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WILLS—TESTATOR’S INTENT AND THE DOCTRINE OF DEPENDENT RELATIVE REVOCATION

Watson v. Landvatter

In 1958 testator duly executed a will leaving all his property to his wife, Jennie. The will provided that if his wife predeceased him the property should be divided equally among Jennie’s nieces and nephews living at the time of his death. Testator and Jennie were divorced in 1969. Under Missouri law the divorce revoked the devise to Jennie. Later in 1969 the testator married Alice. The testator died in 1970. When the 1958 will was filed for probate it was found that in early 1970 the testator had made several changes in ink on the face of the will. These changes included marking through Jennie’s name and substituting Alice’s name above it, and marking through the names of Jennie’s nieces and nephews and replacing them with the names of Alice’s children. After the will was denied probate, Jennie’s nieces and nephews instituted an action to have the will as originally written declared the last will and testament of the testator through application of the doctrine of dependent relative revocation. A jury verdict for the defendants, Alice and others, was affirmed by the Missouri Supreme Court, which refused to apply the doctrine of dependent relative revocation.

Many definitions and explanations have been advanced as to the doctrine of dependent relative revocation. The most widely accepted view among writers is that it is a device used by the courts to provide relief for the mistaken revocation of a testamentary instrument. The doctrine is phrased in language of “conditional” revocation, but the condition is usually a fiction. In reality, the act of revocation is treated as ineffective because it was induced by a mistake of fact or law.

1. 517 S.W.2d 117 (Mo. En Banc 1974), rehearing denied (1975).
2. See § 474.420, RSMo 1969.
3. 517 S.W.2d at 124.
5. In jurisdictions where revocation of Will 2, which had earlier revoked Will 1, cannot revive Will 1, the doctrine is applied so as to admit Will 2 to probate despite the testator’s having torn it up with intent to revoke, if it is shown that he mistakenly thought that he could revive Will 1 by this means. See, e.g., In re Callahan’s Estate, 251 Wis. 247, 29 N.W.2d 352 (1947).

Similarly, if a testator executes Will 2 in a defective manner and then tears up Will 1 in the mistaken belief that Will 2 is valid, Will 1 may be admitted to probate despite the testator’s having torn it up with intent to revoke. See Board of Trustees of Methodist Church v. Welpton, 284 S.W.2d 580 (Mo. 1955), where the court held that the testator’s will could be admitted to probate if the jury found that she destroyed the will after executing ineffective deeds to the land described in the will. See also T. ATKINSON, supra note 4, at 456.
The largest class of cases involving dependent relative revocation is that in which the testator revokes or attempts to change his will by some physical act to the document. This may be accomplished by completely destroying the testamentary instrument or, more commonly, by altering the provisions in the instrument. The English Wills Act of 1837 and statutes based on it do not permit revocation of a will by cancellation. Some jurisdictions have statutes that are interpreted as permitting revocation of an entire will by cancellation but do not allow revocation of part of a will by physical act to the document. In these jurisdictions which do not permit partial revocation by cancellation, the act of the testator in cancelling some words and inserting others is given no effect; the will as originally written is admitted to probate.

In jurisdictions like Missouri which permit partial revocation by cancellation, the unattested insertions cannot be given effect. The cancellations, however, act as a revocation unless relief is granted by applying the doctrine of dependent relative revocation. The most common alteration of this type is a reduction in the amount of a legacy. If the testator attempts, by cancellation and interlineation, to reduce a $10,000 legacy to $9,500, it is probable that if he knew the insertion was ineffective, he would want the original legacy to take effect. Therefore, application of the doctrine of dependent relative revocation would carry out his probable intention. If, on the other hand, the testator attempts in the same manner to reduce a $10,000 legacy to $5, it is most unlikely that he would want the doctrine applied to defeat his effort to revoke the legacy by cancellation. Previous Missouri cases, like the majority of cases in other jurisdictions which permit partial revocation by cancellation, have applied the doctrine of dependent relative revocation to cancellation and insertion cases. Without mention of the probable wishes of the testator if he had known that the

6. Palmer; supra note 4, at 992. For Missouri cases, see Watson v. Landvatter, 517 S.W.2d 117 (Mo. En Banc 1974); Board of Trustees of Methodist Church v. Welpton, 284 S.W.2d 580 (Mo. 1955); Woodson v. Woodson, 563 Mo. 978, 255 S.W.2d 771 (En Banc 1953) (dependent relative revocation was applied to give effect to the original amount of the legacies where testator had tried to reduce the amounts); Banks v. Banks, 65 Mo. 432 (1877) (dependent relative revocation was not applied because an absolute revocation was found when the testator burned his first will after preparing a second will but before the second will had been executed); Oliver v. Union National Bank, 504 S.W.2d 647 (Mo. App., D. Spr. 1974) (dependent relative revocation was applied to reinstate the plaintiff as a residuary legatee after the testator had cancelled the plaintiff’s name out of the residuary clause); Varnon v. Varnon, 67 Mo. App. 554 (K.C. Ct. App. 1896) (dependent relative revocation was applied to admit the will to probate as originally written even though the testator attempted to revoke one disposition by tearing out the fifth page and substituting another for it).

