

No. 46778-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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THE ESTATE OF DANA BRUCE MOWER,

Deceased.

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Dana Bruce Mower and Eric Schuler were friends since the 1970s, before Mr. Mower married Mr. Schuler's sister, Christine.<sup>1</sup> In 2005, while Mr. Mower and Christine Mower were married, Mr. Mower executed his Will. The Will contained a provision with an alternate distribution of the residue of Mr. Mower's Estate in the event Christine Mower "failed to survive him by 30 days." In such event, one-half was to be distributed to Mr. Mower's "siblings Larry Mower, Steve Mower, Greg Mower, Linda Turner and Scott Mower" and the remaining one-half was left to Eric and Teresa Schuler. The Schulers were identified with no class designation as "my in-laws" or "my wife's brother and sister in-law." Instead, they were simply named.

In 2012, Dana and Christine Mower divorced. The decree of dissolution was entered on November 13, 2012. On November 28, 2012, Mr. Mower died unexpectedly.

Nothing contained within Mr. Mower's Will indicated anything other than an intent that one-half of his Estate, should his wife fail to survive him, would be distributed to Eric and Teresa Schuler. Mr. Mower made no condition requiring that he and Ms. Mower remain married at the time of death for either of them. There is no language contained in the

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<sup>1</sup> Any reference to Christine or Dana Mower by their first name only is done for clarity and no disrespect is intended.

Will setting forth the disinheritance of Eric or Teresa Schuler in the event of divorce from Ms. Mower. On summary judgment, the trial court dismissed Ms. Turner's Petitions for Declaratory Relief.

Appellant Linda Turner, Personal Representative of Mr. Mower's Estate and one of the named alternative beneficiaries, invites this Court to create new law by holding that the statutory revocation of a spouse from a Will upon divorce simultaneously disinherits the family members of the former spouse who may be named beneficiaries under the Will—irrespective of the absence of any class designation. Appellant's argument is unsupported by Washington's statutory language. The out-of-state cases relied upon by Appellant do not support her argument regarding the interpretation of Washington law, and numerous other states have ruled in a manner contrary to Appellant's position.

The facts of this case and the established law of Washington and other jurisdictions do not support revoking the bequest to Eric and Teresa Schuler as a matter of law. The trial court correctly ruled that the bequest to the Schulers was not revoked by divorce from Ms. Mower, and accordingly, granted summary judgment in their favor.

## **II. RESTATEMENT OF ISSUES**

1. No authority supports Appellant's position that a dissolution of marriage revokes any bequest to the former spouse and the

former spouse's family in addition to the statutory language treating the former spouse as predeceasing the testator. The evidence on record shows a friendly relationship between Dana Mower and Eric Schuler prior to Mr. Mower's marriage to Christine, and the Schulers were named individually and not by class in Mr. Mower's Will. Under these facts, should this Court apply the plain language of RCW 11.12.051 to treat only Christine Mower as predeceasing Dana Mower, thereby triggering the alternate bequests under the Will, and affirm the trial court's ruling upholding the alternative bequest to the Schulers? **Yes.**

2. Mr. Mower's Will stated that "In the event my spouse fails to survive me by a period of thirty (30) days..." before making alternative bequests. Did the trial court correctly rule that this language in the Will does not require the literal death of Ms. Mower, but instead treats the former spouse as failing to survive Mr. Mower by operation of law? **Yes.**

3. When there is a valid, uncontested Will that provides alternative bequests, is it proper for the trial court to deny the invitation to apply the laws of intestacy? **Yes.**

4. When one party substantially prevails on summary judgment which effectively dismisses another beneficiary's TEDRA petition, are attorneys' fees appropriately awarded to the prevailing party? **Yes.**

5. Should this Court award attorney's fees to the Schulers under RAP 18.1 and RCW 11.96A.150? **Yes.**

### **III. FACTS**

It is undisputed that the Schulers and Mr. Mower were friends before Mr. Mower's marriage to Christine. CP 236. Without citation to the record and without evidence to support the assertion, Ms. Turner proposes that "Dana's alternative bequest to the Schulers was based solely on his marriage to Christine, and not a personal relationship." Brief at 5. To the contrary, the language of the Will and the long-established friendship between Eric Schuler and Dana Mower suggest an independent purpose for the alternative bequest. CP 8. In the Will, Mr. Mower made the following alternative disposition of the residue of his Estate:

In the event my spouse fails to survive me by a period of thirty (30) days, I hereby give, devise, and bequeath the residue of my estate to the following individuals in the following percentages:

(a) Fifty percent (50%) of the residue of my estate to my then-surviving siblings equally (currently consisting of Larry Mower, Steve Mower, Greg Mower, Linda Turner, and Scott Mower); provided, however, in the event that all of my siblings predecease me, said residuary bequest shall be to my then-surviving nieces and nephews equally; and

(b) Fifty percent (50%) of the residue of my estate to Teresa Schuler and Eric Schuler; provided, however, in the event either predecease me, the survivor of the two shall receive this entire residuary bequest. In the event both Teresa and Eric predecease me, I hereby give, devise, and

bequeath fifty percent (50%) of the residue of my estate equally to their then-surviving children.

CP 8.

The intent to provide for Eric and Teresa Schuler separately is demonstrated by the language of the Will. Mr. Mower separately designated that 50% of the remainder of his Estate be distributed to the two Schulers, with the remaining 50% distributed to Mr. Mower's five siblings. CP 8. This gave each Schuler a larger personal proportional share in his Estate than any of his siblings would receive. Had Mr. Mower intended to designate the Schulers as alternative beneficiaries by their sibling-in-law relationship alone, he arguably would have bequeathed the residue in proportion to his own siblings. Instead, he gave each of the Schulers a larger individual proportion, and made a separate provision in the event either Eric or Teresa Schuler predeceased him—leaving the entirety of the residue of the bequest to the surviving Schuler before making provisions for the Schulers' children. By contrast, should all of Mr. Mower's siblings have predeceased him, the residuary bequest passed to the then-surviving "nieces and nephews."

The decree of dissolution dissolving the marriage of Christine and Dana Mower was entered on November 13, 2012. CP 111. Mr. Mower passed away on November 28, 2012. *Id.*

On December 18, 2012, Linda Turner petitioned the trial court to admit the Will to probate and to appoint her as Personal Representative. CP 508-11. The Petition stated as a basis to appoint Ms. Turner as Personal Representative, "However, a final Decree of Dissolution was entered and filed on November 13, 2012. Therefore, Christine Leiren Mower is deemed to have predeceased Decedent pursuant to RCW 11.12.051." CP 28. The Petition also listed Eric and Teresa Schuler as beneficiaries. CP 29. On January 3, 2013, Ms. Turner was appointed Personal Representative. CP 35-37.

On February 27, 2013, Ms. Turner as Personal Representative of the Estate caused the Estate to file a TEDRA Petition seeking declaratory relief that the provisions of the bequest to the Schulers were revoked. CP 42-57. Then, on July 5, 2013, Ms. Turner personally filed a TEDRA Petition seeking declaratory relief that the provisions bequeathing the residue of the Estate to the Schulers was revoked. CP 221-25. On August 1, 2013, the Schulers moved for summary judgment to dismiss the Petitions. CP 230-35. On September 27, 2013, the trial court granted summary judgment in favor of the Schulers and dismissed Ms. Turner's petitions for declaratory relief. CP 329-31.

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#### IV. AUTHORITY

##### A. Standard of Review.

Summary judgment is reviewed de novo—the inquiry on appeal is the same as at the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from the facts are viewed in the light most favorable to the non-moving party. *In re the Estates of Harvey L. Jones and Mildred L. Jones*, 170 Wn. App. 594, 603, 287 P.3d 610 (2012). A material fact is one that the outcome of the litigation depends on, in whole or in part. *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If a moving party, a defendant, meets the initial showing of absence of an issue of fact, the inquiry shifts to the party with the burden of proof at trial. *Young v. Key Parm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the party with the burden at trial “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, then the court should grant the motion.” *Id.* (internal citations omitted). When the material facts are undisputed, the Court may enter judgment as a matter of law.

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**B. The Dissolution of Marriage Only Revoked the Bequest to Christine Mower.**

The trial court properly granted summary judgment in favor of the Schulers because the plain language of the statute and the Will support treating Christine Mower as predeceasing Dana Mower and thus triggering the alternate bequests. No authority supports revoking the bequest to the Schulers. The arguments presented by Appellant that attempt to conflate what Ms. Mower received as an award in the dissolution proceedings with the Estate distribution should be unpersuasive to this Court. Similarly, any argument that Ms. Mower is in control of the bequest to Eric and Teresa Schuler should also be rejected and is irrelevant to the legal issues before this Court.

1. Washington Law Supports Only Revoking the Bequest to Christine Mower.

No statute or case supports the Appellant's position that RCW 11.12.051 mandates the revocation of the bequest to Eric and Teresa Schuler. Washington statute revokes by operation of law any bequest to the former spouse of the decedent:

If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the

testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner. Revocation of certain nonprobate transfers is provided under RCW 11.07.010.

RCW 11.12.051 (1).

Appellant argues without authority that the language revoking all provisions in favor of the former spouse also revokes provisions relating to the former spouse's relatives. Appellant relies upon the Third Restatement of Wills of 1999. The error in this position is that the Restatement was drafted in 1999, after RCW 11.12.051 was effective in 1995. *See* Laws of 1994, ch. 221, § 11. Moreover, even if the Restatement were controlling, the language permissively states that courts should "feel free" to extend the terms of the revocation to relatives of the revoked spouse. As discussed in further detail below, the statutory language in Washington differs from those states that do extend such revocation. In Washington, RCW 11.12.051 does not contain any reference to relatives of the spouse but instead treats the former spouse as failing to survive the testator, revoking provisions "in favor of...the former spouse."

Similarly, Appellant's reliance on UPC § 2-804 is equally as misplaced. Washington's statute differs from the Uniform Probate Code

relied upon by Appellant. Washington's statute more closely follows the language of UPC § 2-508 which does not reference relatives and treats the former spouse as predeceasing the testator:

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent...

Uniform Probate Code § 2-508.

Under § 2-804, the uniform code expressly revokes any disposition or appointment of a relative of the former spouse:

Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

The plain language of RCW 11.12.051 lacks any such express revocation and instead limits the revocation only to those made to the former spouse.

Appellant is essentially requesting that this Court extend Washington law beyond the scope of the plain language of the statute to

more closely mirror the more recently drafted uniform code. Doing such would be in error. The plain language of the statute should only be re-written by the Legislature. See *Skagit Surveyors v. Friends of Skagit*, 135 Wn.2d 542, 958 P.2d 962 (1998) (“[The Court’s] role is to interpret the statute as enacted by the Legislature, after the Legislature’s determination of what remedy best serves the public interest of this state; we will not rewrite the statute.”).

The Washington cases relied upon by Appellant do not support revoking the bequest to the Schulers. Appellant cites *McLaughlin* and *Harrison* as the only Washington cases to support the revocation of the bequest to the Schulers. Neither case is instructive. Both *McLaughlin* and *Harrison* were decided on the predecessor statutes RCW 11.12.050, which was repealed and replaced in 1994 by RCW 11.12.051, RCW 11.07.010, and RCW 11.12.095. As stated in the statute, RCW 11.12.051 is a remedial statute and affects decrees of dissolution and declarations of invalidity entered even before the statute’s effective date.

Unlike the current statute, the repealed RCW 11.12.050 did not explicitly instruct the Court to treat the dissolution as if the former spouse *predeceased* the testator, but instead caused the effect of the divorce to revoke the entire Will as to the divorced spouse:

If, after making any will, the testator or testatrix marries and the wife, or husband, is living at the time of the death of the testator or testatrix, such will shall be deemed revoked, unless provision has been made for the survivor by marriage settlement, or unless such survivor is provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse.

