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TOO NARROW TO BE TRUE: MONTANA'S INTERPRETATION OF DEPENDENT RELATIVE REVOCATION

Timothy D. Geiszler

One purpose of the law of wills is to discover and make effective the intent of the decedent in the distribution of his property.¹ People normally set forth the scheme for the distribution of their property in a will. Wills must conform to certain statutory standards to be valid and enforceable.² A problem arises when the will sufficiently explains the decedent's desires, but is denied probate because it fails to comply with the requirements mandated by statute. Judicial responses to this problem are many. The object of this note is to focus on one solution, the doctrine of dependent relative revocation, and its applicability in Montana as demonstrated by *In re Patten*.³

I. INTRODUCTION TO THE DOCTRINE

A. *The Traditional Doctrine*

The doctrine of dependent relative revocation (DRR) is a rule of presumed intent⁴ used in certain circumstances to set aside a revocation of an earlier will. According to the doctrine, if a testator revokes or destroys his old will and substitutes another which fails for any reason, a rebuttable presumption arises that he would prefer to have his property distributed according to the earlier will than according to intestate succession statutes. DRR complements the general presumption that one would prefer to die testate.⁵

Generally, three elements must exist before DRR can be applied. They are: (1) revocation of a valid will by physical act⁶ as part of a plan to make a new will; (2) preparation of a second will containing a plan of distribution similar to that of the revoked will; and (3) invalidation of the second will. To avoid the unexpected intes-

1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 72-1-102(2)(b) (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 91A-1-102(2)(b)).

2. See MCA § 72-1-101 *et seq.* (1978) (formerly codified at R.C.M. 1947, § 91A-1-101 *et seq.*).

3. ___ Mont. ___, 587 P.2d 1307 (1978).

4. See, e.g., *Estate of Lubbe*, 142 So. 2d 130 (Fla. 1962).

5. See T.E. ATKINSON, *LAW OF WILLS* [hereinafter cited as ATKINSON] 814 (2d ed. 1953).

6. An exception to the general requirement of revocation by physical act is the rare occurrence of a subsequent valid will which revokes the earlier will and demonstrates a reliance on a mistake of law or fact. For example, "Since my children are all dead, I hereby revoke all my earlier wills and declare this will to be" In this situation DRR can be applied to set aside the revocation if any child is still alive. ATKINSON, *supra* note 5, at 459.

tacy in this situation, proponents of the earlier will may argue that based on the doctrine of DRR, the first will was not revoked *absolutely*. Recall that revocation consists of an act coupled with an intent to revoke. A court applies DRR when its examination reveals an intent different from an absolute intent to revoke. Particularly, the court finds an intent to revoke coupled with a reliance on the validity of the later will. The court often labels this intent "conditional."⁷ Stated succinctly, when a testator substantially repeats the same dispositive plan in a new will, revocation of the old will is deemed inseparably related to and dependent upon the legal effectiveness of the new one.⁸

The court, in presuming a conditional intent, engages in a legal fiction. Because a decedent rarely entertains doubts as to the validity of his latest will, his subjective intent is to revoke the first will absolutely. Nevertheless, the courts find grounds for conditional revocation. In applying DRR, courts may refer to the revocation as conditional or based on mistake. In either instance, the testator revoked the first will on the assumption that the second will was valid.⁹

Similarity between the dispositive schemes of the two wills is an essential element of DRR.¹⁰ Indeed, it is this similarity that is the basis for the presumption that the testator would prefer the earlier will to intestacy. Similarity of dispositive schemes of the two wills indicates that the testator is partially satisfied with the earlier will.¹¹ For example, if the first will leaves the bulk of the estate to Peter and the second leaves the bulk of the estate to Paul, there is no evidence implying that the testator, given the invalidity of the second will, would still prefer Peter to take the bulk of the estate. DRR therefore would not be applicable in such a case. On the other hand, if the first and second wills had both devised the bulk of the estate to Peter and only minor differences existed between the two wills, it is reasonable to infer that the testator would want the first will to be valid. This is especially true if intestate succession provisions would serve significantly to reduce or negate Peter's interest. Thus, the standard the court should use in determining the appli-

7. See, e.g., *Flanders v. White*, 142 Or. 375, 18 P.2d 823 (1933).

8. *In re Kaufman*, 25 Cal. 2d 854, 155 P.2d 831, 834 (1945).

9. DRR is not suited for all instances of mistake, but is limited to situations where the mistake is connected with a subsequent dispositive attempt. In *Emenecker's Estate*, 218 Pa. 369, 67 A. 701 (1907), the testatrix destroyed her will believing a neighbor's incorrect advice that the will was invalid. She expressed an intention to make a new will at the next convenient time, but never did. The court refused to apply DRR because there was no subsequent attempted disposition. *Id.* at 372, 67 A. at 702. This case exemplifies the limited scope of DRR as a means of effectuating intent in cases of mistaken revocation.

