First Supplement to Memorandum 82-11

Subject: Study L-603 - Probate Law (Choice of Law as to Revocation)

Under UPC Section 2-506, a written will is valid when offered in this state if executed in compliance with the law of this state, or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national. This provision is discussed in Memorandum 82-11 which recommends adoption of the UPC provision in California.

At the last meeting, the Commission requested further analysis of the question of what law (the law of which state) determines whether a will has been revoked (insofar as it benefits the former spouse) by divorce of the testator after execution of the will. This supplement has been prepared in response to this request.

UPC Section 2-506 (described above) covers revocation by a subsequent will . This is true because a revocation made by the subsequent will is effective if the subsequent will is valid, and whether the subsequent will is valid is determined under Section 2-506.

The Uniform Comissioners state in the Comment to UPC Section 2-506:

> A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.

This comment ignores the choice of law problem as related to revocation by operation of law (such as partial revocation by divorce).

Suppose H executes a will in State X giving all his property to his wife W. H lives in State X and the will is valid under the law of that state. After execution of the will, H obtains a divorce from his wife W. Under the law of State X, divorce does not affect the validity of the will. Under California law, as revised by the Commission, divorce revokes the will as to the former spouse. H moves to State Y where the rule is that divorce revokes a will as to a former spouse and dies there leaving real property in California. The will (leaving the real prop-

erty to W) is offered by W for probate in California. C, the only child of H, claims the property by intestate succession. Result? Would the result be different if H moved to California a few years after the divorce and died here? Would the result be different if the divorce took place in California?

Take another example. Suppose H makes a will before he marries W. Under the law of the State X where H is domiciled when the will is executed and where the marriage takes place, a will is revoked entirely upon marriage. After marriage, H and W live in State X for 20 years and when H retires they move to California. H dies three weeks after the move to California is completed. GF, a former girl friend of H before H's marriage, offers the will for probate in California. The will gives GF "all of his estate." There is no other will and no evidence H ever revoked the will. W, the surviving wife, claims the will was revoked by operation of law. Assume that under California law, as revised by the Commission, a will is not revoked by subsequent marriage. Result?

Attached is an extract from the Report on the Making and Revocation of Wills by the Law Reform Commission of British Columbia. The British Columbia Commission concludes that the choice of law rules as to the effect of attempted revocation by destruction or revocation by operation of law should be left to court development, because a legislative attempt to state such rules would be less likely to be satisfactory than court developed rules that are formulated to apply to particular fact situations as they are presented to the courts. The staff agrees with the conclusion, and we recommend that the Commission not attempt to supplement the UPC provision which does not cover these issues.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXTRACT from Report on The Making and Revocation of Wills, Law Reform Commission of British Columbia (1981).

E. Revocation in the Conflict of Laws

The legal principles involved in this issue are particularly intractable. In Dicey and Morris the following comment may be found:[54]

> The question what law determines whether a will has been revoked is one of considerable nicety and does not appear to have received much discussion except as regards revocation by subsequent marriage.

Revocation of a will occurs when one of the three necessary preconditions is fulfilled: the execution of a later document either expressly revoking the will or inconsistent with the will; revocation by exception of law (e.g. revocation on marriage), or by destruction *animo revocandi*.

1. Revocation by Express Instrument

Dicey and Morris suggest that the effect of such an instrument falls to be determined by the same rules which govern the formal and essential validity of all testamentary instruments,[55] a position with which Castel agrees.[56] The Manitoba *Wills Act*[57] expressly provides that a will is properly made:

> So far as it revokes a will which under this Part [conflict of laws] would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of a will conformed to any law by reference to which the revoked will or provision would be treated as properly made.

The position under current British Columbia law is unsettled. Section 14 (1) of the *Wills Act* provides that a will is revoked only by (*inter alia*) another will "made in accordance with the provisions of this Act" or a writing

[54] Dicey & Morris, The Conflict of Laws, Ninth Edition, at 615.
[55] *Ibid.* at 618-9
[56] Castel, Canadian Conflict of Laws, vol 2, at 619.
[57] Section 40 (2) (b).

declaring an intention to revoke "made in accordance with the provisions of this Act governing the making of a will." That would undoubtedly include the conflict of laws provisions of Part 3 of the *Wills Act*. However the Act is silent on the question whether the later revocation must conform to the foreign law chosen to validate the will being revoked, or the law governing the second will in which the revocation clause is contained. The better view appears to be, on the wording of the statute, that compliance with the foreign law applicable to the second will is necessary.

