding section is W. VA. CODE ch. 41, art. 1, § 6 (Michie 1961), which reads: "Every will made by a man or a woman shall be revoked by his or her marriage, except a will which makes provision therein for such contingency, or a will which, though not making provision for such contingency, is made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heirs, personal representative or next of kin." Virginia formerly had the same provision, but it was repealed in 1956. VA. CODE § 64-58 (Michie Supp. 1964). Kentucky has a similar provision. KY. REV. STAT. ANN. § 394.090 (1963).

<sup>9</sup> 3 W. Va. 175 (1869).

<sup>10</sup> *Id.* at 180. The court cites: 3 Lomax Dig., 61; Loughton v. Atkins, 1 Pick. 545 (Mass. 1823).

Thus it appears to have been early recognized that there might be an implied revocation by a subsequent instrument making a different disposition, even though the subsequent disposition were ineffective. The holding of the case, that the will stands, is seemingly in direct conflict with the *dictum*. The court carefully took the case out of the operation of the *dictum* by stating an exception thereto: Whenever prior dispositions of property are complete, and the words of the later instrument are precatory, the later instrument will not be construed to revoke a former will. Had the words of the codicil been mandatory, the will apparently would have fallen and the residuary estate passed by intestacy.<sup>11</sup>

The next case to consider implied revocation in West Virginia presents the only actual law on the subject in this jurisdiction. In *Henry v. Haymond*,<sup>12</sup> a 1915 case, the court once again failed to mention the revocation statute and applied the common law theory of implied revocation. In this case testator was twice married and had children by both wives. He executed a will, naming severally the children of his first wife and stated they had received all he intended them to have. By the residuary clause he gave the remainder of his estate to the children by his second wife. Two years later, testator executed a codicil to his will whereby he devised specific property to the several children by his second wife, and the remainder to them in the residuary clause. The court held that the codicil "is a substitute for and a complete revocation of the previous residuary clause."<sup>13</sup> . . . [I]t abrogates it as completely as if the testator had expressly revoked it. . . . A subsequent inconsistent disposition of property, previously devised is an implied revocation *pro tanto*.<sup>14</sup> This case leaves no doubt that implied revocation existed at its decision.

Implied revocation, *standing alone*, is of little other than academic import. The problems that arise can be solved with little difficulty at probate. However, when implied revocation is linked with the problem of revival, a thorough understanding of both implied revocation and revival is necessary, because a concrete problem, fraught with undersirable consequences may easily arise.

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<sup>11</sup> *Id.* at Syllabus No. 3.

<sup>12</sup> 77 W. Va. 173, 87 S.E. 78 (1915).

<sup>13</sup> *Id.* at 174, 87 S.E. at 78.

<sup>14</sup> *Id.* at 177, 87 S.E. at 79.

It appears that under the dictum of the *Carpenter* case, and the law of the *Henry* case, implied revocation does exist in West Virginia. Thus the question causing practical concern becomes: Recognizing implied revocation, *when* does it occur?

In the *Henry* case, by using the phraseology, "is a complete revocation" and "abrogates . . . completely as if . . . expressly revoked . . ." the court appears to say that such revocation occurs at the execution of the subsequent inconsistent instrument. Such is the rule in Kentucky under a similar statute,<sup>15</sup> and until recently was the Virginia rule.<sup>16</sup>

It would appear safe at this point to conclude that West Virginia has implied revocation and that it is effective at execution. However, in proceeding one step further, *Swann v. Swann*,<sup>17</sup> a 1948 case, is found, which by *dictum* flatly denies the existence of implied revocation, at least as to partial inconsistency, in West Virginia. The court states: "[I]mplied revocation is precluded as a recognized principle by the express language of our applicable statute."<sup>18</sup>

If, then, revocation is based purely on a statutory interpretation, ignoring the common law theory of implied revocation, and revival,<sup>19</sup> as is generally conceded, is purely statutory, what occurs when there are two wills, with inconsistent dispositions as to part, the latter containing no express clause of revocation? The situation more commonly arises in this manner: *T* executes a will devising Blackacre to *A*, and Whiteacre to *B*. Subsequently, *T* executes a codicil devising Blackacre to *B*, which does not contain an express revocatory clause. If this were the situation at *T*'s death, simply enough, Blackacre and Whiteacre would pass to *B*. But, prior to *T*'s death what is the state of *T*'s devise of Blackacre to *A* in the will? To give the problem a practical bent, suppose that after the above executions, *T* executes an instrument expressly revoking the codicil.

