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Decedents' Estates - Wills - Doctrine of Dependent Relative Revocation - May Not Be Applicable in Arkansas

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DECEDENTS' ESTATES—WILLS—DOCTRINE OF DEPENDENT RELATIVE REVOCATION—MAY NOT BE APPLICABLE IN ARKANSAS. *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92 (Ct. App. 1980).

Woodrow Larrick died June 27, 1979. His wife Verna contended that he had died intestate, while his brother, Arthur, urged that a 1978 will be admitted to probate. Arthur testified that the 1978 will provided him a devise of $30,000 with Verna to get the rest of the estate.[1] One witness testified that Woodrow had asked him how to effectively destroy his will. Another testified to hearing Woodrow say, the day before he died, that he had torn up his will and had to "get one made out."[2] He added that Woodrow at one time had said that his brothers "had all they needed." Verna testified that her husband intended to make a new will quite a bit different from the destroyed one, but died suddenly before doing so.[3] She testified that he tore and burned the 1978 will because of conversations with his family which indicated that were he to die Verna would get nothing.[4]

The Cleburne County Probate Court found that Woodrow had destroyed the 1978 will with the intention of making a new one. The court then applied the doctrine of dependent relative revocation and admitted the 1978 will to probate.[5]

On appeal Verna Larrick argued that the lower court had erred in applying the doctrine of dependent relative revocation since the doctrine was not law in Arkansas. In the alternative, she urged that there was not sufficient evidence to rebut the presumption that Woodrow intended to revoke the will in question.[6]

The Arkansas Court of Appeals reversed and remanded the decision of the probate court, finding that the deceased's will had been revoked and that he therefore died intestate.[7] The court left a strong implication that in Arkansas, application of the doctrine of dependent relative revocation may be precluded by existing Arkansas stat-

1. Larrick v. Larrick, 271 Ark. 120, 123, 607 S.W.2d 92, 94 (Ct. App. 1980).
2. *Id.* at 121, 607 S.W.2d at 93.
3. *Id.* at 121-22, 607 S.W.2d at 93.
4. *Id.* at 124, 607 S.W.2d at 94.
5. *Id.* at 121, 607 S.W.2d at 93.
6. Brief for Appellant at 79.
7. Larrick v. Larrick, 271 Ark. 120, 126, 607 S.W.2d 92, 96 (Ct. App. 1980).

utory law. *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92 (Ct. App. 1980).

Under the doctrine of dependent relative revocation, also known as conditional or provisional revocation,[8] a revocation is not effective if a testator revokes a will with a present intention to make a new disposition as a substitute, and the new disposition is either not made or is ineffective.[9] The doctrine is mainly a fiction which the courts may employ to deny an apparent revocation upon the feigned ground that the revocation was conditional.[10] The origin of the doctrine is not clear, although its principles were recognized at least as early as 1587.[11] The doctrine in its present form was applied in the most celebrated[12] of the early cases, *Onions v. Tyrer*,[13] which held that an insufficiently executed will did not operate to revoke an earlier will. The phrase dependent relative revocation was coined in 1788,[14] and the law had become fairly well crystallized in England by the start of the 19th century.[15]

The doctrine is one of postulated intent and is utilized to further the supposed wishes of the deceased.[16] It is based upon the premise that the courts (and presumably the deceased) prefer testacy over intestacy.[17] When it is obvious that the deceased intended otherwise, the doctrine will not be applied.[18]

When the testator destroys his will with a view toward making a new one, but then fails to do so, the courts must determine whether there was an intent to revoke absolutely or whether the tes-

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8. 79 AM. JUR. 2d *Wills* § 563 (1975).

9. 95 C.J.S. *Wills* § 267 (1957).

10. T. ATKINSON, ATKINSON ON WILLS § 88, at 454 (2d ed. 1953).

11. French's Case, Rolle's Abr., Dev.(O) 4 (c. 1587). In that case it was held that an ineffective devise could not operate to pass lands but could operate to revoke a prior devise of the same lands. The report gives none of the surrounding facts.

12. Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 343 (1920).

13. 23 Eng. Rep. 1085 (1716). The testator destroyed his first will in the belief that a second instrument was valid. The second instrument, in fact, was not valid because it had not been witnessed in the testator's presence. The court refused to treat the destruction of the first will as a revocation.

14. Warren, *supra* note 12, at 337.

15. Cornish, *Dependent Relative Revocation*, 5 SO. CAL. L. REV. 273, 277 (1932).

16. *In re* Pratt's Estate, 88 So.2d 499 (Fla. 1956); Watson v. Landvatter, 517 S.W.2d 117 (Mo. 1974).