*In re Steele's Estate*, 45 Wn.2d 58, 60, 273 P.2d 235, (1954) (quoting RCW 11.12.050 (repealed 1995)). Thus, the courts following this old statute were forced to revoke the bequest and therefore did not treat the spouse as predeceasing the decedent. Now, however, the legislature explicitly provided for a solution: the provisions affected by divorce **“must be interpreted...as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree.”** RCW 11.12.051 (emphasis added).<sup>2</sup>

Both Washington cases relied upon by Appellant were decided on the earlier statute. In *In re McLaughlin's Estate*,<sup>3</sup> the decedent and his wife Ethel divorced four months before the decedent died on April 25, 1973. 11 Wn. App. 320, 321, 523 P.2d 437 (1974). The son of his former

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<sup>2</sup> Black's Law Dictionary defines both "Predecease" and "Survivor": Predecease is "[t]o die before (another). Survivor is "[o]ne who outlives another." The definitions are indistinguishable, as is the law.

<sup>3</sup> Other than the *Matter of Harrison's Estate* no other reported Washington State decisions cite to *In re McLaughlin's Estate*.

wife, Warren Pike, was provided for in his Will in the event his wife predeceased him. *Id.* The court, relying exclusively on RCW 11.12.050 and cases interpreting that statute, held that the provision is clear: the former wife must predecease him because the statutory language revokes any provision related to the former spouse upon divorce. *Id.* at 321-22. Similarly, the court in *Matter of Harrison's Estate*, 21 Wn. App. 382, 585 P.2d 187 (1978),<sup>4</sup> held that a bequest to the decedent's natural child from an earlier marriage failed because the decedent's wife did not predecease him, but instead the parties divorced.

Two crucial distinctions exist between these cases and the case at hand: (1) In both cases relied upon by Appellant, the bequest was with a designation of a relationship, "my step-son," "my children," or "my daughter." Here, although the parties were related, Mr. Mower made no such designation in his Will and expressed no testamentary intent to make the bequest contingent on any familial relationship or as any class gift. The gift was not treated as conditional on the relationship between the decedent and the beneficiary remaining the same (i.e. still a step-parent). (2) Probably the most instructive distinction is that both cases turned on RCW 11.12.050—a now repealed statute. The language of the former statute was substantially changed when the new statutes were enacted.

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<sup>4</sup> There is not one reported Washington case which has ever cited to *Matter of Harrison's Estate*.

The fact that RCW 11.12.050 was repealed and replaced by RCW 11.12.051 also cuts against Appellant's argument that the current statute revokes bequests to the former spouse's family.<sup>5</sup> The Legislature could have but chose not to extend the revocation to the former spouse and all of the former spouse's relatives. There is no such expansive language in the Washington law. There is no language in the Washington statute that conceivably extends the revocation to other individuals other than the former spouse—particularly when the alternative bequest has no class designation tying the alternative beneficiaries to the former spouse (i.e. step-son, step-daughter, sister-in-law, mother-in-law, etc.). Given that the bequest named Eric and Teresa Schuler individually, there is nothing to support the revocation of the bequest to them.

Appellant argues that Mr. Mower wanted to change his Will but did not have the opportunity to do so. Brief at 14. This argument is unsupported by the evidence. There is no evidence that Mr. Mower wanted to execute a new Will in light of his divorce. The argument that

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<sup>5</sup> Appellant argues that the Legislature made no mention of the *McLaughlin* or *Harrison* cases in enacting RCW 11.12.051 and therefore did not overturn those cases. Brief at 24. While the Legislature is presumed to know the law, statutes that are plain and unambiguous must be construed in conformity with its obvious meaning. *See State v. Ortega*, 177 Wn.2d 116, 125, 297 P.3d 57 (2013). The present statute unambiguously replaced and repealed RCW 11.12.050 and provided instruction as to how to treat bequests to the former spouse after divorce—language that was notably missing when *McLaughlin* and *Harrison* were decided.

there is no evidence of any relationship between the Schulers and Mr. Mower between dissolution is death is weak in light of the unfortunate circumstance that Mr. Mower died merely days after his dissolution was final. This alone, however, does not support Appellant's presumption that Mr. Mower wanted to change his Will.

Regardless, an assumption that a decedent may have "wanted" to change a will before death is insufficient to allow the Court to re-write the Will. The relevant intent is at the time of execution.

It is well-settled Washington law that although a will speaks at the time of death, the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will. *In re Estate of Elmer*, 91 Wn. App. 785, 959 P.2d 701 (1998). The testator is presumed to have known the law at the time of the execution of his will. *In re Estate of Patton*, 6 Wn. App. 464, 471, 494 P.2d 238, *review denied*, 80 Wn.2d 1009 (1972). The intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety. *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); *In re Estate of Douglas*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965).

The language of the Will demonstrates an intent to make an alternate bequest to the Schulers. Unlike the cases relied upon by

Appellant, the Schulers are named individually as beneficiaries under the Will, and not pursuant to a class designation.

It is inappropriate to argue, “if the Schulers are allowed to inherit, Christine’s family will have taken 75 percent of Dana’s assets and Christine stands to benefit by later inheritance through her siblings.”<sup>6</sup> Brief at 9. Even if this argument did not posit some scenario where the Schulers and Ms. Mower are the same person, it ignores the most obvious: Christine Mower did not receive any of Dana Mower’s assets pursuant to his Will. Any property of Dana Mower’s that Christine may have received is a result of their dissolution proceedings. The award of property during a dissolution proceeding is wholly irrelevant to the interpretation of the Will.

The language of Mr. Mower’s Will with regard to the bequest further supports that revocation would be inappropriate. Comparing the bequest to Schulers with the bequest to Mr. Mower’s siblings shows that

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<sup>6</sup> This argument makes far too many presumptions about Eric and Teresa Schuler’s own estate plans and deaths. Neither Schuler is deceased, it is not within the record whether the Schulers have their own wills, and Christine Mower is the sister of Eric Schuler. To the extent the Appellant is arguing that Christine Mower is the beneficiary of the Schulers’ future estates or stands to take by intestate succession, the evidence is not before the Court and the argument is an illogical leap of far too many hypothetical conclusions. Most importantly, it is irrelevant. Even more offensive, this argument attempts to conflate what Christine Mower was awarded in the dissolution proceedings with the bequest to the Schulers in the Will. It is wholly inappropriate to confer some connotation that Ms. Mower’s award under the decree should affect the analysis in these proceedings.

Mr. Mower made special provisions for the Schulers. First, there is no class designation. The bequest was not to “my in-laws,” or “my wife’s brother and sister-in-law.” Instead, he named Eric and Teresa Schuler with no indication as to their relationship to his wife or himself. Second, had Mr. Mower intended to treat the Schulers as his brother and sister in-law, he arguably would have distributed a share equal to the proportion of that devised to his own siblings. Instead, he treated his five siblings differently than the two Schulers. This means that the Schulers would each receive a larger individual share than any of Mr. Mower’s five siblings. This supports that Mr. Mower was not making a bequest in consideration of the in-law relationship, and that the bequest was irrespective to the marriage to Christine.

Mr. Mower also included alternative bequests to each of the Schulers should either predecease him. This language was not included for any of Mr. Mower’s siblings. If Mr. Mower’s siblings predeceased him, the residuary bequest was to his “then-surviving nieces and nephews equally.” For the Schulers, Mr. Mower bequeathed, “in the event either predecease me, the survivor of the two shall receive this entire residuary bequest.” This shows an intention to distribute to the Schulers, even in the event one should predecease him.

Lastly, even the identification of the final residual beneficiaries demonstrates the lack of intention to treat the Schulers as “in-laws.” Mr. Mower provided for a distributions to his “then-surviving nieces and nephews equally” in the event all siblings predecease him. On the other-hand, the Will provides to the Shulers’ then-surviving children should both predecease Mr. Mower. At the time of execution of his Will, the children of the Schulers were Mr. Mower’s nieces and nephews by his marriage to Christine. Listing them as the Schulers’ “then-surviving children” further supports the absence of any condition that marriage between Christine and Dana remain intact at his time of death, or that the bequest to the Schulers was only limited to the Schulers as in-laws.

2. The Policies of Probate Administration and the Finality of Wills Requires that the Court Uphold the Will as Written.

Appellant has essentially asked that the Court reinterpret the Will as to what Mr. Mower would have intended after he divorced from Christine. The only evidence Appellant relies upon to show that Mr. Mower wanted a different disposition at his time of death was an email exchange that preceded his dissolution and death by four years. CP 257-60. The email merely expresses anger or dislike of the Schulers’ conduct, but does not mention or discuss his own estate plan. Even if this was sufficient to show Mr. Mower’s intent after dissolution, that is irrelevant. The proper inquiry is the intent at the time the Will is executed for

important policy purposes. Appellant's argument invites drastic changes to the law regarding wills and probate administration.

To allow the court to re-write the Will based upon the presumed intention of the testator after the will is executed would erode all finality and certainty afforded to the execution of a will. Even when a changed intent is expressed, the court places great weight in the procedures or formalities for revocation of a will, drafting of a new will, or execution of a codicil. *See e.g.* RCW 11.12.040, *Matter of Estate of Malloy*, 134 Wn.2d 396, 949 P.2d 804 (1998) (formalities required for execution of will to protect testator's intent); *In re Halls Estate*, 159 Wash. 236, 292 P. 401 (1930) (revocation by implication is not favored). This protects the only intention of the testator that has been determined relevant and reliable: the intent at the time of the will's execution. To chip away at these protections would be to reduce the confidence in the finality of a disposition by will. Allowing the court to examine whether Mr. Mower continued to intend a bequest after the dissolution from his wife would open the door to every dissatisfied party who believes that the decedent did not intend to make a certain bequest at the time of death.

Such analysis is rejected by the Court for important reasons as reflected in the deadman's statute. At the time of death, the will is the only object that speaks for the decedent. The deadman's statute prohibits

interested parties from testifying as to transactions with the decedent.

RCW 5.60.030. The purpose of this statute is in part to protect the probate process from the type of argument the Appellant seeks to make. The decedent is not available to testify as to their intention or the events of any transaction. *See In re Estate of Coredo*, 127 Wn. App. 783, 113 P.3d 16 (2005) (the purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony regarding conversations with the deceased because the dead cannot respond to unfavorable testimony). While the deadman's statute is not directly at issue here, the principles apply to this analysis.

To weigh evidence as to the decedent's intentions with regard to specific bequests between the time of the Will's execution and death would cause a re-writing of the principles of probate. It would clog the courts with disgruntled or disappointed beneficiaries seeking to prove an intention different than that expressed in the will. Most importantly, those who have drafted their wills would have no certainty that their intention, as expressed in the will, would be upheld. To accept Appellant's argument would allow any evidence of displeasure, dislike, anger or frustration expressed by the testator about the beneficiary to change the disposition of the will. This is an extreme shift in the law that would

eradicate many established and long-standing principles of probate administration and the laws governing wills.

3. The Case Law Cited by Appellant from Other Jurisdictions Does Not Support Appellant's Interpretation of the Washington Statute.

Appellant relies upon several out of state cases to argue that this court should extend the revocation caused by divorce to revoke the bequest to the Schulers. The statutory language of the states in which these cases were decided, however, differs significantly from the language of Washington's statute. Those cases turned on language of a class-designation. Moreover, numerous other states with statutes more similar to Washington's have not revoked the alternative bequest by virtue of divorce.

For example, the statute at issue in *Friedmann v. Hannan*, a Maryland case, contained a key term that impacted the court's ruling: "relating to." 412 Md. 328, 987 A.2d 60 (2010). The Maryland statute addresses not only any provision to the former spouse, but states "any provisions in the will relating to the spouse..." Md. Code, Est. & Trusts, 4-105. By contrast, Washington's statute only affects provisions to the spouse and does not include the "relating to" language. In *Friedmann*, the court examined what the term "relating to" meant under Maryland law. The family of the former spouse sought to enforce a provision of the will

that provided if the former wife and decedent “die[d] together by accident or otherwise, the property would be distributed to named beneficiaries, including the former spouse’s family. *Id.* The *Friedmann* court, however, determined that the language “relating to the spouse” should be broadly construed because Maryland law broadly construes that type of language. The *Friedmann* court further distinguished Maryland law from the language of UPC § 2-508, the model probate code section upon which Washington’s statute is modeled. The court in *Friedmann* noted that the Maryland statute did not follow the UPC’s “restricted” approach to revocation by divorce.