<sup>15</sup> *Slaughter's Adm'r v. Wyman*, 228 Ky. 226, 14 S.E.2d 777 (1929).

<sup>16</sup> *Rudisill's Ex'r v. Rhodes*, 70 Va. (29 Gratt.) 147 (1877). Overruled by *Timerlake v. State-Planters Bank*, 201 Va. 950, 115 S.E.2d 39 (1960).

<sup>17</sup> 13 W. Va. 555, 48 S.E.2d 425 (1948).

<sup>18</sup> *Id.* at 559, 48 S.E.2d at 428.

<sup>19</sup> W. VA. CODE ch. 41, art. 1, § 8 (Michie 1961) reads: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reexecution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown." Virginia has an identical statute. VA. CODE § 64-60 (Michie 1950). Kentucky has a similar statute. KY. REV. STAT. ANN. § 394.100 (1963).

Under the Kentucky<sup>20</sup> and former Virginia<sup>21</sup> view, the execution of the codicil devising Blackacre to *B* would impliedly revoke the devise to *A* contained in the will—at execution, and the subsequent revocation of the codicil would cause Blackacre to pass by intestacy, Whiteacre passing by valid devise under the will. A devise or bequest once revoked may be revived only in the statutory manner.<sup>22</sup>

In West Virginia, however, a different result may occur due to the *Swann* case.<sup>23</sup> Here, in a factual situation containing a will hoped by appellees to have been revoked by a property settlement, impliedly or otherwise, the court rejected implied revocation. In a paragraph at the end of the opinion, Judge Kenna states:

“There is some confusion in the decided cases arising from the discussion of revocation of a whole instrument and what is termed revocation of only a repugnant specific provision, as, for example, by making a subsequent different disposition of the same property. The latter is spoken of in *Henry v. Haymond* . . . as being an implied revocation; thus, perhaps, creating some confusion if considered in the light of the cases discussing the general rule of implied revocation as it related to the instrument as a whole. *It would seem that the subsequent different disposition of property without reference to a former devise, or bequest thereof does not erase the first provision nor have the effect of making it invalid: it simply nullifies its effect by eliminating its object. In short it countermands rather than revokes.*” (Emphasis added.)<sup>24</sup>

What is the effect of such *dictum* on the hypothetical situation? *T*'s devise by the codicil apparently “eliminates” the object of the same devise in the will, and yet does not “revoke” such devise. The use of such terminology as “eliminate” and “nullifies” appears final; yet, if this were the case, the above would be a mere exercise in semantics. However, such words as “countermand rather than revoke” would seem to put the wording outside the statute and keep such devise, though presently a “nullity,” in a state of sus-

<sup>20</sup> *Op. cit. supra* note 15.

<sup>21</sup> *Op. cit. supra* note 16.

<sup>22</sup> *Op. cit. supra* note 19.

<sup>23</sup> *Op. cit. supra* note 17.

<sup>24</sup> *Op. cit. supra* note 17, at pages 561, 562, 48 S.E.2d at 429.

pending animation. Briefly, if the devise is not revoked, it lives as a possibility—at least until *T*'s death.

If this view be accepted, the *Swann dictum* is easily applied to the hypothetical situation as permitting the first will to stand *in toto*, Blackacre passing to *A*, and Whiteacre to *B*.

The reasoning here appears to be that a will, unless specifically, statutorily revoked, is ambulatory until death, and therefore a valid expression of *T*'s will. Thus, an inconsistent disposition "blots out" the first devise until it either is removed, or *T* dies. This would seem to fall in with the other theories of attempting to force the decedent to die testate if he has once made a will, such as dependent relative revocation. That whole train of reasoning appears fallacious, however, in the light of such decisions as *Finely v. Howell*,<sup>25</sup> an early Georgia case. In this case, two wills were admitted to probate, the one later in time being expressly revoked. The court stated that the second will, though at one time testator's wish, is expressly revoked and of no effect. As to the first will, it previously was the testator's wish, but it was superseded by the second will. The point is simply this: Merely because a second or later will is revoked, why should it be presumed that the testator would prefer his property to pass by the first will? If there were but two means of disposition of an estate, then such a conclusion would be logical in that revoking one, testator returned to the other. However, in each case the possible schemes of disposition are legion.