7. Wills Act of 1837, 7 Will. 4 & 1 Vic., c. 26, § 20.


10. See Varnon v. Varnon, 67 Mo. App. 554 (K.C. Ct. App. 1896), where partial revocation by physical act to the instrument was given recognition in Missour.
sersion could not take effect. This automatic application of the doctrine achieves the same result as would a jurisdiction that does not permit partial revocation by cancellation.

In Watson the Missouri Supreme Court adopted the view that the doctrine of dependent relative revocation is subordinate to the rule that the testator's intent is paramount in interpreting or carrying out his will.

The court looked to extrinsic evidence in order to determine what the testator's intent would have been had he known that the attempted changes were ineffective. This included consideration of the change in the family situation between the time of execution of the will and the date of the alterations, and statements made by the testator indicating that he wished to revoke the legacy to Jennie and that he no longer considered Jennie's nieces and nephews his kin. After reviewing this evidence, the court held that "there was ample evidence to support the submission to the jury of the issue as to whether [testator], by making the alterations in question, intended to cancel the entire document as originally written."

The court expressly rejected the plaintiff's contention that the doctrine of dependent relative revocation should be applied automatically in this situation, stating "the intent of the testator is an important factor which may present a factual issue concerning revocation." Thus, Watson clearly establishes that in Missouri the doctrine of dependent relative revocation will be applied to give relief for a revocation by an act to the document only when the testator would have intended the document as originally written to be effective had he known that the attempted changes were ineffective.

The cases are in conflict as to whether the doctrine of dependent relative revocation should be applied to revocation by a subsequent instrument. Revocation by a subsequent instrument which is executed with the

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11. Note 6, supra. See, e.g., Varnon v. Varnon, 67 Mo. App. 534 (K.C. Ct. App. 1896); Wolf v. Bollinger, 62 Ill. 368 (1872); In re Bronkowski's Estate, 266 Mich. 112, 253 N.W. 235 (1934); In re Knapen's Will, 75 Vt. 146 (1902); In re Marvin's Will, 172 Wis. 457, 179 N.W. 508 (1920). But see Ruel v. Hardy, 90 N.H. 240, 6 A.2d 753 (1939) in which the doctrine was not applied to cancellation of $500 legacies accompanied by interlineation of $100.

12. 517 S.W.2d at 121. The court based its discussion of the doctrine of dependent relative revocation on and quoted extensively from 95 C.J.S., Wills § 267 (1957).

13. 517 S.W.2d at 122. Parol evidence of the testator's intent is admissible to set a physical act to the instrument in its proper light. 3 J. WIGMORE, EVIDENCE § 1782 (3d ed. 1940); 2 W. PAGE, supra note 4, at § 21.58; T. ATKINSON, supra note 4.


15. 517 S.W.2d at 122.


17. 517 S.W.2d at 121.

formalities required of a will may be by inconsistent dispositions of property, by an express clause of revocation, or by both. The Missouri position on the application of the doctrine in these situations is not clear, although the Watson decision arguably clarifies it.

A later will which has a disposition of property that is inconsistent with the disposition of that property in an earlier will may act as a revocation of the first disposition by its inconsistency, even though the second disposition cannot be given effect for some reason. In Mort v. Trustees of Baker University the testator in his first will left the residue of his estate to Baker University. In his second will the testator left the residue to the Caldwell County Rural Schools. The court held that the dispositive provision of the second will was void for uncertainty because the Caldwell County Rural Schools could not be located. Because the second will was validly executed and contained an inconsistent disposition, it revoked the residuary clause in the first will even though the second disposition was void. This resulted in the residue of the testator's estate passing by intestacy. Limiting its search to the four corners of the two instruments, the court did not try to ascertain what the testator would have intended had he known that the second disposition was ineffective. Rather, it tried only to determine the testator's actual intent at the time of the execution of the second instrument. The court found no evidence in the instruments to indicate that the testator did not intend for the second instrument to act as a revocation of the first instrument by providing for an inconsistent disposition.

If the Watson approach had been applied to the Mort case, extrinsic evidence could have been admitted to determine what the testator would have intended had he known that the second disposition was ineffective. Because both bequests were to educational institutions it seems likely that the testator, had he known that the second disposition was ineffective, would have intended for the first disposition to take effect. The doctrine of dependent relative revocation could have been applied to achieve this result. Because partial revocation by inconsistent disposition is conceptually similar to partial revocation by cancellation, the rationale of the Watson decision should apply equally as well to both situations. In other words, the doctrine of dependent relative revocation should be applied to give relief for revocation by inconsistent dispositions, but only if the testator would have intended for the first disposition to take effect had he known that the second disposition was ineffective.