Unlike the Maryland statute, RCW 11.12.051 is a restrictive approach. Not only does the Washington law lack any language of “relating to” the former spouse, but also provides precise instructions that the former spouse will be treated as failing to survive the testator. This type of instructive language is notably missing from the Maryland statute, which is drafted more like the former RCW 11.12.050 and less like the current state of Washington law.

Similarly, the California cases upon which Appellants rely are distinguishable and offer little support. In *Estate of Hermon*, 39 Cal. App. 4th 1525 (1995), the will included bequests to “my children and my spouse’s children,” and “my issue and my spouse’s issue.” The former

spouse's children were named specifically in the preamble, but not the alternate bequests, instead only being identified by class. The class-gift was instructive to the court. In addition, the California court found that its ruling was consistent with the modern version of the UPC contained in section 2-804, and advocated for the adoption of that model code in California. Similarly, in *In re Estate of Jones*, 122 Cal. App. 4th 326 (2004), the California court focused on the term "step-daughter" and found that because the beneficiary was no longer a "step-daughter," the bequest must fail under a literal reading of the provision. In addition, the Court determined that the legislature's failure to act after the *Hermon* decision was a tacit approval of the *Hermon* holding and the adoption of the current uniform probate code.

Again, Washington law does not follow the UPC section upon which the California court advocated the legislature to adopt. And most telling and distinguishing is that in this case, there is no designation as "step" or "in-law." There is no class designation with regard to the Schulers at all. The bequest is simply to Eric and Teresa Schuler.

The other out-of-state cases relied upon by Appellant also contain the class designation like those in the Maryland and California cases. *See Bloom v. Selfon*, 520 Pa. 519, 555 A.2d 75 (1989) (disposition was to "my husband's uncle, Stanley Selfon."). Most distinguishable, the Montana

statute expressly revokes any bequest to the former spouse's relatives. *See In re Estate of Marchwick*, 356 Mont. 385, 234 P.3d 879 (2010) (Plain language of Mont. Code sec. 72-2-814 revoking disposition "to the individual's former spouse...and any disposition...to a relative of the divorced individual's former spouse.").

On the other hand, states that have statutes more similar to Washington's do not extend the revocation to family members other than the former spouse. *First Church of Christ, Scientist v. Watson*, 239 So.2d 194, 196-97 (Ala. 1970) (relying on *Peiffer v. Old Nat. Bank & Union Trust Co.*, 166 Wn. 1, 6 P.2d 386 (1931) and holding Alabama statute that is similar to Washington's statute treated former spouse as deceased and applying gift over provision as written in will); *In re Estate of Kerr*, 520 N.W.2d 512 (Minn. 1994) (gift to daughter of former wife valid because "a marriage dissolution only revokes the devise to a former spouse; all other provisions of the will remain intact" and the will was unambiguous); *Russell v. Russell's Estate*, 534 P.2d 261, 264-65 (Kan. 1975) (adopting the "majority" and "better reasoned rule" in line with UPC § 2-508 that treats former spouse as deceased and holding former spouse's issue takes bequest); *Steele v. Chase*, 281 N.E.2d 137, 140-41 (Ind. Ct. App. 1972) ("We recognize that in certain circumstances a relative of a divorced spouse may receive a greater devise than the heirs at law, yet a court may

not speculate as to what a decedent's intentions may have been and thus rewrite his will.”); *Jones v. Brown*, 248 S.E.2d 812, 814 (Va. 1978) (adopting “majority rule” and passing property, even to former in-laws, because former spouse is treated as predeceasing testator).

Looking to these cases for guidance, the reasoning of the Washington statute is sound. The revocation extends only to the former spouse of the decedent. All other provisions are treated as if the former spouse failed to survive the decedent. Here, that triggers the bequest to Eric and Teresa Schuler.

4. The Will does not Condition the Bequest to the Schulers Upon Dana Mower’s Marriage to Christine.

Nothing in the Will conditions the disposition to Mr. Mower’s siblings and the Schulers upon the marriage to Christine. As discussed, the statutory language requires treating a former spouse as failing to survive the testator. It is wrong that Christine and Dana must have been married at the time of Dana’s death for the bequest to the Schulers to be upheld. The statute satisfies this requirement, and Christine Schuler is identified as “my spouse,” because at the time of the Will’s execution, she was his spouse. Again, to require this as a condition precedent would cause the statute to have no purpose. The Legislature is presumed not to deliberately engage in unnecessary or meaningless acts. *Knowles v. Holly*,

82 Wn.2d 694, 513 P.2d 18 (1973). Accepting Appellant's argument would cause RCW 11.12.051 to be unnecessary or meaningless.

In addition, this type of condition, should Mr. Mower have intended it, would have been easily accomplished through plain language. Had Mr. Mower intended that he and Christine remain married at the time of either of their deaths to trigger the alternate disposition, he could have stated, "so long as Christine and I have not divorced," or "so long as my spouse and I remain married until either of our deaths." The absence of such language further establishes that the condition was satisfied by operation of law and the continued marriage to Christine was not necessary.

C. The Literal Death of Christine Mower is not a Condition Precedent to Trigger the Alternative Bequests; Presumed Death by Operation of Law Sufficiently Meets this Provision of the Will.

Appellant argues that the bequest to the Schuler's should fail because the Will contemplates, "in the event my spouse fails to survive me by a period of thirty (30) days..." This language does not create a condition precedent requiring that Christine literally die, such that her living causes the condition to fail and the failure of the gift. Mr. Mower did not state an express condition precedent that must have been satisfied, other than his spouse fail to survive him, which was effectuated by the statute.

Appellant argues that Washington law requires a spouse to “actually fail to survive” the testator. This argument is based upon the line of cases which interpret the since repealed RCW 11.12.050. These cases do not support the proposition that RCW 11.12.051 should be interpreted as a condition precedent because the earlier statute simply instructed that a bequest to the former spouse be revoked. Instead, the modern statute requires that the “Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator....” RCW 11.12.051. This language was notably missing from the earlier version of the statute.

This distinction is important. To the extent *Harrison* and *McLaughlin* may have required a finding that a condition precedent could not have occurred, the law was repealed and replaced by a statute that accordingly satisfied, by operation of law, the requirement of a condition precedent—to the extent the alternate bequest requires such condition. The court in those cases had no other statutory language which treated the spouse as having failed to survive the testator. Under the earlier statute, the survival of the former spouse, coupled with the fact that the statute only provided for the revocation, necessitated that the bequest would fail.

Taken to its logical conclusion, Appellant’s argument would in essence make the second portion of RCW 11.12.051 frivolous and never

applicable. If the dissolution causes every bequest to a former spouse to be revoked, without treating the former spouse as predeceasing the testator, then the second portion of the current statute would have no purpose. Under Appellant's application, in every instance where the former spouse survives the testator, any provision regarding such as the one at issue here would be a condition precedent that failed. The second sentence of RCW 11.12.051(1) would have no purpose. The Legislature is presumed not to create frivolous laws.

Appellant argues that the Legislature is presumed to be aware of the common law when it enacted RCW 11.12.051, which did not overrule the common law in *Harrison* and *McLaughlin*. This argument fails to recognize that the statutory provision relied upon in those cases was expressly repealed and replaced by a "remedial statute." The language that was key to the analysis in those cases (simply the revocation of the bequest to the former spouse) was supplemented by the Legislature with an instruction as how to treat an alternate bequest: as if the former spouse predeceased the testator. To the extent the prior statute was interpreted to allow the failure of a condition precedent for an alternative bequest, the curative language of RCW 11.12.051 creates the occurrence of such condition by operation of law.

The plain language of the Will further demonstrates the absence of any condition precedent. Had Mr. Mower intended to condition the bequest to the Schulers upon his marriage to Christine, he simply could have included language such as “so long as Christine and I have never divorced,” or “so long as Christine and I were married at the time of her death or mine.” Nothing within the Will demonstrates any intent to include a condition precedent that the Mowers be married at the time of death, or that Christine literally die for the Schulers to take.

D. These Proceedings Involve a Valid, Uncontested Will. There is No Basis to Apply Laws of Intestate Probate.

The alternative bequest to Eric and Teresa Schuler survives. As discussed, nothing within RCW 11.12.051 or RCW 11.07.010 requires the revocation of any bequest to a family member of a former spouse. Moreover, the Will does not contain a condition precedent that the Mowers remained married at the time of death, or that Christine Mower literally die.

The Will is valid and uncontested. Given that the bequests to the Schulers and Mr. Mower’s siblings survive, there is no basis to apply the laws of intestacy. Summary judgment was proper because there is no genuine issue of material fact and as a matter of law, the Will should be enforced as written. No action was ever commenced to revoke the decedent’s will, just for declaratory relief interpreting it. RCW 11.24 et

seq. prescribes specific procedures for a will contest, which Appellant failed to follow. The Appellant cannot create a will contest on appeal over a year after Appellant admitted that very same Will to probate.

E. The Schulers were the Substantially Prevailing Parties in the Trial Court. The Trial Court Correctly Awarded Attorney's Fees.

Attorneys' fees were properly awarded to the Schulers by the trial court. RCW 11.96A.150 is the statutory vehicle for authorizing an award of costs and attorney's fees to a party in any Title 11 RCW action. *In re Guardianship of Matthews*, 156 Wn.App. 201, 213, 232 P.3d 1140 (2010).

The statute provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and

11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

RCW 11.96A.150.

Under RCW 11.96A.150, the trial court had broad discretion to award attorneys' fees. In exercising its discretion, the court may consider any factors that it deems relevant and appropriate. *Id.* A trial court's fee determination will not be disturbed on appeal unless "there are facts and circumstances clearly showing an abuse of the trial court's discretion." *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796, 807 (2004), quoting *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).

The Schulers substantially prevailed on summary judgment. The trial court denied Ms. Turner's cross-motion for summary judgment and granted the Schulers' motion. For the reasons set forth herein, the Schulers were the proper prevailing parties at the trial court, and the trial court was well within its discretion to award attorneys' fees.

F. This Court Should Award Attorney's Fees to the Schulers on Appeal.

The Schulers should be awarded attorneys' fees on appeal. The trial court properly granted summary judgment, and this Court is

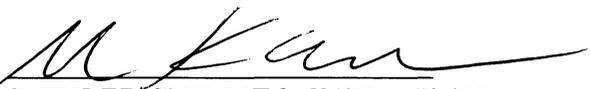
respectfully asked to affirm the trial court's rulings. As such, the Schulers should be entitled to attorneys' fees and costs under RAP 18.1 and RCW 11.96A.150.

## V. CONCLUSION

RCW 11.12.051 causes a dissolution to revoke any bequest or other provision in a Will that is in favor of the former spouse. The statute, however, explicitly instructs that the former spouse should be treated as having failed to survive the testator. In this case, the trial court properly ruled that the alternate bequest to the Schulers was triggered by Dana Mower's divorce from Christine. Thus, summary judgment was properly granted and the bequests to the Schulers should stand. This Court is respectfully requested to affirm the trial court's grant of summary judgment and award of attorneys' fees. This Court is further requested to award the Schulers' attorneys' fees on appeal.

Respectfully submitted this 27<sup>th</sup> day of April, 2015.

SMITH ALLING, P.S.

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of April, 2015, I caused to be served a true and correct copy of [this] Brief of Respondents upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 27th day of April, 2015.