In a recent Virginia case, *Timberlake v. State Planters Bank*,<sup>26</sup> the Virginia court fell victim to reasoning similar to that of the *Swann dictum*, although on a more tenuous ground. In this case, testatrix executed two wills, the latter containing a clause expressly revoking the former. She deposited both in a bank, and later withdrew the second and revoking will, saying that she was going to execute a new will. The new will was never found, nor was the revoking will. The court allowed the first will to probate, presuming the second to be revoked *animo revocandi*.<sup>27</sup> In reaching a three-two decision, the majority stated:

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<sup>25</sup> 29 Ga. 514 (1859).

<sup>26</sup> 201 Va. 950, 115 S.E.2d 39 (1960); 63 W. VA. L. REV. 86 (1960); 18 WASH. & LEE L. REV. 166 (1961).

<sup>27</sup> *Tate v. Wren*, 185 Va. 773, 784, 40 S.E.2d 188, 193 (1946).



"[W]hen a revocation of a prior will is made under the statute, § 64-59, by a subsequent will, the revocation clause speaks, not at the time of the execution of the will, but at the death of the testator; and if in the testator's lifetime he destroys or cancels the revoking will with the intent to revoke it, the revocation provision falls with the will and is not effective to revoke the prior will."<sup>28</sup>

It now appears that under the Virginia statute as interpreted by *Timberlake*, it is impossible to revoke effectively a will at any time prior to death, in any fashion not limited to physical mutilation or destruction. To pursue this further, there is a Virginia statute concerning construction of wills which reads:

"A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will.*" (Emphasis added.)<sup>29</sup>

It would seem that the words "hereby expressly revoking any and all wills and/or codicils by me at any time heretofore made"<sup>30</sup> express such contrary intention. The Virginia decision ignored this statute.

In West Virginia there is one case, decided after *Swann*, which mentions implied revocation. That is *Nelson v. Ratliffe*,<sup>31</sup> a 1952 case, wherein testatrix executed a will, and subsequently, desiring to execute another, struck out certain portions of the existing will as a draft. A portion struck out was the signature of testatrix. The court held that the requisite of intent was not present and admitted the will to probate. In so holding, Judge Lovins stated:

"A will or other testamentary paper may be expressly or impliedly revoked. A testamentary disposition of property may be impliedly revoked 'by the testator, or some person in his presence and by his direction, cutting, . . . obliterating the signature thereto with intent to revoke.'<sup>32</sup>

<sup>28</sup> *Op. cit. supra* note 26, at page 957, 958, 115 S.E.2d at 44.

<sup>29</sup> VA. CODE § 64-62 (Michie 1950). West Virginia formerly had the same statute, but the words "real and personal" have been deleted. W. VA. CODE ch. 41, art. 3, § 1 (Michie 1961).

<sup>30</sup> *Op. cit. supra* note 26, at 951, 115 S.E.2d at 40.

<sup>31</sup> 137 W. Va. 27, 69 S.E.2d 217 (1952).

<sup>32</sup> *Id.* at 34, 69 S.E.2d at 221.

The type of revocation contemplated by this quotation is manifested by an affirmative act on the part of the testator or his agent. There is no implication involved in the revocatory sense—there is an affirmative, physical act.

#### CONCLUSION

From the standpoint of case law, it appears that implied revocation of an instrument totally inconsistent with a later disposition exists in West Virginia.<sup>33</sup> However, implied revocation as to part of an instrument differing with a later disposition is confused. The law would seem to be that implied revocation *pro tanto* does exist under the *Henry* case, but that it is in danger from the *dictum* of the *Swann* case, and the misunderstanding of *Nelson v. Ratcliffe*. What rationale can there be for sustaining life in a superseded instrument, whether there be an express revocatory clause or not? What basis for distinction can be found for giving effect to implied revocation of totally inconsistent instruments and refusing its application to partially inconsistent instruments? Any inconsistent disposition should clearly manifest the intent and will of a testator. The abolishment of implied revocation as to part would serve only to muddy the waters of revocation which until *Swann* were clear.

*Charles Marion Love, III*

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<sup>33</sup> *Op. cit. supra* note 4.