17. Starnes v. Andre, 243 Ark. 712, 421 S.W.2d 616 (1967); Gibbons v. Ward, 115 Ark. 184, 171 S.W. 90 (1914); Connecticut Bank & Trust Co. v. Coles, 150 Conn. 569, 192 A.2d 202 (1963).

18. John Hancock Mut. Life Ins. Co. v. Jackson, 477 F.2d 319 (8th Cir. 1973); La Croix v. Senecal, 140 Conn. 311, 99 A.2d 115 (1953).

tator would prefer the old will to intestacy.[19] Perhaps this is the only instance under dependent relative revocation when the testator has a truly conditional state of mind; that is, when the testator intends for revocation to be effective only upon the execution of a valid new will.[20]

Far more frequent are the cases where the testator is mistaken about some fact or point of law.[21] In such situations the doctrine may manifest itself in a number of ways. The testator may revoke a will in the mistaken belief that devisees or legatees are no longer alive.[22] Or, he may revoke a previous will and execute a new document making provision for some unknown or unidentifiable person, such as in *John Hancock Mutual Life Insurance Co. v. Jackson*.[23] In that case the deceased had revoked a former disposition and named his wife as beneficiary, when in fact he had never been married. It was impossible to determine who he intended as beneficiary. The court applied the doctrine of dependent relative revocation, concluding that had the deceased known his intended disposition would be inoperative, he would have preferred the prior beneficiary designation to be given effect.[24] Another mistake of fact situation occurs when the testator destroys his will without realizing what he is destroying.[25] Although these are really mistakes, and there is no conditional frame of mind on the part of the person mistaken, the fiction of dependent relative revocation is often used to infer that if the testator had known the true nature of the situation, he would not have revoked his will.[26] Hence, the revocation is treated as dependent upon the facts being as the testator perceived them and is otherwise void.[27]

The doctrine is also applied where the testator is mistaken about the applicable law.[28] The testator may revoke a will in the belief that a previous will is revived[29] or that all of his estate will go

19. Briscoe v. Allison, 200 Tenn. 115, 290 S.W.2d 864 (1956); *In re* Estate of Hall, 7 Wash. App. 341, 499 P.2d 912 (1972).

20. ATKINSON, *supra* note 10, § 88, at 453.

21. *Id.*

22. *E.g.*, *In re* Mucklow's Will, 242 App. Div. 111, 272 N.Y.S. 776 (1934).

23. 477 F.2d 319 (8th Cir. 1973).

24. *Id.* at 323.

25. *E.g.*, *In re* Spencer, 77 Conn. 638, 60 A. 289 (1905).

26. 2 PAGE ON WILLS § 21.57, at 447-48 (Bowe-Parker rev. 1960).

27. *Id.*

28. *E.g.*, Flanders v. White, 142 Or. 375, 18 P.2d 823 (1933).

29. *E.g.*, *In re* McCaffrey's Estate, 174 Misc. 162, 20 N.Y.S. 2d 178 (Sur. Ct. 1940).

to a spouse or some other family member.[30] He may attempt to revoke a previous will in a subsequent will that has no legal effect.[31] In such a case the efficacy of the intended revocation must be determined by the deceased's intent.[32]

Frequently cases arise where the testator deletes or changes portions of an existing will without properly reexecuting it, as in *Oliver v. Union National Bank of Springfield*[33] and *Woodson v. Woodson*.[34] In both instances the testator or testatrix made handwritten changes to a valid will but failed to have the alterations attested. The courts in both cases applied the doctrine of dependent relative revocation, holding that the wills as originally written remained operative. In such cases the court must determine the intent of the testator and decide whether he would prefer the old provisions of the will or partial intestacy.[35]

Although the doctrine of dependent relative revocation has never been applied in Arkansas,[36] two supreme court cases have mentioned it. The question in *Starnes v. Andre*[37] was whether the writing of the word "void" at the top of the pages of a will along with making slash marks across the pages were valid attempts to revoke the will. The court stated that it could find no facts to justify application of the doctrine in that case,[38] finding instead that the testatrix made the marks with the intention to revoke the will absolutely.[39]

The court reached a similar conclusion in *Armstrong v. Butler*.[40] In that case, the testatrix made no mention of several grandchildren in a 1970 will although in her 1967 will she had specifically disinherited them. The plaintiff sought to avail herself of the doctrine of dependent relative revocation, hoping to convince the court that since the 1970 will did not express the intent of the testatrix, its revo-

30. *See* 39 HARV. L. REV. 405 (1926).