10. See, e.g., *Estate of Lubbe*, 142 So. 2d 130 (Fla. 1962).

cability of DRR is whether the testator would have preferred the earlier will to intestacy.¹²

B. *Extensions of the Traditional Doctrine*

Courts have applied DRR to instances of partial revocation and revocation by subsequent writing. In cases of partial revocation, DRR may be applied when the testator attempts to alter his executed will by changing the name of a beneficiary, the amount of a legacy, or some other provision of the will.¹³ For example, if Testator crosses out John's name on an executed will and writes in Mary's, the addition of Mary's name is ineffective for lack of proper execution.¹⁴ In Montana, the crossing out of John's name would constitute a partial revocation.¹⁵

Courts in other jurisdictions have taken two approaches to this situation. Some courts apply DRR mechanically on the premise that the testator would not prefer the revocation to be effective unless the modification is enforceable.¹⁶ To use the example above, if the addition of Mary's name is ineffective, the court would automatically set aside the revocation of John's devise. Other courts, using a more intent-oriented approach, do not apply DRR unless the court infers from the will that the testator would have preferred the revocation to stand even if the substitution is ineffective.¹⁷ Using the intent approach, the court would enforce the original bequest if it had been increased by an unattested change, but would not enforce the bequest if it were significantly decreased.¹⁸ Just as DRR is not applicable when two wills have substantially different dispositive schemes, it also is not applicable when the difference between the original bequest and the invalid addition implies dissatisfaction with the original bequest.

DRR has also been extended to situations in which the earlier will is expressly revoked by a valid subsequent will which is par-

12. See, Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337 (1920). When revocation of the earlier will is by physical act, parol evidence is admitted to determine whether the testator had conditional intent at the time of the revocation. The admissibility of this evidence is helpful since the proponent of DRR must show the testator relied on the validity of the second will. The availability of this evidence, however, is limited since most wills are destroyed or modified in private. *Id.* at 347. In Montana, statements made by the testator at any time other than execution or revocation are normally inadmissible. *In re Colbert's Estate*, 31 Mont. 461, 78 P. 971 (1904).

13. ATKINSON, *supra* note 5, at 458.

14. See MCA § 72-2-302 (1978) (formerly codified at R.C.M. 1947, § 91A-2-502).

15. MCA § 72-2-321(2) (1978) (formerly codified at R.C.M. 1947, § 91A-2-507(2)).

16. ATKINSON, *supra* note 5, at 458.

17. See, e.g., *Ruel v. Harding*, 90 N.H. 240, 6 A.2d 753 (1939).

18. *Id.* This latter approach is more consistent with the rationale of DRR in that it focuses on the testator's intent.

tially ineffective. For example, a devise in a later valid will, revoking all prior wills, might be ineffective in Montana because the devisee was a witness to the will.¹⁹ Another example is a charitable bequest denied effect by a *mortmain* statute.²⁰ In *In re Kaufman*,²¹ the testator redrafted an earlier will changing only the executor. The second will, like the first, left the residue of the estate to a New York church. Because the second will was executed within thirty days of Kaufman's death, the bequest was barred by California's *mortmain* statute.²² The second will included a valid revoking clause. Since the earlier will contained the same residuary devise to the church and was executed more than thirty days before the testator's death, the court applied DRR and allowed the church to take under the earlier will.²³

II. *In re Patten*

Until recently, the Montana Supreme Court had not considered the doctrine of dependent relative revocation. Arguably, the doctrine is part of the common law,²⁴ and the Montana Uniform Probate Code does not prohibit its application.²⁵ The purpose clause of the code provides:

(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

. . . .

(b) to discover and make effective the intent of a decedent in the distribution of his property²⁶

The code further states that the testator's intent should always control construction.²⁷ The law of Montana therefore seems amenable to the adoption of DRR. *In Re Patten*²⁸ presented the first opportunity for the Montana Supreme Court to consider the doctrine.

19. MCA § 72-2-305(3) (1978) (formerly codified at R.C.M. 1947, § 91A-2-505(3)).

20. See, e.g., MCA § 72-11-334 (1978) (formerly codified at R.C.M. 1947, § 91-142). This statute prohibits a charitable devise to the extent it exceeds one third of the estate if the devise was executed within thirty days of the testator's death.

21. 25 Cal. 2d 854, 155 P.2d 831 (1945).