(1855). If the later will does not contain an express clause of revocation, the English courts will not apply the doctrine to a later will with inconsistent dispositions which fail. See, e.g., Ward v. Van der Loeff, [1924] A.C. 653. Most American courts do not follow this later English view. See, e.g., Crawford v. Crawford, 225 Miss. 208, 82 So. 2d 823 (1955). See generally 2 W. PAGE, supra note 4, at §§ 21.60-62.

20. Id. at 637, 78 S.W.2d at 501.
21. Palmer, supra note 4, at 1006. Extrinsic evidence would be admissible because the two instruments when viewed together would be ambiguous.
A more difficult problem is the applicability of the doctrine of dependent relative revocation to revocation by an express clause of revocation in a subsequent testamentary instrument. This situation arises when there is an express clause of revocation coupled with a disposition which fails for some reason other than for lack of due execution. Many courts have held that an express clause of revocation is the exclusive evidence of the testator's intent to revoke any previous testamentary instrument, and therefore the doctrine of dependent relative revocation should not be applied. Some courts, however, without considering the admissibility of extrinsic evidence, refer only to the two testamentary instruments to determine the testator's intent. If the dispositions in the second will are substantially similar to the dispositions in the first will, the court will apply the doctrine of dependent relative revocation to give effect to the first will notwithstanding the express clause of revocation in the second will.

Other courts have held that extrinsic evidence is admissible to ascertain the testator's intent only if the mistake which induced the revocation appears on the face of the instrument. A few courts admit extrinsic evidence to determine what the testator would have intended even though the mistake does not appear on the face of the instrument.

The Missouri position is uncertain as to the admissibility of extrinsic evidence in determining the testator's probable intention in this situation. The court in Paris v. Erisman, although stating that the testator's intention must be determined from the four corners of the instrument, admitted extrinsic evidence where the mistake appeared on the face of the subsequent instrument. In John Hancock Mutual Life Insurance Co. v. Jackson the court admitted extrinsic evidence of the testator's probable intent because it believed that reading the two instruments together

22. T. ATKINSON, supra note 4, at 462. These reasons include: (1) incapacity of beneficiary to take; (2) violation of the rule against perpetuities; (3) indefiniteness; (4) excessiveness in a charitable devise; and (5) charitable disposition in a will executed within 30 days of death.


25. T. ATKINSON, supra note 4, at 459, citing Dunham v. Áverill, 45 Conn. 61 (1877); Gifford v. Dyer, 2 R.I. 99 (1852). However, unlike mistake in the inducement to make a will, courts do not require that what the testator would have done but for the mistake appear on the face of the revoking instrument.


27. 300 S.W. 487 (Mo. 1927).

28. The testator had made a codicil to his will stating that he wished to exclude from his will the land he had deeded to his son, but in describing the land he excluded more land than he had actually deeded his son. The court admitted extrinsic evidence as to the amount of land given to the son and held that the rest of the land passed under the will. Id. at 491.

29. 477 F.2d 319 (8th Cir. 1973).
made them ambiguous, notwithstanding the express clause of revocation in the second instrument.\textsuperscript{30}

There are three possible ways to resolve the problem of the admissibility of extrinsic evidence in this situation. First, the parol evidence rule could be applied without regard to the testator's probable intent. Using this traditional approach will mean that the first instrument cannot be given effect. Second, the parol evidence rule could be held to be subordinate to the testator's intent, just as \textit{Watson} held that the doctrine of dependent relative revocation is subordinate to the testator's intent.\textsuperscript{31} Third, an exception to the parol evidence rule could be found by reasoning that the two instruments read together are ambiguous and parol evidence should be admitted to clarify the ambiguity. If, because of acceptance of the second or third approach, extrinsic evidence is admitted, then the doctrine of dependent relative revocation should be applied or not applied according to the testator's probable intent as determined by that evidence.

The doctrine of dependent relative revocation should not be a mechanical rule of law. The applicability of the doctrine should be determined in accordance with the probable intent of the testator. \textit{Watson}, by refusing to apply the doctrine of dependent relative revocation automatically, emphasized that Missouri follows this position, at least as to revocation by physical acts to the document. The same approach should be used for cases involving revocation by a subsequent testamentary instrument, whether by inconsistent disposition or by an express clause of revocation, because this would more likely give effect to the probable intent of the testator.

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\textsuperscript{30} Decedent had executed a second beneficiary designation naming "Shirley Ray (Wife)" as beneficiary under his life insurance policy. This designation contained an express clause of revocation of all other designations. The decedent was never married and it could not be determined who "Shirley Ray" was. The court held that extrinsic evidence was admissible to ascertain the decedent's probable intent in determining the applicability of the doctrine of dependent relative revocation to give effect to a previous beneficiary designation naming decedent's sister as beneficiary under the policy. \textit{Id.} at 322.

\textsuperscript{31} 517 S.W.2d at 121.