  
\_\_\_\_\_  
Joseph M. Salonga, Legal Assistant

## APPENDIX

1. Uniform Probate Code § 2-508
2. Uniform Probate Code § 2-804
3. Md. Code, Est. & Trust s. 4-105
4. Cited Cases - Foreign Jurisdictions
  - *First Church of Christ, Scientist v. Watson*, 239 So.2d 194, 196-97 (Ala. 1970)
  - *In re Estate of Kerr*, 520 N.W.2d 512 (Minn. 1994)
  - *Jones v. Brown*, 248 S.E.2d 812, 814 (Va. 1978)
  - *Russell v. Russell's Estate*, 534 P.2d 261, 264-65 (Kan. 1975)
  - *Steele v. Chase*, 281 N.E.2d 137, 140-41 (Ind. Ct. App. 1972)

## Appendix 1

Uniform Laws Annotated

Uniform Probate Code (1969) Last Amended or Revised in 2010 (Refs & Annos)

Prior Article II Intestate Succession and Wills--(Pre-1990 Version) (Refs & Annos)

Part 5. Wills (Refs & Annos)

Unif.Probate Code § 2-508

§ 2-508. [Revocation by Divorce; No Revocation by Other Changes of Circumstances].

Currentness

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

<Material relating to revised version of Article II, Intestacy, Wills, and Donative Transfers, precedes Prior Article II.>

**Editors' Notes**

**COMMENT**

**1997 Main Volume**

The section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of issue operate to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except as otherwise provided in this Code; although this is occasionally called revocation, it is not within the present section. The provisions with regard to invalid divorce decrees parallel those in Section 2-802. Neither this section nor 2-802 includes "divorce from bed and board" as an event which affects devises or marital rights on death.

But see Section 2-204 providing that a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits under a prior will, unless the settlement provides otherwise.

Although this Section does not provide for revocation of a will by subsequent marriage of the testator, the spouse may be protected by Section 2-301 or an elective share under Section 2-201.

**LAW REVIEW AND JOURNAL COMMENTARIES**

Divorced but not deceased--The anomaly of the "surviving" former spouse. Mark Reutlinger and William C. Oltman. 40 Wash.St.B.News 27 (March 1986).  
Probate change. 20 Boston B.J. 6 (1976).

**LIBRARY REFERENCES**

**1997 Main Volume**

Wills 193.

Westlaw Topic No. 409.

C.J.S. Wills § 441.

Notes of Decisions (14)

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Unif. Probate Code § 2-508, ULA PROB CODE § 2-508

## Appendix 2

Uniform Laws Annotated

Uniform Probate Code (1969) Last Amended or Revised in 2010 (Refs & Annos)

Revised Article II Intestacy, Wills, and Donative Transfers (Refs & Annos)

Part 8. General Provisions Concerning Probate and Nonprobate Transfers (Refs & Annos)

Unif.Probate Code § 2-804

§ 2-804. Revocation of Probate and Nonprobate Transfers by  
Divorce; No Revocation by Other Changes of Circumstances.

Currentness

(a) [Definitions.] In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable

(A) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,

(B) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and

(C) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the former spouses into equal tenancies in common.

(c) [Effect of Severance.] A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) [Effect of Revocation.] Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) [Revival if Divorce Nullified.] Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) [No Revocation for Other Change of Circumstances.] No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

(g) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received

written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

**Credits**

As amended in 1993 and 1997.

<Material relating to prior version of Article II, Intestate Succession and Wills, follows Revised Article II.>

**Editors' Notes**

**COMMENT**

**1997 Main Volume**

**Purpose and Scope of Revision.** The revisions of this section, pre-1990 Section 2-508, intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

As revised, this section is the most comprehensive provision of its kind, but many states have enacted piecemeal legislation tending in the same direction. For example, Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich. Comp. Laws Ann. § 552.102; Ohio Rev. Code Ann. § 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable inter-vivos trusts. Ohio Rev. Code Ann. § 1339.62; Okla. Stat. Ann. tit. 60, § 175; Tenn. Code Ann. § 35-50-5115 (applies to revocable and irrevocable inter-vivos trusts). Statutes in Michigan, Ohio, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Mich. Comp. Laws Ann. § 552.101; Ohio Rev. Code Ann. § 1339.63; Okla. Stat. Ann. tit. 15, § 178; Tex. Fam. Code §§ 3.632-633.

The courts have also come under increasing pressure to use statutory construction techniques to extend statutes like the pre-1990 version of Section 2-508 to various will substitutes. In *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass.1985), the Massachusetts court held the statute applicable to a revocable inter-vivos trust, but restricted its "holding to the particular facts of this case—specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. The trust in that case was an unfunded life-insurance trust; the life insurance was employer-paid life insurance. In *Miller v. First Nat'l Bank & Tr. Co.*, 637 P.2d 75 (Okla.1981), the court also held such a statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. Despite the absence of meaningful evidence of intent to incorporate, the court held that the pour-over devise incorporated the life-insurance trust into the will by reference, and thus was able to apply the revocation-upon-divorce statute. In *Equitable Life Assurance Society v. Stitzel*, 1 Pa. Fiduc. 2d 316 (C.P. 1981), however, the court held a statute similar to the pre-1990 version of Section 2-508 to be inapplicable to effect a revocation of a life-insurance beneficiary designation of the former spouse.

**Revoking Benefits of the Former Spouse's Relatives.** In several cases, including *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass.1985), and *Estate of Coffed*, 387 N.E.2d 1209 (N.Y.1979), the result of treating the former spouse as if he or she predeceased the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, see *Porter v. Porter*, 286 N.W.2d 649 (Iowa 1979); *Bloom v. Selfon*, 555 A.2d 75 (Pa.1989); *Estate of Graef*, 368 N.W.2d 633 (Wis.1985). Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

**Consequence of Revocation.** The effect of revocation by this section is that the provisions of the governing instrument are given effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed all provisions revoked by this section (see Section 2-1106 for the effect of a disclaimer). Note that this means that the antilapse statute applies in appropriate cases in which the divorced individual or relative is treated as having disclaimed. In the case of a revoked nomination in a fiduciary or representative capacity, the provisions of the governing instrument are given effect as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment. If the divorced individual (or relative of the

## § 2-804. Revocation of Probate and Nonprobate Transfers..., Unif.Probate Code §...

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divorced individual) is the donee of an unexercised power of appointment that is revoked by this section, the gift-in-default clause, if any, is to take effect, to the extent that the gift-in-default clause is not itself revoked by this section.

**ERISA Preemption of State Law.** The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” governed by ERISA.

ERISA's preemption clause is extraordinarily broad. ERISA Section 514(a) does not merely preempt state laws that conflict with specific provisions in ERISA. Section 514(a) preempts “any and all State laws” insofar as they “relate to” any ERISA-governed employee benefit plan.

A complex case law has arisen concerning the question of whether to apply ERISA Section 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees. See, e.g., *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979). The Retirement Equity Act of 1984 amended ERISA to add Sections 206(d)(3) and 514(b)(7), confirming the judicially created exception for state domestic relations decrees.

The federal courts have been less certain about whether to defer to state probate law. In *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009 (9th Cir. 1987), the court held that ERISA preempted the Montana nonclaim statute (which is Section 3-803 of the Uniform Probate Code). On the other hand, in *Mendez-Bellido v. Board of Trustees*, 709 F.Supp. 329 (E.D.N.Y. 1989), the court applied the New York “slayer-rule” against an ERISA preemption claim, reasoning that “state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a ‘patchwork scheme of regulations’ ” that ERISA sought to avoid.

It is to be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

**Cross References.** See Section 1-201 for definitions of “beneficiary designated in a governing instrument,” “governing instrument,” “joint tenants with the right of survivorship,” “community property with the right of survivorship,” and “payor.”

**References.** The theory of this section is discussed in Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 *Real Prop. Prob. & Tr. J.* 683, 689-701 (1992). See also Langbein, “The Nonprobate Revolution and the Future of the Law of Succession,” 97 *Harv. L. Rev.* 1108 (1984).

**1997 Technical Amendment.** For an explanation of the 1997 technical amendment, which added the word “equal” to subsection (b)(2), see the Comment to Section 2-803.

**2002 Amendment Relating to Disclaimers.** In 2002, the Code's former disclaimer provision (Section 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (Sections 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.

**Historical Note.** The above Comment was revised in 1993 and 2002. For the prior version, see 8 U.L.A. 164 (Supp.1992).

#### LAW REVIEW AND JOURNAL COMMENTARIES

Some Property Law Issues in the Law of Disclaimers. William P. LaPiana. 38 Real Prop.Prob. & Tr.J. 207 (Summer 2003).  
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Unif. Probate Code § 2-804, ULA PROB CODE § 2-804

## Appendix 3

West's Annotated Code of Maryland  
Estates and Trusts (Refs & Annos)  
Title 4. Wills (Refs & Annos)  
Subtitle 1. Execution, Revocation, and Revival (Refs & Annos)

MD Code, Estates and Trusts, § 4-105

§ 4-105. Procedures to revoke will

Currentness

A will, or any part of it, may not be revoked in a manner other than as provided in this section.

- (1) By provision in a subsequent, validly executed will which (i) revokes any prior will or part of it either expressly or by necessary implication, or (ii) expressly republishes an earlier will that had been revoked by an intermediate will but is still in existence;
- (2) By burning, cancelling, tearing, or obliterating the same, by the testator himself, or by some other person in his presence and by his express direction and consent;
- (3) By the subsequent marriage of the testator followed by the birth, adoption, or legitimation of a child by him, provided such child or his descendant survives the testator; and all wills executed prior to such marriage shall be revoked; or
- (4) By an absolute divorce of a testator and his spouse or the annulment of the marriage, either of which occurs subsequent to the execution of the testator's will; and all provisions in the will relating to the spouse, and only those provisions, shall be revoked unless otherwise provided in the will or decree.

**Credits**

Added by Acts 1974, c. 11, § 2, eff. July 1, 1974. Amended by Acts 1986, c. 396, § 1.

**Formerly** Art. 93, § 4-105.

Notes of Decisions (89)

MD Code, Estates and Trusts, § 4-105, MD EST & TRST § 4-105

Current through chapters 1, 2, 5, 14, 15, 19, 21, 22, 42, 81, and 108 of the 2015 Regular Session of the General Assembly

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## Appendix 4

286 Ala. 270

Supreme Court of Alabama.

The FIRST CHURCH OF CHRIST, SCIENTIST

v.

Dallas L. WATSON, III, et al.

4 Div. 393. | Sept. 10, 1970.

Proceeding upon bill of complaint, by church against children of testator by his first wife, seeking construction of a will. The Circuit Court, Houston County, in Equity, Keener Baxley, J., sustained a demurrer to the bill and dismissed it, and the church appealed. The Supreme Court, Maddox, J., held that where the testator gave his estate to his wife providing she survived him for a period of 30 days but gave estate to the church if she died before end of such period, the wife after divorce was no longer his wife and did not survive him as his widow, and her survival for more than 30 days did not preclude construing the will as leaving the property, under such circumstances, to the church.

Reversed and remanded for further proceedings not inconsistent with opinion.

West Headnotes (4)

[1] **Wills**  
↔ Divorce

Where testator was divorced after making will, former spouse could take nothing under provisions of will, but only that portion which made provision for former spouse, and not entire will, was revoked. Code 1940, Tit. 61, § 9(1).

4 Cases that cite this headnote

[2] **Wills**  
↔ Disposition of Entire Estate, or Partial Intestacy

Absent contrary intention which was so plain as to compel different conclusion, it was presumed that testator intended to dispose of his entire estate and did not intend to die intestate as to any portion of his property.

3 Cases that cite this headnote

[3] **Wills**  
↔ Husband and Wife

Where testator gave his estate to his wife providing she survived him for period of 30 days but gave estate to church if she died before end of such period, wife after divorce was no longer wife and did not survive as his widow, and her survival for more than 30 days did not preclude construing will as leaving property, under such circumstances, to church. Code 1940, Tit. 61, § 9(1).