31. *In re* Anthony's Estate, 265 Minn. 382, 121 N.W.2d 772 (1963).

32. *See generally* cases cited note 17 *supra*.

33. 504 S.W.2d 647 (Mo. Ct. App. 1974).

34. 363 Mo. 978, 255 S.W.2d 771 (1953).

35. For example, if the original will contained a legacy of $1000, and the testator had marked through the figure and written $800 above it, the court would probably construe the testator's intent as desiring the original term; whereas, if the change had been to $10, the court would probably presume that the testator preferred intestacy as to that portion of the will, rather than to give effect to the original amount.

36. Larrick v. Larrick, 271 Ark. 120, 125, 607 S.W.2d 92, 95 (Ct. App. 1980).

37. 243 Ark. 712, 421 S.W.2d 616 (1967).

38. *Id.* at 720, 421 S.W.2d at 621.

39. *Id.* at 717, 421 S.W.2d at 619.

40. 262 Ark. 31, 553 S.W.2d 453 (1977).

cation clause should be void and the 1967 will should be given effect. The court was unable to find facts to justify application of the doctrine.[41]

One other Arkansas case must be mentioned when discussing the utility of the doctrine in Arkansas. In *Parker v. Mobley*[42] the plaintiffs tried to revive a 1973 will that had been expressly revoked by a 1976 testamentary document. The latter will had been destroyed at the direction of the testator. Although the case did not mention conditional revocation, the court held that no will which has been revoked may be revived other than in accordance with ARK. STAT. ANN. § 60-408 (1971),[43] which requires that a revoked will can only be revived by reexecuting it. Since there had been no reexecution of the 1973 will, the court found that the deceased died intestate.[44]

In *Walpole v. Lewis*[45] the Arkansas Supreme Court cited with apparent approval the following passage:

> Where a testator obliterates, deletes, or cancels a will, having a present intent to make a new will, as a substitute for the old, and the new will is not made, it is presumed that the testator preferred the old will to intestacy and effect will be given the old will.[46]

While the term dependent relative revocation was not expressly used, the language evinces the essence of the doctrine.

The *Larrick* court sought to answer three questions: who had removed the will from Woodrow's safety lock box and destroyed it; was the doctrine of dependent relative revocation applicable in Arkansas; and, if so, would the doctrine apply in this case?[47]

The question of who had destroyed the will was of paramount importance because if Woodrow had not performed or directed the performance of the destructive act, no revocation had occurred.[48] The court noted that one method of revoking one's will under Arkansas law is to physically destroy it "with the intent and for the

41. *Id.* at 40, 553 S.W.2d at 458.

42. 264 Ark. 805, 577 S.W.2d 583 (1979).

43. *Id.* at 809, 577 S.W.2d at 585. Section 60-408 provides in pertinent part: "No will or any part thereof which shall be revoked . . . can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked . . . will . . . is incorporated by reference."

44. Parker v. Mobley, 264 Ark. 805, 809-A, 577 S.W.2d 583, 586 (1979).

45. 254 Ark. 89, 492 S.W.2d 410 (1973).

46. *Id.* at 97, 492 S.W.2d at 415 (citing 95 C.J.S. *Wills* § 385 (1957)).

47. Larrick v. Larrick, 271 Ark. 120, 607 S.W.2d 92 (Ct. App. 1980).

48. ARK. STAT. ANN. § 60-406 (1971).

purpose of revoking the same . . . ."[49] Although the court left unresolved the question of who had removed the will from the lock box,[50] based upon the statements of Verna Larrick and another witness it was determined that there was "substantial evidence" to support a finding of fact that it was Woodrow Larrick who had destroyed the will.[51]

Having determined this, the court set out to determine the applicability of the doctrine of dependent relative revocation in Arkansas. Upon defining the doctrine and recognizing its subordination to the intent of the testator, the court traced the sparse history of the doctrine in Arkansas. After finding that it had been mentioned infrequently and had never been applied to any known case,[52] the court turned to a consideration of ARK. STAT. ANN. § 60-408 (1971).[53] Section 60-408 states that a revoked will can be revived only by reexecution or by incorporation in another will. The court said that "this statute would seem to preclude the application of the doctrine of dependent relative revocation here in Arkansas."[54]

