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Wills--Subsequent Will Containing Express Clause of Revocation-- Time Revocation Takes Effect

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In most of the jurisdictions in which recovery has been granted for prenatal injuries, two conditions appear to be essential: (1) the infant must have been viable at the time of the negligent act; and (2) it must have been born alive. *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953). However, the New Hampshire court in two recent cases, *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958) and *Poliquin v. Macdonald*, 101 N.H. 104, 135 A.2d 249 (1957), seems to take the view that if either of the two above conditions is present, recovery will be granted. In the *Bennett* case the court held that an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another, even if it had not reached the state of a viable foetus at the time of the injury. *Accord, Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960). On the other hand, in the *Poliquin* case the court said that a foetus having reached that period of prenatal maturity where it is capable of independent life is a person, and if such child dies in the womb as a result of another's negligence, an action of recovery may be maintained in its behalf. *Accord, Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955).

Thus, the courts are taking the more liberal view, and are allowing recovery for prenatal injuries. Most courts hold that the child must have been viable and born alive before recovery can be granted. Some courts hold that the child need not have been viable so long as it was born alive. A few courts permit recovery even where the child is born dead, provided it was viable when the injury occurred. The only other possibility, for which no authority has been found, is where the child was neither viable at the time of injury nor born alive.

Nick George Zegrea

Wills—Subsequent Will Containing Express Clause of Revocation—Time Revocation Takes Effect

Testatrix executed two wills, the first in 1954 and the second in 1955. The later will contained a revocation clause which expressly revoked all wills previously made. Both wills were left in the custody of a bank. In 1956 testatrix withdrew the 1955 will stating that she wished to make a new will. The new will was never made and the 1955 will was never found, and so was presumptively destroyed

animo revocandi. An unsigned copy of the 1955 will was retained by the bank and exhibited in evidence. After death of the testatrix the 1954 will was presented to the chancery court and offered for probate. The court ordered the 1954 will probated as the true last will and testament of testatrix. *Held*, affirmed. A duly executed will in existence when testatrix died was not revoked by a subsequent will not in existence at the death of the testatrix, even though the subsequent will contained a revocation clause; the revocation clause speaks not at the time of execution but at the death of the testatrix. *Timberlake v. State-Planters Bank of Commerce & Trusts*, 115 S.E.2d 39 (Va. 1960).

The *Timberlake* holding will be of particular interest to the courts of West Virginia since both Virginia and West Virginia have substantially the same statutory provisions concerning the revocation and revival of wills. The principal case expressly overrules the earlier view taken by Virginian courts as stated in *Rudisill's Ex'r. v. Rodes*, 70 Va. (29 Gratt.) 147 (1877) which held that the effective time of revocation by a subsequent will containing a revoking cause was at the time of execution of the revoking will.

The problems of revocation and revival are so intermingled and virtually inseparable that it is necessary to consider them jointly. There is a great deal of confusion in this general area due to a number of contributing causes. Much of the confusion stems from the dual origin of the law of wills in both the common law and ecclesiastical law.

Prior to the Will's Act of 1837 in England there were two distinct views as to the status of a prior will upon the revocation of a subsequent revoking will. The common law rule was that the prior will was automatically revived by the destruction of the later revoking will. 1 PAGE, WILLS § 472 (3d ed. 1941). Under the ecclesiastical rule the intent of the testator controlled, so that whether revival took place depended on the intent manifested. *Id.* § 471. The Statute of Victoria provided that a will could be revived only by a new will or codicil, or reexecution of the prior will, and the courts construed revocation by subsequent instrument to be effective from the date of its execution. Note, 28 Ky. L.J. 227 (1940). Consequently, both the common law rule and the ecclesiastical rule were, in effect, abolished in England.

However, in the United States these rules have been reincarnated to meet the needs of the various jurisdictions. There are at least five

views as to the effect upon the prior will by revocation of the revoking will: (1) the earlier will is revived ipso facto (common law rule); (2) the earlier will is revived unless an intention to the contrary appears (common law rule modified by the ecclesiastical rule); (3) the earlier will is not revived unless reexecuted or republished (English view after adoption of the Statute of Victoria); (4) the earlier will is not revived unless intent to revive appears (post-Statute of Victoria view modified by the ecclesiastical rule); (5) revival is solely a question of intent (ecclesiastical rule). Annot., 28 A.L.R. 911 (1924). These views are allocated haphazardly among the various states, each jurisdiction basing its view according to its statutory requirements and individual theories. Many states have enacted statutes affecting the doctrines of revocation and revival. See Zacharias & Maschinot, *Revocation and Revival of Wills*, 26 CHI.-KENT L. REV. 107 (1947). Of this group, Virginia, West Virginia and Kentucky have enacted substantially similar statutes based on the twenty-second section of the Statute of Victoria providing that no will or codicil in any manner revoked shall be revived otherwise than by reexecution, or by a codicil properly executed and showing intent to revive the revoked instrument. See W. VA. CODE ch. 41, art. 1 § 8 (Michie 1955).