4 Cases that cite this headnote

[4] **Wills**  
↔ Devises and Legatees

**Wills**  
↔ Pleading

Where complainant was mentioned in will, complainant was entitled to have construction thereof, and where answer and testimony would probably aid trial court in construing will, will should not have been construed on demurrer.

Cases that cite this headnote

**Attorneys and Law Firms**

\*271 \*\*195 Farmer & Herring, Dothan, for appellant.

A. A. Smith, Hartford, Farmer & Farmer, Dothan, for appellees.

**Opinion**

\*272 MADDUX, Justice.

The sole question presented by this appeal involves the construction to be given to the following will clause:

“I give, devise and bequeath all of my property, real, personal and mixed, wheresoever located to my beloved wife, LILLIE GRICE WATSON, to have and to hold as her property absolutely; provided that she lives to survive me for

a period of (30) thirty days; but in the event of her death prior to the end of said period, then to THE FIRST CHURCH OF CHRIST, SCIENTIST, BOSTON, MASSACHUSETTS.”

Dallas L. Watson, Jr., the testator, and Lillie Grice Watson were divorced on January 27, 1969, and he died 22 days later, and Lillie Grice Watson survived the testator for more than thirty days. The will was admitted to probate in Houston County on May 21, 1969.

The First Church of Christ, Scientist, in Boston, Massachusetts, a corporation, filed an original bill of complaint in the Circuit Court of Houston County against Dallas L. Watson, III, and Willie Marie Watson, children of the testator by his first wife, Jeanette Hutto Watson, seeking a construction of the will and asking the Court to find that it was the sole devisee under the will and therefore entitled to all the assets of the estate of the testator.

The trial court sustained demurrers filed separately and severally, on behalf of the two minor children of the defendants, to the bill as amended and substituted, and dismissed \*\*196 the bill. The First Church of Christ, Scientist, then took this appeal.

On appeal, both sides seem to agree that the divorce between Dallas L. Watson, Jr., and Lillie Grice Watson prevents her from taking anything under the provisions of the will, in view of the provisions of Section 1 of Act No. 287, Acts of Alabama, 1951, Regular Session, p. 572 (Title 61, Section 9(1)), which reads as follows:

‘A divorce from the bonds of matrimony operates as a revocation of that part of the will of either party, made during coverture, making provision for the spouse of such party; and if after the making of a will, a woman marries, the marriage operates as a revocation of the will.’

There is sharp disagreement among the parties as to the right of The First Church of Christ, Scientist, to take under the will.

[1] [2] Construing the will before us as of the date of the testator's death and in view of the mandate of the statute, the former spouse could take nothing under the provisions of the will, but the entire will is not revoked, only

that portion which makes provision for the former spouse. Tankersley v. Tankersley, 270 Ala. 571, 120 So.2d 744 (1960). Furthermore, there is a presumption that the testator intended to dispose of his entire estate and that he did not intend to die intestate as to any portion of his property, unless the contrary intention is so plain as to compel a different conclusion. Baker v. Wright, 257 Ala. 697, 60 So.2d 825 (1952). In this connection, it might be pointed out that the testator did not make any provision in his will for his children by the former marriage, and these \*273 children would share in the estate which passes by the will only if the will is declared to be invalid and they become entitled as heirs under our laws of descent and distribution. Appellees say this is what should happen.

A number of states have enacted statutes similar to ours specifying that a divorce from the bonds of matrimony operates, as a matter of law, as a revocation of that part of the will making provision for the former spouse.<sup>1</sup> The language of these various state statutes would indicate that each was based upon s 53 of the Model Probate Code. In fact, the newer Uniform Probate Code, in s 2-508, provides:

‘\* \* \* (D)ivorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment Passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.’ (Emphasis added)

While our statute does not contain all of the provisions of s 2-508 of the Uniform Probate Code, we think that property which is prevented from passing to the former spouse because of revocation by divorce should pass as if the former spouse failed to survive the decedent, unless a contrary intention is apparent from the provisions of the will.<sup>2</sup>

A case strikingly similar to our own here is Peiffer v. Old Nat. Bank & Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931). There, \*\*197 the testator expressed a positive intention to give nothing to his daughter by his first wife, but left his entire property to his ‘beloved wife,’ if she should survive him for three months, otherwise to his son. However, the

testator and his wife were divorced at the time of his death and the will as to her was revoked under the provisions of a Washington statute very similar to our own. The daughter by the first marriage, the contestant, contended that because the decedent's former spouse still lived, the son would take nothing under the will but was entitled to share equally with her under the laws of descent and distribution. Except for the fact that The First Church of Christ, Scientist, is the alternate devisee here instead of a member of the decedent's family, the facts in the Peiffer case, *supra*, are almost identical with those presented in this appeal. The Washington Supreme Court held in Peiffer, *supra*, that the provisions for the former spouse were revoked by the divorce, and that while the divorce necessarily annulled the provisions as to the former spouse taking any part of the estate, it did not revoke and annul the bequests to the son and the disinheritance of the daughter.

[3] The appellees contend that by the very terms of the will, the former spouse survived the decedent for thirty days, and that the condition precedent for the Church to take therefore never occurred. The same argument was made in Peiffer, *supra*. We say, as that court did, that it is not necessary for us to go so far, as is contended by the appellees, as to declare that the divorce of the wife of the testator was equivalent to her death. After her divorce, she was \*274 no longer the wife of the testator and did not survive as his widow. See also *Iles v. Iles*, 158 Fla. 493, 29 So.2d 21 (1947), where the Supreme Court of Florida, without benefit of a statute like ours, found that a divorced wife took nothing by a will where the testator gave all his property to his wife in case she survived him, and not otherwise, and provided that if she did not survive him, his property should go to his lawful issue, and that if he left to lawful issue, then to his brother. The testator was drowned

about 11 weeks after his wife obtained a divorce, without having changed his will, and without leaving any children. Cf. *Bell v. Smalley*, 45 N.J.E. 478, 18 A. 70 (1889).

In view of our statute and the presumptions we must indulge, we cannot follow the construction of the will contended for by the appellees. To do so would bring about intestacy and defeat the intent of the testator with respect to the disposition of his property.

[4] We also point out that the bill shows that appellant is entitled to have a construction of the will and that an answer and testimony will probably aid the trial court in construing the will, and that the will in this case should not be construed on demurrer. *Curlee v. Wadsworth*, 273 Ala. 196, 136 So.2d 886 (1962); *Robinson v. Robinson*, 273 Ala. 192, 136 So.2d 889 (1962); *Fillmore v. Yarbrough*, 246 Ala. 375, 20 So.2d 792 (1945).

The judgment, therefore, of the circuit court dismissing appellant's bill of complaint is due to be reversed and the cause remanded to the court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LIVINGSTON, C.J., and LAWSON, MERRILL and BLOODWORTH, JJ., concur.

**Parallel Citations**

239 So.2d 194

**Footnotes**

- 1 See Rees, *American Wills Statutes-II*, 46 Va.Law Rev. 885.
- 2 In *Jeffries v. Boyd*, 269 Ala. 177, 112 So.2d 210 (1959), we held the former spouse was not entitled to be named executrix of her former husband's estate even though the husband had appointed 'my wife' as the executrix. We there cited the provisions of Title 61, s 9(1), even though our statute does not contain any provisions with regard to the effect of a divorce upon the nominations made by a testator of a former spouse as executor.

520 N.W.2d 512  
Court of Appeals of Minnesota.

In re ESTATE OF Ivan S. KERR, deceased.

No. C6-94-773. | Aug. 23, 1994.  
| Review Denied Oct. 14, 1994.

Personal representative of testator's estate brought action alleging that bequest to testator's stepchild was invalid because marriage between testator and stepchild's parent had dissolved. The District Court, Hennepin County, Cara Lee Neville, J., entered judgment for stepchild, and personal representative appealed. The Court of Appeals, Short, J., held that absent manifestation of contrary intention, bequest to specifically named stepchild is effective without regard to whether person occupies descriptive status of stepchild at time of testator's death.

Affirmed.

Davies, J., dissented and filed opinion.

#### **\*513 Syllabus by the Court**

Absent manifestation of a contrary intention, a bequest to a specifically named stepchild is effective without regard to whether the person occupies the descriptive status of stepchild at the time of the testator's death.

#### **Attorneys and Law Firms**

Arthur Sund Nelson, Robert B. Fine, Minneapolis, for appellant.

Mark C. McCullough, Skaar & McCullough, Minneapolis, for respondent.

Considered and decided by DAVIES, P.J. and SHORT and HARTEN, JJ.

#### **OPINION**

SHORT, Judge.

By will, Ivan S. Kerr devised his estate to his wife, son, and stepdaughter. Before his death, he was incapacitated

and then divorced. His will was not changed. By operation of Minn.Stat. § 524.2-508 (1992), the devise to his former spouse was revoked. This case raises the issue whether the divorce had an effect on testator's devise to his stepdaughter. The trial court determined the devise was valid.

#### **FACTS**

On March 1, 1985, Ivan S. Kerr (testator) married Joan Valentine Kerr, now known as Joan Valentine Mohamed. The couple had no children together, but each had a child by a prior marriage. On July 2, 1985, testator executed a will in which he left a bequest to,

all children of mine in being or who are born after the date of this Will including legally adopted children and shall specifically \*514 include my son, Kevin Scott Kerr, and my stepdaughter, Dawn M. Valentine.

Four months later, testator executed a codicil to correct a typographical error; the codicil made no substantive change and affirmed the last will.

In August of 1988, testator became incompetent as a result of Alzheimer's disease and was placed under a conservatorship. Testator's wife commenced a dissolution action and a dissolution decree was entered on December 29, 1988. Testator's wife remarried. On January 9, 1992, testator died unmarried. In October of 1992, testator's will was probated, and his son, Kevin Kerr, was named personal representative of the estate.

#### **ISSUE**

Absent a contrary expressed intent, is the term "stepdaughter" a description or a condition limiting a bequest?

#### **ANALYSIS**

[1] [2] [3] The principle purpose of construing a will is to ascertain the testator's intent at the time of execution. *In re Will of Wyman*, 308 N.W.2d 311, 315 (Minn.1981). But extrinsic evidence of the meaning of a will is admissible only where the text of the will is ambiguous. *In re Will of Hartman*,

347 N.W.2d 480, 483 (Minn.1984); *In re Estate of Zagar*, 491 N.W.2d 915, 916 (Minn.App.1992). The trial court found that testator's will was not ambiguous. Whether the language of a will is ambiguous is a question of law which we review de novo. *Zagar*, 491 N.W.2d at 916 (citing *In re Peavey's Estate*, 144 Minn. 208, 211, 175 N.W. 105, 106 (1919)).

[4] The son argues that testator's intent in defining the word "child" to include "my stepdaughter, Dawn M. Valentine," was to make a devise to a person occupying a particular position. But nowhere in the fifteen-page will or codicil is an intent expressed to exclude the stepdaughter if she ceased to be a stepdaughter because her mother was not married to the testator at the time of his death. We decline to read such a limitation into the document. See *In re Estate of Lutzi*, 266 Minn. 294, 303, 123 N.W.2d 618, 624 (1963) (in construing testamentary provisions, court cannot supply words to bring about a claimed result); *In re Estate of Hoigaard*, 360 N.W.2d 360, 363 (Minn.App.1984) (court's function is not to rewrite will), *pet. for rev. denied* (Minn. Mar. 21, 1985).

[5] The will not only refers to a "stepdaughter," but it mentions the name of a specific individual. In the absence of a contrary intent, the word "stepdaughter," when used in conjunction with an individual's name, is a descriptive term which may not be distorted into a condition limiting the bequest. See, e.g., *In re Estate of McGlone*, 436 So.2d 441, 441 (Fla.App.1983) ("husband" and "wife" are descriptive terms, not limitations); *In re Will of Dezell*, 292 Minn. 179, 180-82, 194 N.W.2d 190, 191-92 (1972) ("daughter-in-law" does not suggest intent to exclude beneficiary if she does not remain married to settlor's son); *In re Application of Carleton*, 105 Misc.2d 444, 432 N.Y.S.2d 441, 443 (N.Y.Sur.Ct.1980) ("wife" is a descriptive term, not a limitation). In addition, the son failed to offer any evidence that a mistake was made in the drafting of the will. Under these circumstances, the will is not ambiguous.