The Uniform Wills Act provides in section 40 (2) (b) that a will is properly made:

> . . . so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made . . .

A similar provision was enacted in Ontario as section 37 (2) of the *Succession Law Reform Act*.

The effect of this provision is to expand the choice of laws by which a revocation contained in a will is rendered effective. The revocation will be effective if the will in which it is contained is effective, or alternatively if it complies with any law which would validate the prior disposition. Assume, for example that a testator domiciled in Utopia makes a valid Utopian will, which does not comply with any other law suggested by British Columbia choice of law rules. He later becomes domiciled in Ruritania, where he executes a second will which conforms to Utopian, but not Ruritanian law. Under current British Columbia law, a court could not give effect to the second instrument. However, under section 40 (2), the second will is effective, if only to revoke the prior will. The testator would, therefore, die intestate.

We have nevertheless concluded that subsection 40 (2) should be adopted in British Columbia. Where a new will containing a revocation clause is executed, the obvious intent of the testator is to revoke the former will. Although we can only speculate what the testator might have done had he realized the second will was invalid, we have as an established fact that he considered his first will no longer appropriate. In such a case the revocation of the earlier will should more often conform to the testator's wishes. We admit the possibility that the result might be an intestacy, even though the testator has executed two wills. On the whole we think that to be preferable to giving effect to a will which the testator has attempted to revoke.

A will may revoke by implication provisions in earlier wills with which it is inconsistent, although in all other respects the earlier will remains in force. The effect of such a later will is a question of construction,[58] and in line with our earlier view that the choice of law rule set out in the *Wills Act* respecting construction of wills, we feel that no specific recommendation is called for.

The Commission recommends that:

30. A provision comparable to section 40 (2) (b) of the Uniform Wills Act *be enacted in British Columbia.*

2. Revocation by Destruction

Castel, agreeing with Dicey and Morris, states:[59]

> Whether a will is revoked by burning, tearing or otherwise destroying the same by the testator or by someone in his presence and by his direction with the intention of revoking the same should be governed by the law of the testator's domicile at the

[58] *Supra* n. 56, at 619.

[59] *Supra* n. 56, at 467.

date of the alleged act of revocation in the case of movables, and by the *lex rei sitae* in the case of immovables.

Dicey and Morris note that there is no authority for this point, but nevertheless tentatively put forward this view as a rule.[60] The lack of authority on this point indicates not only that the issue is not contentious, but also that any proposal for reform would be premature.

3. Revocation by Operation of Law

In British Columbia the marriage of a testator is currently the only change of circumstance which revokes an entire will. A contrasting problem is that posed by the breakdown of a marriage by an event described in section 43 of the *Family Relations Act*, which may under section 16 of the *Wills Act* result in the revocation of a portion of a will. Problems may arise where the law of a foreign jurisdiction stipulates that a will is revoked by a change of circumstances not having such an effect by British Columbia law. Such authority as there is suggests that the *lex domicilii tempore mortis* should govern in the case of movables, and the *lex rei sitae* for immmovables.[61] In view of the lack of case authority on the effect of such other changes of circumstances, we have concluded that any conflict between competing laws concerning revocation by change of circumstances does not pose practical problems requiring resolution by legislation.

A particular problem arises in cases where foreign law does not provide that a will is revoked by marriage. The issue of the effect of marriage on a will presents a primary problem of characterization. Case law supports the view that the matter is best characterized as a rule of matrimonial law. In the case of *In re Martin*[62] Lord Justice Vaughan Williams held[63]:

> . . . I think that the rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law, and that probate of this will ought not to be granted: but as I am not sure that we ought to infer that there was at the time of the marriage an agreement that the English law should govern the matrimonial property, I prefer to ground my judgment on the change of the husband's domicil at the time of marriage; and I think that, if he did change it from a French to an English domicil, then his subsequent reversion to a French domicil will not prevent English law continuing to govern the matrimonial property.