In addition, the three states also have substantially the same statute on revocation, each statute providing that no will shall be revoked unless by a subsequent will or codicil, by some writing declaring the intent to revoke and executed in the manner in which a will is required to be executed, or by a physical act of destruction on the part of the testator. W. VA. CODE ch. 41, art. 1 § 7 (Michie 1955). These statutes make no attempt to define the moment of time at which revocation by a later instrument takes effect. While in West Virginia the problem has not yet been before the courts, Kentucky is firmly committed to the view that revocation takes place at the time of execution, and Virginia until the ruling in the principal case also held the same conclusion. *Slaughter's Adm'r. v. Wyman*, 228 Ky. 226, 14 S.W.2d 777 (1929); *Rudisill's Ex'r. v. Rodes*, *supra*.

The rationale of the *Timberlake* decision is that a will is an ambulatory instrument having no life or force until the death of its maker, and then only if admitted to probate. The court took the view that an express clause of revocation, being an integral part of the will, can have no separate legal effect, but instead can only become operative at death when the whole will takes effect. It cannot

be said that such reasoning is entirely without logic. Yet, when the result of this holding is considered objectively, divorced from its sequence of logic and compared with the result proposed by the dissenting opinion and the Kentucky view, the open comparison reveals the undersirability of the majority holding.

The court reasons that revocation of the first will never took place so that the first will was continually in effect, and since no revocation occurred the question of revival is never reached. In essence the Virginia court is applying one aspect of the common law rule (that revocation takes effect at death) to the English post-Statute of Victoria rule that a prior will can be revoked only under the provisions of the statute. This is a brand new development in the law of wills, but instead of being a break away from the fog engulfing this area, this holding only thickens the haze. The purpose of the Statute of Victoria was to avoid the evils of the ecclesiastical and common law rules, but this interpretation of the Virginia statute partly exhumes the common law rule.

Under the ruling of the principal case a testator can make any number of wills, each revoking the previous, yet regardless of how many wills are made none are revoked until the death of the testator at which time the earlier wills are all defeated in a reverse chain reaction. It is highly unlikely that the testator upon destruction of a later revoking will thinks that his earlier will is still operative since he has expressly stated that he has revoked the former will. To rationalize as the majority opinion does that the testator could avoid this result by physical destruction of the earlier will is no justification for an essentially bad rule. By revocation of a later revoking will, the testator has expressed his final intent to be that he wishes neither of the wills to operate. It is mere speculation to say that he would prefer the first will to no will.

Another basis for attacking the majority opinion in this case is that the decision is entirely dependent upon the presumption by the court that the second will was destroyed by the testatrix *animo revocandi*. This presumption is based on the authority of *Tate v. Wren*, 185 Va. 773, 784, 40 S.E.2d 188, 193 (1946) which held that where a testator was known to have made a will but the will could not be found, it is a rebuttable presumption that such will was destroyed by the testator with the intent to revoke. Being a rebuttable presumption evidence may be received to overcome the presumption. The facts of the principal case do overcome this presumption. The evidence

shows the testatrix withdrew the second will from the bank stating that she intended to change her will by the making of a new will. The intent to revoke the second will was dependent upon the making of a third will. It appears the doctrine of dependent relative revocation would apply to this set of facts and the second will would not have been revoked. However, this line of reasoning was apparently not advanced by counsel and so is merely parenthetical to the scope and purpose of this comment.

The plain language of the West Virginia statute on revocation puts revocation by subsequent will on the same footing as revocation by some other writing, and revocation by physical destruction. There is no distinction made and none is suggested by the statute. Instead all three methods of revocation appear equal. Revocation by some other writing and revocation by physical destruction undeniably take effect immediately. There is no basis to suppose that the legislature intended to allow two methods of immediate revocation while the third method could not take effect until death. Furthermore, if revocation could not take effect until death then the revival statute allowing revival only by reexecution or republishing would be meaningless in the case of revocation by a later revoking will since the testator would not be alive to revive it.

The dissenting opinion of the principal case takes the view that the first will was revoked at the time of execution of the second will by virtue of the express clause of revocation. The first will would then be null and void, and since it had never been revived under the provisions of the revival statute, the testatrix died intestate. This appears to be the more reasonable of the two views since the expressed intent of the testatrix would be carried out and the purposes of the statute would be accomplished.

John James McKenzie

**Workmen's Compensation—Award as a Proper Subject for
Remittitur in an Action Against Third Parties**

A, while working for *B*, a subscriber to the West Virginia Compensation Fund, was electrocuted due to the alleged negligence of *C*. *A*'s administratrix, after recovering workmen's compensation through *B*, received a judgment against *C*, no part of which was offset by the workmen's compensation award. *Held*, reversing the verdict upon other grounds, that the amount of compensation received for the