[6] The son also argues that the testator's marriage dissolution revokes the bequest to the stepdaughter. But a marriage dissolution only revokes the devise to a former spouse; all other provisions of the will remain intact. Minn.Stat. § 524.2-508 (1992). The legislature could have chosen to revoke gifts to relatives of a former spouse, but did not do so. Minn.Stat. § 645.16 (1992) (when words of law are clear, the letter of law shall not be disregarded

under the pretext of pursuing the spirit). A testator will not necessarily be estranged from relatives of a former spouse. *Porter v. Porter*, 286 N.W.2d 649, 655 (Iowa 1979). Under these circumstances, the bequest to testator's stepdaughter is not revoked. See *McGuire v. McGuire*, 275 Ark. 432, 631 S.W.2d 12, 14 (1982) (named stepchildren entitled to receive under will after divorce in state with similar statute); *Bowling v. Deaton*, 31 Ohio App.3d 17, 31 O.B.R. 31, 507 N.E.2d 1152, 1154 (1986) (bequest to stepchildren upheld where \*515 statute revoked only bequests to a former spouse).

[7] In the absence of ambiguity, the trial court properly refused to allow the son to introduce extrinsic evidence of testator's intent or evidence of the nature of the relationship between testator and the stepdaughter. *Hartman*, 347 N.W.2d at 483. The plain intention of the testator, as manifested in his will, must govern. *Id.* at 484; see *In re Will of Cosgrave*, 225 Minn. 443, 449, 31 N.W.2d 20, 25 (intention which testator did not express in his will cannot be considered). We will not engage in speculation regarding what the testator would have intended had he foreseen a change in circumstances. *Hartman*, 347 N.W.2d at 484 (court cannot speculate what testator would have done).

## DECISION

The devise to Dawn Valentine was intended without regard to her status at the time of the testator's death. Because the devise was not revoked by the marriage dissolution of her mother and testator, the trial court properly determined that the devise was valid.

**Affirmed.**

DAVIES, Judge, dissenting.  
I respectfully dissent.

In the factual context of this case, common sense suggests that the intent of the testator would have been to terminate the gift to the stepchild upon the end of his marriage to the stepchild's mother. I think it appropriate to take into account that Alzheimer's disease interrupted the ability of the testator to rewrite his will.

219 Va. 599  
Supreme Court of Virginia.

Rose B. JONES et al.

v.

Charles E. BROWN, Individually, etc.

Record No. 770491. | Nov. 22, 1978.

The Circuit Court of City of Norfolk, John P. Harper, Jr., J., entered order construing testator's will from which four of five heirs at law appealed. The Supreme Court, Harman, J., held that: (1) property devised to a former spouse, which is prevented from passing because of statutory revocation, shall pass as if former spouse failed to survive testator unless a contrary intention is apparent from provisions of will, and (2) where applicable provisions of will manifested testator's intent to first prefer his wife, but, after her, to prefer his first heir at law to exclusion of his other four heirs at law, and divorce revoked devise to former wife just as surely as if she had died, it was proper to construe will so that first heir took entire estate under will as though testator's former wife predeceased him, since such construction not only carried out testator's intent, but also avoided intestacy, which was not favored in law.

Affirmed.

West Headnotes (2)

[1] **Wills**

↪ Effect of Failure of Devise or Bequest on Limitation Over or Other Disposition

Property devised to a former spouse, which is prevented from passing because of statutory revocation, shall pass as if former spouse failed to survive testator unless a contrary intention is apparent from provisions of will. Code 1950, § 64.1-59.

1 Cases that cite this headnote

[2] **Wills**

↪ Devises and Bequests Which Fall Into Residuum in General

Where applicable provisions of will manifested testator's intent to first prefer his wife, but, after her, to prefer his first heir at law to exclusion of his other four heirs at law, and divorce revoked devise to former wife just as surely as if she had died, it was proper to construe will so that first heir took entire estate under will as though testator's former wife predeceased him, since such construction not only carried out testator's intent, but also avoided intestacy, which was not favored in law. Code 1959, § 64.1-59.

3 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*812 \*600** Howard I. Legum, Norfolk (Fine, Fine, Legum & Fine, Norfolk, on brief), for appellants.

Marc Jacobson, Norfolk (Charles E. Sizemore, Jr., Moss & Moss, Norfolk, on brief), for appellee.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

**Opinion**

HARMAN, Justice.

This is an appeal by four of the five heirs at law of Wade Benjamin Brown, Jr., deceased, challenging the trial court's construction of the testator's last will and testament. Charles E. Brown, decedent's remaining heir at law, individually and as Administrator, c.t.a., of the testator, is the appellee.

The facts are not in dispute. Wade Benjamin Brown, Jr., a resident of the City of Norfolk, died on July 30, 1976. His will, executed on December 1, 1971, was duly probated in the trial court on August 5, 1976.

The relevant provisions of the will read as follows:

“THIRD: I give, devise and bequeath all of my estate, both real and personal, and whatever kind and wheresoever situate, of which I may die seized or possessed, or to which I or my estate may be entitled at the time of my death, absolutely and in fee simple unto my wife, AGNES JOANNA BROWN, if she shall survive me.

“FOURTH: In the event my said Wife shall not survive me, then, in that event, I give, devise and bequeath, absolutely and in fee simple, all of my estate, both real and personal, and whatever kind and wheresoever situate, of which I may die **\*\*813** seized or possessed, or to which I, or my estate, may be entitled at the time of my death, absolutely and in fee simple to CHARLES EDWARD BROWN.”

**\*601** When the will was executed, the testator was married to Agnes Joanna Brown. Subsequent to execution of the will, but prior to his death, the testator and his wife were divorced a vinculo matrimonii. The former wife survived the testator. While she was a party to the original suit, she did not appeal the chancellor's ruling that the devise to her was revoked under Code s 64.1-59<sup>\*</sup>, so this holding has become final.

The chancellor, following the rule adopted by a majority of our sister states where this same question has arisen, held that Charles E. Brown took the entire estate under paragraph “Fourth” of the will as though the testator's former wife predeceased him.

Here, as in the trial court, appellants contend that the devise to Charles E. Brown contained in paragraph “Fourth” of the will did not become effective because the express condition precedent to the devise, that Agnes Joanna Brown die before the testator, did not occur. Therefore, they argue, the testator died intestate as to his entire estate and the estate should be distributed in equal shares to the testator's five heirs at law.

The appellee argues that the trial court should be affirmed as only paragraph “Third”, devising testator's estate to his former spouse, was revoked by virtue of Code s 64.1-59. This being so, he says, the devise in paragraph “Fourth” became effective as it was clearly the testator's intent that Charles Edward Brown inherit testator's entire estate if the devise to testator's wife lapsed or was revoked.

While the question presented is one of first impression in Virginia, the courts in our sister states have been presented with the same or similar questions and have emerged with conflicting views. Annot., 74 A.L.R.3d 1108 (1976).

One line of decisions holds that where the devise to a former spouse is barred as the result of divorce, a gift over on condition that the spouse predecease the testator will be literally construed and the gift over will not be effective where the former spouse **\*602** survived the testator. See, e. g., In

re Estate of Rosecrantz, 183 Wis. 643, 198 N.W. 728 (1924); In re Will of Lampshire, 57 Misc.2d 332, 292 N.Y.S.2d 578 (Sur.Ct.1968); Contra, In re Will of Sharinay, 58 Misc.2d 334, 295 N.Y.S.2d 502 (Sur.Ct.1968).

However, a majority of the other jurisdictions, although not always for the same reasons, have held the gift over to be effective. For example, the Supreme Court of Alabama, relying primarily on the testator's intent and the presumption against intestacy, held “that property which is prevented from passing . . . because of revocation by divorce should pass as if the former spouse failed to survive the decedent, unless a contrary intention is apparent from the provisions of the will.” First Church of Christ, Scientist v. Watson, 286 Ala. 270, 272, 239 So.2d 194, 196 (1970).

The Supreme Court of Kansas, confronted with a devise to a former spouse barred by divorce, sustained a gift over conditioned on nonsurvivorship because failure to do so “would defeat the clear intention of the testator with respect to the disposition of his property and would bring about an intestacy which should be avoided when possible.” Russell v. Estate of Russell, 216 Kan. 730, 733, 534 P.2d 261, 265 (1975). Similarly, other courts, to effectuate the testator's intent, have sustained a gift over, which is conditioned on nonsurvivorship, of property barred by divorce from passing to a former spouse. Peiffer v. Old Nat'l Bank & Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931); In re Estate of Fredericks, 311 So.2d 376 (Fla.App.1975); In re Estate of Shelton, 19 Ill.App.3d 542, 311 N.E.2d 780 (1974); Steele v. Chase, 151 Ind.App. 600, 281 N.E.2d 137 (1972). See also, **\*\*814** In re Estate of McLaughlin, 11 Wash.App. 320, 523 P.2d 437 (1974).

[1] Believing it to be sounder and in accord with our rules of construction, we adopt the majority rule; namely, that property devised to a former spouse, which is prevented from passing because of statutory revocation, shall pass as if the former spouse failed to survive the decedent unless a contrary intention is apparent from the provisions of the will.

We believe this course is dictated by the rules of construction long followed by this court, and as recently restated in Draper v. Piedmont Trust Bank, 214 Va. 59, 61, 197 S.E.2d 178, 180 (1973), where we said:

**\*603** “The principles of law which control the disposition of this case are well settled and have been often stated. That the intent of the testator

must control is the cardinal rule in the construction of wills, and if that intent can be clearly conceived and is not contrary to some positive rule of law, it must prevail. *Newton v. Newton*, 199 Va. 785, 102 S.E.2d 312 (1958). Where a will has been executed, the reasonable and natural presumption is that the testator intended to dispose of his entire estate. Accordingly, where two modes of interpretation are possible, that is preferred which will prevent either total or partial intestacy. *Baptist Home v. Mizell, Adm'r*, 197 Va. 399, 89 S.E.2d 332 (1955).”

[2] When we look to the four corners of the will at issue here, its applicable provisions manifest a clear intent on the part of the testator to first prefer his wife, but, after her, to prefer Charles E. Brown to the exclusion of the other heirs at law. The divorce revoked the devise to the former wife just as surely as if she had died. If the wife could not take under the will, it is evident that the testator wanted his property to pass to Charles E. Brown. We believe this construction not only carries out what we perceive to be the testator's clear intent, it also avoids intestacy, which is not favored in the law.

For these reasons, the decree of the trial court will be affirmed.

Affirmed.

**Parallel Citations**

248 S.E.2d 812

**Footnotes**

- \* Code s 64.1-59 provides:  
“If, after making a will, the testator is divorced a vinculo matrimonii, all provisions in the will in favor of the testator's divorced spouse are thereby revoked.”

216 Kan. 730  
Supreme Court of Kansas.

Daniel Alan RUSSELL and Kay Marlene  
Russell, Petitioners-Appellants,

v.

In the Matter of the ESTATE of Milton  
C. RUSSELL, Deceased, et al., Appellees.

No. 47611. | April 5, 1975.

Petition was brought to construe a will. The Sedgwick District Court, Division No. 4, James V. Riddel, J., entered judgment in favor of adopted child, and natural children appealed. The Supreme Court, Prager, J., held that where testator left estate to his wife and to certain named children if wife should predecease him, and where testator and his wife were thereafter divorced, requiring revocation of will provisions in favor of wife in accordance with statute, divorced wife would be considered as having predeceased testator in order to give effect to the bequest to the children.

Affirmed.

Fromme, J., not participating.