This characterization has been adopted in Canada,[64] notwithstanding some criticism from Falconbridge,[65] who thought that the consequences of this classification were:

> . . . inconvenient and undesirable insofar as they may involve probable diversity in the distribution of the assets situated in different countries, belonging to the estate of a decedent, as between [Ontario] on the one hand, and some other country, as for example, [Quebec], the domestic law of which does not contain a rule that a will is revoked by the subsequent marriage of the testator, and in the law of which a foreign rule of this kind may be characterized as being testamentary, and (2) some other country, as, for example, a state of the United States of America, the domestic law of which contains a rule similar to or identical with the [Ontario] rule, but in the law of which the rule is characterized as one of testamentary law.

However, characterizing the matter as one of succession law will not result in a resolution of the issue, as the only result would be to put British Columbia law out of step with the rule in force in the other common law provinces. For that

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[60] Dicey & Morris, *supra* n. 54, rule 109 at 615.
[61] *Re Howard*, [1924] 1 D.L.R. 1062 at 1071.
[62] [1900] P. 211.
[63] Ibid. at 240.
[64] *Seifert* v. *Seifert*, (1914) 23 D.L.R. 440, 32 O.L.R. 433.
[65] Cited in Castel, *supra* n. 56 at pp. 467-468.

reason the result would not be necessarily more just. We do not therefore make any recommendation to resolve the issues raised by the characterization of this rule as one of matrimonial law.

The choice of law rule respecting revocation by marriage appears to be settled. A will is revoked by marriage if the husband's domicile would so regard it. The husband's domicile is crucial insofar as the wife gains the same domicile on marriage as a domicile of dependency. Such a domicile of dependency is generally regarded as outmoded, but it nevertheless still exists in Canada for purposes other than divorce. In England, a wife has, since January 1, 1974 been able to acquire an independent domicile, and her domicile after marriage is determined by the same factors as her husband's.[66] The result of this development must be the re-examination in England of *In Re Martin*, which depends for its consistency upon the notion of the domicile of dependency. If the wife has an independent domicile, there seems little reason to prefer the husband's domicile over hers in determining the effect of the marriage, and hence there is no basis for determining which domicile is to govern.

We feel that the concept of a domicile of dependency is archaic. Its abolition in other jurisdictions will in time erode whatever benefits flow from uniformity of approach to the effect of marriage. The choice of domicile as a connecting factor places undue emphasis on the technicalities of the law concerning domicile. The Commission feels therefore that the choice of a different connecting factor is justified.

The connecting factor must be one common to both parties, or the possibility of an irresolvable conflict between the laws chosen in respect of each party to the marriage may result. The law of the place of marriage fills that requirement, but in many cases may be fortuitous. Common habitual residence presumes that the parties have lived together for some time in one jurisdiction, which may not be the case if one spouse dies soon after the marriage. A test is required which allows an immediate determination of the rights of the parties.

Recently, in a case concerning capacity to contract a polygamous marriage, Mr. Justice Cumming Bruce, adopted the law of the intended matrimonial home.[67] This choice of law rule could be applied in a different context to determine the effect of marriage on a will. However, it raises as many problems as it solves. Must the intent actually be fulfilled? When does it expire? What if the parties never addressed their minds to the issue?

The infinite variety of factual situations which may arise, combined with the fact that it is still open to Canadian appellate courts to devise rules other than domicile at the time of marriage, and the fact that a test which will produce fair results in all cases is difficult to articulate, all militate against a legislative response. The development of the law in this area could more usefully proceed on a case by case basis, where a judge may have regard to all the facts of a case. We have therefore concluded that in the circumstances legislative reform is inappropriate, and hence make no recommendation.

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[66] *Domicile and Matrimonial Proceedings Act*, 1973, s. 1.

[67] *Radwan* v. *Radwan* 2, [1973] Fam. 24, [1972] 3 W.L.R. 735, [1972] 3 All E.R. 967