22. CAL. PROB. CODE § 41 (West).

23. 155 P.2d at 834.

24. See MCA §§ 1-1-108 and 109 (1978) (formerly codified at R.C.M. 1947, §§ 12-103 and 104).

25. MCA § 72-2-321 (1978) (formerly codified at R.C.M. 1947, § 91A-2-507).

26. MCA § 72-1-102 (1978) (formerly codified at R.C.M. 1947, § 91A-1-102).

27. MCA § 72-2-501 (1978) (formerly codified at R.C.M. 1947, § 91A-2-603).

28. ___ Mont. ___, 587 P.2d 1307 (1978).

A. *The Facts*

Ella Patten executed two wills. The earlier will, dated November 25, 1968, devised \$5,000 to her son, Robert, who was designated executor; \$5,000 to a son of Robert; \$2,500 to a daughter of Robert; and the remainder of the estate to her son, Donald. The estate was valued in excess of \$200,000. The will was executed properly in the office of Mrs. Patten's attorney. She kept the original will and the attorney retained a copy. On July 6, 1970, Mrs. Patten drafted a second will which expressly revoked all former wills. The second will differed from the first in that the second will made no provision for Mrs. Patten's grandchildren and substituted Donald as executor. The two sons took the same bequests: \$5,000 to Robert and the remainder to Donald.

Ella Patten made the second will without the assistance of an attorney. But for the deletion of bequests to her grandchildren and the change of executor in the second will, the two wills were identical in the distribution of the property. In addition, both wills had the same punctuation and used three witnesses instead of the two required by statute.²⁹ This later will was denied probate for lack of proper execution.³⁰ Because the earlier will was in the possession of the testatrix and was not found at her death, a rebuttable presumption arose that she destroyed that will with the intent to revoke.³¹

Donald Patten commenced an action requesting the probate of the first will on the theory that DRR served to negate the revocation of the first will. The district court refused to apply DRR, and Donald appealed. The issue facing the Montana Supreme Court was whether DRR could set aside this revocation. In deciding the case the court recognized DRR as part of Montana's common law, but refused to apply the doctrine to the facts.³²

B. *Application of the Doctrine*

Two of the three elements requisite to the application of DRR were easily satisfied in *Patten*. Recall the first element requires that the earlier will be revoked by physical act as part of a scheme to make a second will. In this case, revocation by physical act is satisfied by the presumption that a will in the control of the testatrix and not found at her death was destroyed by her with the intent to revoke.³³ The similarity of punctuation and phraseology between the

29. MCA § 72-2-302 (1978) (formerly codified at R.C.M. 1947, § 91A-2-502).

30. *Patten v. Patten*, 171 Mont. 399, 558 P.2d 659 (1976).

31. *See Estate of Newman*, 165 Mont. 15, 215 P.2d 800 (1974).

32. ___ Mont. at ___, 587 P.2d at 1309.

33. *See note 31, supra.*

two wills implies that one was drafted from the other. The revocation of the earlier will was therefore so connected with the execution of the later will that the two acts reasonably can be considered to be part of the same plan or scheme. The second required element is that the later will be unenforceable. As mentioned above, Ella Patten's 1970 will was denied probate for want of proper execution.³⁴

The final element, and the one unsatisfied in the view of the court, requires the second will to have a similar dispositive scheme. Since DRR is based on the presumption that the testator would prefer the earlier will to intestacy evidence of a radical difference in the dispositive schemes, of the two wills negates the presumption. In *Patten*, the Montana Supreme Court determined that DRR was inapplicable because the dispositive schemes were too different.³⁵ The court based this finding on Mrs. Patten's failure to provide anything in her second will for her grandchildren. It gave no indication, however, of what would constitute sufficient similarity. One question whether the court's demand for similarity is really a demand that the two wills be identical. To apply DRR in Montana the proponent will have to convince the court that *reasonable similarity* of dispositive schemes, coupled with the *presumption* that one prefers to die testate, is sufficient to invoke dependent relative revocation. *Patten* provides little assistance to this task.

This author can conceive of two methods to measure similarity of dispositive schemes. One method is to view the number of bequests changed in relation to the total number of bequests. Disregarding the change of executor,³⁶ Mrs. Patten deleted two of the original four bequests. An alteration of half the bequests in a will tends to support the finding of dissimilarity.³⁷ A second and more accurate method to measure similarity is to evaluate the changes made in view of their effect on the final distribution of the estate. Using this approach, Robert's \$5,000 legacy represents 2.5 percent of the \$200,000 estate. Robert's percentage is the same in both wills. The deletion of the two bequests in the later will only effects Donald's share, which increases from 93.25 percent of the total estate in the 1968 will to 97.5 percent in the 1970 will. The result of this second method of analysis is that the difference in the dispositive schemes of the two wills affects only 4.25 percent of the total estate.