West Headnotes (2)

[1] **Wills**

☛ Intention of Testator

**Wills**

☛ Contravention of Law

**Wills**

☛ Operative Effect, and Construction Against Intestacy

**Wills**

☛ Operative Effect of All Parts of Will

**Wills**

☛ Construction as a Whole

In construing a will courts must arrive at intention of testator from examination of the whole instrument if consistent with rules of law, giving every single provision thereof a practicable operative effect, uphold it if possible, avoid any interpretation resulting in intestacy

when possible, give supreme importance to intention of testator, and when language found in such instrument is clearly and unequivocally expressed, determine intent and purpose of testator without resort to rules of judicial construction applicable to interpretation of an instrument which is uncertain, indefinite and ambiguous in its terms.

5 Cases that cite this headnote

[2] **Wills**

☛ Construction and Operation of Conditions

Where testator's will left estate to his wife and to certain named children should wife predecease him, and where thereafter testator and wife were divorced, with the result that provisions in wife's favor contained in second paragraph of will were revoked in accordance with statute, divorced wife would be considered as having predeceased testator, so that conditions at beginning of third paragraph of will which stated "In the event my wife \* \* \* should predecease me \* \* \* " was also nullified by statute, so that estate would pass by virtue of remaining provisions of third paragraph of will. K.S.A. 59-610.

5 Cases that cite this headnote

**\*730 \*\*262** Syllabus by the Court

1. In construing a will courts must (a) arrive at the intention of the testator from an examination of the whole instrument, if consistent with rules of law, giving every single provision thereof a practicable operative effect, (b) uphold it if possible, (c) avoid any interpretation resulting in intestacy when possible, (d) give supreme importance to the intention of the testator, and (e) when the language found in such instrument is clearly and unequivocally expressed determine the intent and purpose of the testator without resort to rules of judicial construction applicable to the interpretation of an instrument which is uncertain, indefinite and ambiguous in its terms. (Following *In re Estate of Porter*, 164 Kan. 92, 187 P.2d 520.)

2. Where a testator left his estate to his wife, but if she should predecease him, then to certain named children, and the testator and his wife were then divorced, and the will

provisions in favor of the wife were revoked by the divorce in accordance with K.S.A. 59-610, it is held that the will should be construed in accordance with the rules for construction of wills set forth in Syllabus 1, so that the divorced spouse is to be considered as having predeceased the testator in order to give effect to the bequest to the children.

#### Attorneys and Law Firms

Kenneth H. Hiebsch, of Gamelson, Hiebsch, Robbins & Tinker, Wichita, argued the cause, and was on the brief for the appellants.

Carl N. Kelly, Wichita, Guardian ad Litem of John Jacob Russell, argued the cause, and was on the brief, and Thomas A. Bush, of Grist & Bush, Wichita, was on the brief for Michael D. Wilson, Administrator, appellees.

#### Opinion

PRAGER, Justice:

This is an action to construe a will. The facts in this case are not in dispute and are as follows: Milton C. Russell died at Wichita, April 28, 1972. His Last Will and Testament dated May 14, 1969, was admitted to probate. At the time the deceased executed his will he was married to Ina Clare Russell; they were divorced on February 20, 1970. The will dated May \*\*263 14, 1969, was not revoked by the testator prior to his death. Ina Clare \*731 Russell survived the testator. The decedent was a single man at the time of his death and his heirs at law were the appellants, Daniel Alan Russell and Kay Marlene Russell, his natural children, and John Jacob Russell, his adopted child, who is the appellee on this appeal represented by his guardian ad litem, Carl N. Kelly. The appellants, Daniel Alan Russell and Kay Marlene Russell, filed their petition to construe the will in the probate court of Sedgwick county. The case was certified to the district court for trial.

The will contained two paragraphs which are involved in this case. They are as follows:

'SECOND: I hereby give, devise and bequeath all my estate, real, personal or mixed, whatsoever and wheresoever situated, which I own or to which I may be entitled, or which I may have power to dispose of at my death, to my wife, Ina Clare Russell, in fee simple absolute.

'THIRD: In the event my wife, Ina Clare Russell, should predecease me or in the event that we should both be taken in a

common disaster, I hereby devise the sum of \$1.00 to my son, Daniel Alan Russell, the sum of \$1.00 to my daughter, Kay Marlene Russell, and all of the rest, residue and remainder of my estate, whatsoever and wheresoever situated, which I own or to which I may be entitled or which I may have power to dispose of at my death, I hereby give, devise and bequeath to my son, John Jacob Russell.'

The case was tried in the district court upon a written stipulation of fact which incorporated the statement of facts set forth above. The issue of law presented to and determined by the trial court involves the construction of these will provisions in light of K.S.A. 59-610 which provides in part as follows:

'59-610. Revocation by marriage, birth or adoption; divorce. . . . If after making a will the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked.'

The trial court found that this provision of K.S.A. 59-610 revoked and nullified the second paragraph of the will and barred Ina Clare Russell from taking any of the deceased's property under that paragraph. On this finding the parties are not in dispute. The trial court further held that 59-610 also had the effect of taking out or nullifying the condition contained at the beginning of paragraph three which stated as follows:

'In the event my wife, Ina Clare Russell, should predecease me or in the event that we should both be taken in a common disaster, . . .'

In addition the trial court held that the estate of the decedent passed by virtue of the remaining provisions of the third paragraph and should be distributed as follows: \$1.00 to his son, Daniel Alan Russell; \$1.00 to his daughter, Kay Marlene Russell; and all the \*732 rest, residue and remainder of his estate to his son, John Jacob Russell. The ruling of the trial court gave effect to the third paragraph of the will and construed the will as though Ina Clare Russell, the divorced survivor, had predeceased the testator. The trial court entered judgment awarding the appellants, Daniel Alan Russell and Kay Marlene Russell, the amount of \$1.00 each, and the remainder of the estate was awarded to John Jacob Russell.

Daniel Alan Russell and Kay Marlene Russell have brought a timely appeal to this court.

The appellants raise three points of error which in their essence present one issue to be determined: How should the provisions of paragraph three of the will be construed in view of the subsequent divorce and in light of the provisions of K.S.A. 59-610?

The appellants contend that K.S.A. 59-610 had the effect of revoking only those provisions of the will in favor of the surviving divorced spouse as contained in the second paragraph and that the statute **\*\*264** should not be construed to have the effect of revoking any portion of paragraph three which contained no provision in favor of the divorced spouse. The specific bequest to the children under the third paragraph was to take effect only on the condition that Ina Clare Russell should predecease the testator in the event they should both be taken in a common disaster. Appellants maintain that since Ina Clare Russell survived the testator the condition precedent did not occur, and therefore, the bequest to the children was nullified. There being no provisions in the will for disposing of the testator's estate under the factual circumstances, the entire estate of the testator passed by intestate succession, 1/3 to each of the appellants and 1/3 to the appellee, John Jacob Russell. Stated simply, the appellants want the will to be construed strictly in accordance with the language contained in the third paragraph.

The appellee, John Jacob Russell, takes the position that in construing a will a court must determine the intention of the testator from an examination of the entire instrument. Here appellee maintains that the will is clear and unambiguous and it states exactly what the testator intended. The testator intended that all property which did not pass to his wife, would pass to his son, John Jacob Russell, except for \$1 which he intended to go to Daniel Alan Russell and \$1 which he intended to go to Kay Marlene Russell.

The issue presented here is one of first impression in this jurisdiction. The courts of other jurisdictions have been faced with almost identical factual situations and have reached conflicting **\*733** results. The appellants rely primarily upon *Matter of Lampshire*, 57 Misc.2d 332, 292 N.Y.S.2d 578. *Lampshire* is a decision of the surrogate's court of Erie county decided in 1968. The New York statute involved there was substantially the same as K.S.A. 59-610. The will provisions were almost identical to those before us here. The court strictly construed the New York statute and held

that the expressed condition precedent that the testator's wife predecease him not having occurred, the bequest over in favor of the children could not be enforced and that the estate of the testator passed as though there was an intestacy. The New York court reasoned that if the legislature had desired the divorced spouse to be considered predeceased as a result of the divorce, it would have so stated specifically in the applicable statute, as was done by the Missouri legislature when it to specifically provided. (Vernon's Missouri Statutes Annotated s 474.420.)

The appellee, John Jacob Russell, relies upon cases from other jurisdictions which hold that under factual circumstances as we have in this case the will should be construed and given effect as though the divorced spouse had predeceased the testator. The appellee's position is supported by the following decisions: *Peiffer v. Old National Bank & Union Tr. Co.*, (1931) 166 Wash. 1, 6 P.2d 386; *Volkmer v. Chase*, (Tex.Civ.App.1962) 354 S.W.2d 611; *First Church of Christ v. Watson*, (1970) 286 Ala. 270, 239 So.2d 194; *Steele v. Chase*, (Ind.Ct. of App.1972) 281 N.E.2d 137. The rule of these cases also finds support in the Uniform Probate Code s 2-508 which provides in pertinent part as follows:

' . . . Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, . . . '

While the Kansas statute does not contain this provision of s 2-508 of the Uniform Probate Code, we are impressed by the fact that it was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1969.

[1] [2] We have concluded that the rule applied by the trial court and asserted by the appellee on this appeal should be adopted and followed in this jurisdiction. We hold that under the factual circumstances and the will provisions in this case, property which is prevented from passing to a **\*\*265** former spouse because of revocation by divorce or annulment under the provisions of K.S.A. 59-610 passes as if the former spouse failed to survive the decedent. We **\*734** take this position not only because of the fact that it represents the majority view but also because we consider it the better reasoned rule and more in line with the rationale of prior decisions of this court.

In *In re Estate of Porter*, 164 Kan. 92, 187 P.2d 520, we summarized the rules which should be applied by our courts in construing wills. There we stated in Syl. 6:

‘In construing a will courts must (a) arrive at the intention of the testator from an examination of the whole instrument, if consistent with rules of law, giving every single provision thereof a practicable operative effect, (b) uphold it if possible, (c) avoid any interpretation resulting in intestacy when possible, (d) give supreme importance to the intention of the testator and, (e) when the language found in such instrument is clearly and unequivocally expressed determine the intent and purpose of the testator without resort to rules of judicial construction applicable to the interpretation of an instrument which is uncertain, indefinite and ambiguous in its terms.’

When we apply these rules for construction of wills to the factual circumstances before us along with the provisions of K.S.A. 59-610, we cannot construe paragraph there of the will in the manner contended for by the appellants. To do so in our judgment would defeat the clear intention of the testator with respect to the disposition of his property and would bring about an intestacy which should be avoided when possible. It is clear to us that the principle of law adopted and applied by the trial court was correct and its judgment should not be disturbed.

The judgment is affirmed.

FROMME, J., not participating.

**Parallel Citations**

534 P.2d 261, 74 A.L.R.3d 1102

151 Ind.App. 600

Court of Appeals of Indiana, Third District.

William Kenneth STEELE and  
Capitola Jacquetta Steele, Appellants,

v.

Carlton CHASE, Administrator W.W.A. of the  
Estate of Carl Barany, Deceased, et al., Appellees.

No. 1271A262. | April 13, 1972.

Proceeding for construction of a will. The Circuit Court, Steuben County, Jack P. Dunten, Special Judge, held that the divorced wife and stepson of the testator took nothing under the will, and they appealed. The Court of Appeals, Hoffman, C.J., held that where the testator left his estate to his wife but, if his wife did not survive him by 30 days, one-half of his estate was to go to his stepson and the other one-half to the testator's brothers, and the testator and his wife were then divorced, the statute concerning revocation of will provisions by divorce or annulment required that the divorced spouse be considered as having predeceased the testator, and the manifest intent of the testator was to be given effect by giving effect to the gift to the stepson and brothers.

Judgment as to divorced wife affirmed; judgment as to stepson reversed and cause remanded with instructions.

