Til Death Do Us Part: What Happens to a Will After Divorce?

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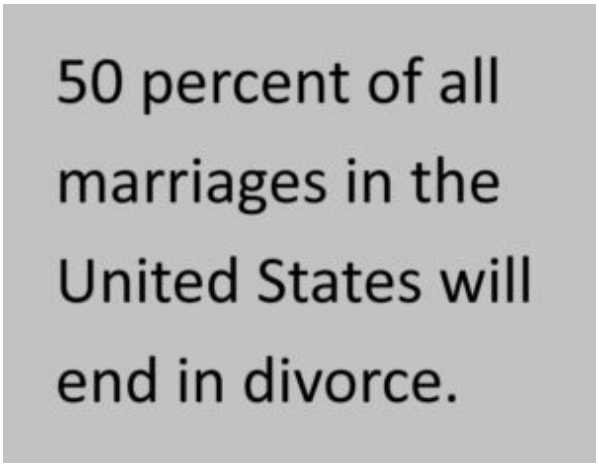
Many people will execute a will to provide for their family upon their death. Most will give their spouse top priority to receive all or most of the assets of their estate upon death, which is a common way for spouses to provide for their partners. However, 50 percent of all marriages in the United States will end in divorce. If a decedent does not update his or her will and the will continues to name an ex-spouse, an important question becomes how to construe the decedent's will. Does the ex-spouse receive a portion of the estate? North Carolina law is clear that provisions in a will in favor of the ex-spouse are revoked. A related question, however, is how should the will be construed in light of the revoked provisions in favor of the ex-spouse. A recent decision from the North Carolina Court of Appeals provides an answer to this question with some potentially serious consequences. *See Parks v. Johnson*, 2022-NCCOA-129.



In *Parks*, the spouses married in 1982 and divorced in 2016. *Id.* ¶ 3. No children were born from the marriage. *Id.* On the couple's one-year anniversary, the husband executed a will. *Id.* ¶ 4. The will provided a three-tiered disposition of the husband's property. *Id.* First, Item Two in the will provided that all of his property goes to his wife. *Id.* Second, Item Three of the will provided that, if his wife predeceased him, then all of his property should go to his children. *Id.* Finally, Item Four of the will provided that if the wife predeceased her husband and if the couple had no children, then the husband's estate would be divided in two. *Id.* One share of the husband's estate would go to his mother-in-law or her descendants and the other share would go to the husband's parents or their descendants. *Id.*

At the time that the husband died, his parents had already passed away; however, he was survived by four siblings. *Id.* ¶¶ 5, 6. The husband's mother-in-law had passed away as well, leaving two daughters including the divorced spouse.

Id. ¶ 5. After the will was admitted to probate, the divorced spouse's sister claimed an interest in the husband's estate under Item Four of the will. *Id.* ¶ 7. As a result, the husband's siblings filed an action for Declaratory Judgment *Id.*

The siblings argued that the direct devise to the divorced spouse in Item Two of the will must be revoked because N.C. Gen. Stat. § 31-5.4 removes all provisions in a will in favor of a divorced spouse. *Id.* ¶ 8. Then, because the divorced spouse was still alive and they had no children, Items Three and Four of the will were inoperative. *Id.* As a result, the siblings argued, the husband's estate should pass to them as his intestate heirs because the will provided no effective residuary disposition. *Id.* This would result in the divorced spouse's sister receiving nothing under the will.

The divorced spouse's sister argued for a different reading of N.C. Gen. Stat. § 31-5.4 that would result in the removal of all provisions in the will that mentioned the divorced spouse, both the direct devise to her in Item Two and the provisions in Items Three and Four that required her to predecease the husband. *Id.* ¶ 9. If the divorced spouse's sister's argument prevailed, she would take half of the husband's estate and the husband's siblings would take the other half. *Id.*

The trial court agreed with the divorced spouse's sister and concluded that N.C. Gen. Stat. § 31-5.4 removes all references of the divorced spouse in the will. *Id.* ¶ 10. As a result, the trial court concluded that the divorced spouse's sister took one-half of the husband's estate. *Id.* The siblings appealed to the Court of Appeals. *Id.*

The statute at issue, N.C. Gen. Stat. § 31-5.4, provides that

[d]issolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse.