While agreeing with the probate court's findings of fact, the court of appeals disagreed with its application of the law.[55] In reversing the lower court's decision, the court based its reasoning upon a determination that Woodrow Larrick had conclusively revoked his will.[56] Even though there was some evidence that he intended to make a new will,[57] the court, borrowing language from *Parker v. Mobley*, stated that "[e]veryone is presumed to possess knowledge of the legal consequences of his acts or omissions."[58] Further, the court added that if the decedent had wished to reinstate his will, he could have easily reexecuted it.[59] Since the "presumption Woodrow Larrick intended to revoke his will has not been overcome nor rebutted,"[60] the court determined that Larrick had

49. Larrick v. Larrick, 271 Ark. 120, 123, 607 S.W.2d 92, 94 (Ct. App. 1980) (quoting ARK. STAT. ANN. § 60-406 (1971)).

50. There was confusing and contradictory testimony on this point. The evidence seemed to indicate that Verna had removed the will although she was not authorized to do so.

51. Larrick v. Larrick, 271 Ark. 120, 124, 607 S.W.2d 92, 94 (Ct. App. 1980).

52. *Id.* at 125, 607 S.W.2d at 95.

53. *Id.*

54. 271 Ark. 120, 125-26, 607 S.W.2d 92, 95 (Ct. App. 1980).

55. *Id.* at 126, 607 S.W.2d at 95.

56. *Id.*

57. *Id.* at 121, 607 S.W.2d at 93.

58. *Id.* at 126, 607 S.W.2d at 95.

59. *Id.*

60. *Id.* at 126, 607 S.W.2d at 96.

died intestate.[61] In addition to stating that Arkansas law seems to preclude application of the doctrine of dependent relative revocation, the court held that the doctrine could not be applied to the facts at hand.[62] Accordingly, the court held that the admission of the revoked will to probate was error.[63]

Judge Newburn concurred with the final outcome of the case but was unwilling to go so far as to declare that ARK. STAT. ANN. § 60-408 (1971) precludes the application of dependent relative revocation in Arkansas.[64] He noted that the statute applies only when there has been a revocation, and the doctrine is used precisely for the purpose of determining whether or not a revocation has occurred.[65]

Hence, it appears that the doctrine of dependent relative revocation currently has no place in Arkansas law. Although the court held that the doctrine could not be applied to the particular facts at hand, it seems apparent that should the requisite facts present themselves, the court would feel compelled to reject the doctrine in view of ARK. STAT. ANN. § 60-408 (1971).

Arkansas courts have consistently expressed a preference for finding testacy rather than intestacy,[66] and, where possible, will construe the facts to find that a deceased has died testate.[67] It would be unwise for the Arkansas courts to totally reject dependent relative revocation as a viable doctrine in this state. Ostensibly the courts would prefer to retain as many alternatives to intestacy as possible. Since the Arkansas Supreme Court has cited with approval the very essence of the doctrine, the better view is that section 60-408 should not preclude application of dependent relative revocation in Arkansas.

The court should have held that the doctrine of dependent relative revocation was not applicable to the facts in *Larrick*, and then indicated a recognition and perhaps an acceptance of the doctrine in Arkansas.[68] Section 60-408 should not serve as a bar to the applica-

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 127, 607 S.W.2d at 96.
65. *Id.*
66. *E.g.*, Gibbons v. Ward, 115 Ark. 184, 171 S.W. 90 (1914).
67. *Id.* at 192, 171 S.W. at 92.
68. The outcome of the case is probably correct. Since dependent relative revocation is an intent supplementing doctrine, it will only be applied where it can further the intent of the deceased. The court found that Woodrow destroyed his will with the intention of revoking it absolutely. They could have found that, in the absence of a new will, he would have

tion of the doctrine. The court in *Larrick* failed to recognize a basic tenet of dependent relative revocation which presumes that the testator does not intend to revoke a previous will until the new will or intended new will becomes effective. In other words, if the revocation is subject to a condition which is not fulfilled, the revocation never takes place.[69] Section 60-408 only applies to *revoked* wills, while dependent relative revocation presumes that the first will was *never* revoked. The doctrine and the statute are therefore compatible.

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preferred intestacy over the terms of the old will. The court received evidence which indicated that Woodrow intended to make substantial changes in his will to the effect that Verna was to get everything and his brothers nothing. Brief for Appellant at 80. Under Arkansas law this is exactly what would happen if he were to die intestate. ARK. STAT. ANN. §§ 61-149, -206 (1971). It was proper under these facts, therefore, not to apply the doctrine of dependent relative revocation because the intent of the deceased was best furthered by not doing so.

69. 95 C.J.S. *Wills* § 267 (1957).