West Headnotes (2)

[1] **Wills**

☛ Divorce

Where testator left his estate to his wife but, if his wife did not survive him by 30 days, one-half of his estate was to go to his stepson and the other one-half to testator's brothers, and testator and his wife were then divorced, statute concerning revocation of will provisions by divorce or annulment required that a divorced spouse be considered as having predeceased testator, and manifest intent of testator was to be given effect by giving effect to gift to stepson and brothers. IC 1971, 29-1-5-8, Burns' Ann.St. § 6-508.

6 Cases that cite this headnote

[2] **Wills**

☛ Intention of Testator

Court may not speculate as to what a decedent's intentions may have been and thus rewrite his will. IC 1971, 29-1-5-8, 29-1-6-5, Burns' Ann.St. §§ 6-508, 6-605.

1 Cases that cite this headnote

**Attorneys and Law Firms**

\*601 \*\*137 Wilson E. Shoup, Angola, for appellants.

Harris W. Hubbard, Angola, for appellees Julius Baranyai, David Baranyai and Joseph Baranyai.

Albert M. Friend, Angola, for appellee Carlton Chase, Administrator W.W.A. of Estate of Carl Barany, deceased.

**Opinion**

HOFFMAN, Chief Judge.

The sole issue presented by this appeal is whether IC 1971, 29-1-5-8, Ind. Ann. Stat. s 6-508 (Burns 1953) operates to exclude the decedent's stepson from the terms of the decedent's will.

The facts giving rise to this appeal are as follows:

On or about January 26, 1968, Carl Barany, the decedent, and Capitola Jacquetta Steele were married. On January 30, 1968, Carl Barany executed and published his Last Will and Testament, a portion of which is the subject of this appeal and reads as follows:

**‘ARTICLE I**

‘I declare that I am married, and that my wife's name is Capitola Jacquetta Barany.

**‘ARTICLE II**

‘I give, devise, and bequeath all of my property, real, personal, or mixed, of whatsoever kind and nature and wheresoever situated, which I may own or of which I may have the right

to dispose at the time of my death, to my beloved **\*\*138** wife, Capitola Jacquetta Barany, as her property, **\*602** in fee simple, absolutely and forever, provided she is living subsequent to thirty (30) days from the date of my death.

### ‘ARTICLE III

‘If my wife predeceases me, or is not living subsequent to thirty (30) days after the date of my death, all of my estate, whether real, personal, or mixed, of whatsoever kind and nature and wheresoever situated, is to be divided and distributed as follows: One-half to my wife’s son, William Kenneth Steele, and one-half to be divided equally among each of my brothers, \* \* \*.’

Carl Barany and Capitola Jacquetta Barany received a decree of absolute divorce on January 21, 1970, at which time a property agreement was made a part of the judgment.

Carl Barany died on January 16, 1971, without revoking his will or executing a new will.

After such will was admitted to probate, the administrator filed a petition requesting that the court ‘construe the Will of Carl Barany; that the Court find and determine that Capitola Jacquetta Barany and William Kenneth Steele according to the laws of the State of Indiana have no interest in the estate of Carl Barany; and that said estate be distributed to the heirs at law of Carl Barany; namely: Julius Baranyai, David Baranyai, and Joseph Baranyai; and for all other proper relief in the premises.’

Thereafter, Capitola Jacquetta Steele and William Kenneth Steele filed their appearances and objections to the granting of the relief prayed for in such petition of the administrator. Following argument and consideration of the briefs filed by the parties, the trial court entered its findings which, in pertinent part, read as follows:

‘5. That at all times relevant to this cause there was in effect in this State the following statutory provision: Burns 6-508. Change of circumstances causing revocation-Divorce or annulment of marriage. If after making a will the testator is divorced, all provisions of the will in favor of the testator’s spouse so divorced are thereby revoked. **\*603** Annulment of the testator’s marriage shall have the same effect as a divorce as hereinabove provided. With this exception, no written will, nor any part thereof, can be revoked by any change in the

circumstances or condition of the testator. (Acts 1953, ch. 112, Sec. 507, p. 295.)

‘The court therefore finds that pursuant to the said Burns statute above quoted Article II of said Will is revoked by operation of law.

‘6. Court further finds that Article III of said Will required that certain conditions occur before it could become effective, and that since said conditions precedent were not met, Article III of said Will is also ineffective.

‘7. The court further finds that said decedent died intestate and that his estate shall pass to his heirs-at-law, pursuant to the statutes concerning intestacy.’ (Emphasis are those of trial court.)

In accordance with these findings the trial court entered its judgment that ‘Capitola Jacquetta Barany (Steele) and William Kenneth Steele have no interest in the Estate of Carl Barany, deceased.’, and that ‘said estate shall be distributed to the heirs-at-law of Carl Barany, \* \* \*.’

Capitola Jacquetta Steele and William Kenneth Steele timely filed their motion to correct errors asserting that ‘1. The decision is not supported by sufficient evidence and is contrary to the evidence \* \* \*.’; and, ‘2. The decision is contrary to law \* \* \*.’ Such motion was subsequently overruled by the trial court and appellants, Capitola Jacquetta Steele and William Kenneth Steele, have perfected **\*\*139** this appeal. On appeal both specifications of error as contained in the motion to correct errors have been combined into one argument. The sole issue here presented, as stated by appellants, is ‘whether the trial court was correct in holding that the decedent Carl Barany died intestate \* \* \*.’

Initially, we find that Finding No. 5 of the trial court, hereinbefore set forth, was correct. Article II of the will of Carl Barany, the provision in favor of his former wife, Capitola Jacquetta Barany (now Steele), was revoked by operation of law when the decree of absolute divorce was **\*604** lawfully entered. Section 6-508, supra, as is here pertinent, provides that ‘(i)f after making a will the testator is divorced, all provisions in the will in favor of the testator’s spouse so divorced are thereby revoked.’

Under the language of s 6-508, supra, the judgment of the trial court that Capitola Jacquetta Barany (Steele) has no interest in the estate of Carl Barany, deceased, should be affirmed.

The remaining question is whether the judgment of the trial court that William Kenneth Steele has no interest in the decedent's estate is correct.

The construction of a will when gathered from the language of the will or from the will and surrounding circumstances which are not in dispute is a question of law. *Ford v. Cleveland* (1942), 112 Ind.App. 420, 44 N.E.2d 244.

See also:

IC 1971, 29-1-6-5, Ind. Ann. Stat. s 6-605 (Burns 1953).

In construing and interpreting a will, the governing factor is the intent of the testator so long as it does not interfere with established rules of law. *In re Estate of Brown* (1969), 145 Ind.App. 591, 252 N.E.2d 142, 19 Ind.Dec. 178, (transfer denied). In arriving at the intention of the testator, the will in all its parts must be considered together and read in light of the circumstances surrounding the testator at the time of its execution. *Epply et al. v. Knecht et al.* (1967), 141 Ind.App. 491, 230 N.E.2d 108 (transfer denied). It has also been held that where the meaning of a will is plain the court is limited in its interpretation to the four corners of the instrument itself. However, where there is an ambiguity, the court may consider the circumstance surrounding the testator at the time of the execution of the will. *Stoner v. Custer, Extr. et al.* (1969), 252 Ind. 661, 666, 251 N.E.2d 668.

In the instant case the only evidence in the record before us bearing on the intent of the testator was the language \*605 of the will itself and the undisputed facts as hereinbefore set forth. From this evidence the trial court concluded that the language in the will, '(i)f my wife predeceases me, or is not living subsequent to thirty (30) days after the date of my death, \* \* \*.' was a condition precedent which had not been met because of the divorce and, therefore, Article III was void.

This appears to be a question of first impression in this jurisdiction. However, other States have passed on this question.

*In re Will of Lampshire* (1968), 57 Misc.2d 332, 292 N.Y.S.2d 578, the third paragraph of the testator's will stated:

'Third: In the event my wife should predecease me \* \* \* I give, devise and bequeath said residue in equal shares, per stirpes, to the children of my wife \* \* \*.'

The applicable New York statute stated, '(i)f, after executing a will, the testator is divorced, \* \* \* the divorce, \* \* \* revokes any disposition or appointment of property made by the will to the former spouse \* \* \*.' (Ibid at 579.)

The court held that:

'Paragraph Third is predicated on a condition set forth therein and limited thereby. The expressed contingency not having occurred, the result is intestacy.' (Ibid at 580.)

**\*\*140** Such result as reached by the New York Court appears to be in the minority. The Uniform Probate Code Pamphlet, s 2-508, at 51, in pertinent part, provides:

'Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, \* \* \*.'

The latter result has also been reached in a number of other jurisdictions which have decided this issue. In **\*606** *First Church of Christ, Scientist v. Watson* (1970), 286 Ala. 270, 239 So.2d 194, at 195, the sole question presented involved the construction to be given the following will clause:

"'I give, devise and bequeath all of my property, real, personal and mixed, wheresoever located to my beloved wife, Lillie Grice Watson, to have and to hold as her property absolutely; provided that she lives to survive me for a period of (30) thirty days; but in the event of her death prior to the end of said period, then to The First Church of Christ, Scientist, Boston, Massachusetts.'"

The testator and his wife were subsequently divorced, however the testator died without revoking his will. The applicable statute provided, '(a) divorce from the bonds of matrimony operates as a revocation of that part of the will of either party, made during coverture, making provision for the spouse of such party; \* \* \*.' The Supreme Court of Alabama held 'that property which is prevented from passing to the

former spouse because of revocation by divorce should pass as if the former spouse failed to survive the decedent.' (Ibid at 196 of 239 So.2d.)

See also:

Peiffer v. Old Nat. Bank & Union Trust Co. (1931), 166 Wash. 1, 6 P.2d 386;  
Volkmer v. Chase (Tex.Civ.App.1962),  
354 S.W.2d 611.

While the above cases only serve as persuasive authority, the result reached that property prevented from passing because of the divorce passes as if the former spouse failed to survive the decedent is the correct result under our statute. For instance, had the testator provided that if his wife should predecease him then his estate should go to a named relative, third person or charitable institution, with no provision in case of divorce, but without altering his will after subsequent divorce, it would be contrary to the intention of such testator for a court to disregard the named beneficiary and permit the estate to pass by intestacy.

**\*607** Furthermore, it has been generally held that the law does not favor and will avoid intestacy whenever possible. Carey v. White, Admr., etc., et al. (1955), 126 Ind.App. 418, 126 N.E.2d 255 (transfer denied); Keplinger v. Keplinger (1916), 185 Ind. 81, 113 N.E. 292.

[1] Here, the intent of Carl Barany was clearly expressed. He intended that if his wife did not survive him by thirty days, one-half of his estate should go to his stepson, William Kenneth Steele, and the other one-half to his three brothers. Because we have construed s 6-508, supra, to require that the

divorced spouse is to be considered as having predeceased the testator the condition precedent is satisfied. The manifest intent of Carl Barany must be given effect as required by the last sentence of s 6-508, supra.

[2] We have considered appellees' arguments that Article II is a residuary clause and that Article III is subject to a condition precedent which has not been met. The former argument fails because it does not consider all the provisions of the will. The latter argument has been herein amply discussed. We recognize that in certain circumstances a relative of a divorced spouse may receive a greater devise than the heirs at law, yet a court may not **\*\*141** speculate as to what a decedent's intentions may have been and thus rewrite his will. Szulkowska v. Werwinski (1941), 109 Ind.App. 511, 518, 36 N.E.2d 948.

The plain intention of the testator as manifested in his will must govern.

The judgment of the trial court that Capitola Jacquetta Barany (Steele) has no interest in the estate of Carl Barany, deceased, is affirmed; the judgment of the trial court that William Kenneth Steele has no interest in the decedent's estate is reversed; and this cause is remanded to the trial court with instructions to enter judgment consistent with this opinion.

**\*608** Judgment affirmed in part and reversed in part, and cause remanded with instructions.

SHARP and STATON, JJ., concur.

**Parallel Citations**

281 N.E.2d 137