Two wills made by the same person will almost always be different in some way. It must be remembered that the purpose of

34. See note 30, *supra*.

35. — Mont. at —, 587 P.2d at 1310.

36. For the purpose of measuring similarity of dispositive schemes, this analysis disregards a change of executor, which is not a bequest in the true sense of the word.

37. See, e.g., *Estate of Lubbe*, 142 So. 2d 130 (Fla. 1962).

examining the similarity of dispositive schemes is *not* to determine whether the testator would prefer the earlier will to the later will, but rather, would he prefer the earlier will to intestacy. Since the testator rarely considers the choice between intestacy and the earlier will, any determination will be founded on some degree of speculation. The cautious route is to uphold the revocation of the earlier will because the testator in fact revoked it. The danger of the cautious route is that it may thwart the intention of the decedent. In light of the circumstances in *Patten*, it appears that the Montana court was excessively cautious at the expense of the testator's intent.

C. A Puzzling Interpretation

In interpreting the doctrine of dependent relative revocation, the Montana Supreme Court stated that DRR "can only be applied where the evidence of the testator's intent is clear and convincing."³⁸ This statement is confusing because DRR is a doctrine of *presumed intent*. The court's own opinion defines DRR by saying:

[I]f a testator, having made a will and desiring to make a new one, cancels the first will preparatory to making the second and thereafter fails lawfully to execute the same or make therein an invalid disposition of his property, *it will be presumed* that he preferred the old will to intestacy, and the old will was intended to be dependent upon making of a new one as a substitute for the old one.³⁹

If a proponent of an earlier will can show clear and convincing evidence of the testator's conditional intent, there is no need for the presumption. The court's interpretation of DRR is so limiting that it precludes the application of the doctrine in Montana in practically all instances.

The court supports its interpretation by referring to two cases, *Roberts v. Fisher*⁴⁰ and *In re Moo's Estate*,⁴¹ which state that a showing of conditional revocation is required to apply DRR. Both cases concern lost wills and involve only one will or will attempt. There is no reference in either case to a second will. DRR is introduced in these cases only to support an unsuccessful contention of conditional revocation. These cases do not raise the issue of DRR because DRR requires the presence of two wills.⁴² The last case cited in support of Montana's interpretation is *In re Hall*,⁴³ which pro-

38. — Mont. at —, 587 P.2d at 1310.

39. *Id.* at —, 587 P.2d at 1309 (emphasis added).

40. 230 Ind. 667, 105 N.E.2d 595 (1952).

41. 414 Ill. 54, 110 N.E.2d 194 (1953).

42. See discussion, note 9, *supra*; *Emenecker's Estate*, 218 Pa. 369, 67 A. 701 (1907).

vides that "a showing of immediate intent to make a new testamentary disposition and of conditional destruction of the original will are [sic] required to reestablish a destroyed will"⁴⁴ under DRR. *Hall* refers to a second will which was never presented to the court. The quote is taken from a paragraph discussing the need to show that the revocation of one will is so connected with the execution of another that the two acts are part of one plan. Viewed in the proper context, this rule is valid. After commenting on the lack of a second will, the court in *Hall* said that by showing that a second will was similar to the earlier will, the proponent could provide circumstantial evidence of a conditional revocation and thus invoke DRR.⁴⁵

III. CONCLUSION

Although the Montana Supreme Court's interpretation of DRR is extremely narrow, it does not preclude the use of the doctrine in Montana. DRR conceivably could be applied where the difference between the two wills consists only of a change in the executor. Another instance suitable to DRR would be when a bequest is denied effect by operation of Montana's *mortmain* statute⁴⁶ or by the rule against a devisee witnessing the execution.⁴⁷ The applicability of DRR to a partial revocation by means of interlineations and unattested substitution remains unclear. The last situation suitable to DRR is that rare case where the dispositive schemes of the two wills are more similar than in *Patten*.

While Montana has expanded its case law with the adoption of DRR, the supreme court's extremely narrow interpretation of the doctrine seems to render its applicability remote at best.

44. *Id.* at 343, 499 P.2d at 914.

45. *Id.* While these three cases inappropriately are cited by the Montana Supreme Court, they also are relied upon inappropriately in 95 C.J.S. *Wills* § 267 (1957), which discusses DRR.

46. MCA § 72-11-334 (1978) (formerly codified at R.C.M. 1947, § 91-142).

47. MCA § 72-2-305(3) (1978) (formerly codified at R.C.M. 1947, § 91A-2-505(3)).