N.C. Gen. Stat. § 31-5.4 (2021). Accordingly, this law provides that a divorce does not revoke a will executed prior to the divorce, but it does "revoke[ ] all provisions in the will in favor of the testator's former spouse or purported former spouse." *Id.* However, a testator can reverse this provision by specifically providing in his will that he wants his or her divorced spouse to take under the will. *Id.* This statute also removes a divorced spouse who is appointed an executor of the estate or provided some other power under the will. *Id.* The statute also provides that any revoked provisions are reinstated if the divorced spouses remarry. *Id.*

In deciding this case, the Court of Appeals had to answer the question of what "in favor of" the divorced spouse means. Does this statute mean that only provisions in a will that provide a direct benefit to the divorced spouse are revoked? Or are all references to a divorced spouse erased from the will? Both sides agreed that the direct devise to the divorced spouse in Item Two was revoked by N.C. Gen. Stat. § 31-5.4. *Parks,* ¶ 11. However, the husband's siblings argued that by removing all provisions in the will that referenced the divorced spouse, "the trial court revoked provisions beyond the statute's scope" and undermined the husband's intent. *Id.* Ultimately, the Court of Appeals agreed with the husband's siblings and employed a very narrow reading of "in favor of." *Id.*

Judge Lucy Inman, writing for a unanimous panel that included Chief Judge Donna Stroud and Judge Jeffrey Carpenter

stated that N.C. Gen. Stat. § 31-5.4 "plainly provides that divorce revokes only those provisions in a will which are 'in favor' of a former spouse" and that "[w]e cannot interpret the statute to nullify all provisions in a will which simply refer to a former spouse." *Id.* ¶ 14 (citing *Burgess v. Your House of Raleigh, Inc.,* 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."); *Gibboney v. Wachovia Bank, N.A.,* 174 N.C. App. 834, 837, 622 S.E.2d 162, 165 (2005) ("[Section 31-5.4] . . . clearly mandates that unless the testator expressly indicates in his will that even if he divorces his spouse she would remain a beneficiary, the former spouse is denied any testate disposition.").

The Court of Appeals concluded that this result "g[a]ve effect to the testator's intent." *Id.* ¶ 15. Further, the Court of Appeals concluded that the provision in the will that required the divorced spouse to predecease the husband for anyone else to take under the will "is a condition precedent that cannot be interpreted to favor [the divorced spouse], because the residuary is operative only if [she] has died." *Id.* ¶ 16. As a result, "she would not be alive to benefit from the estate passing to her relatives." *Id.* Because the divorced spouse survived the husband, the Court of Appeals determined that the condition precedent in Item Four failed and, as a result, the husband's estate passed by intestacy given that the will contained no effective residuary clause. *Id.* ¶¶ 18, 19, 25.

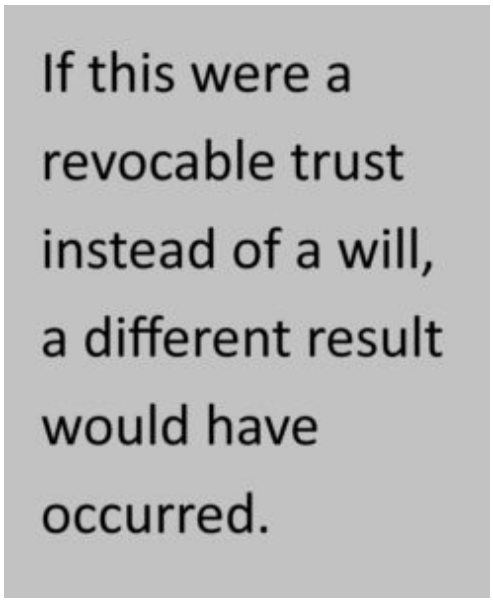
As a result of the Court of Appeals' decision, the husband's siblings take his entire estate and the husband's divorced spouse's sister takes nothing. At first glance, this makes sense and feels "fair." It feels right that, in this case, the husband's siblings take his estate over his divorced spouse's sister. Here, the divorced spouse's sister would take under the will purely because she was the divorced spouse's sister. However, does it make sense that whether a divorced spouse is alive or not at the time of the testator's death can influence how a testator's assets are distributed? The couple divorced and one would expect that divorce would remove all potential influence on how a testator's assets are distributed after their death.

Counsel for the divorced spouse's sister argued that the Court of Appeals' reversal " 'would invalidate thousands of North Carolina wills wherein a former spouse is still living' and disinherit countless children of divorced couples." *Parks*, ¶ 26. The Court of Appeals disagreed, stating that "[t]his argument is refuted by our state intestacy statutes," in which "[a] divorced couple's children are neither divested as intestate heirs nor do they share the estate with another class of relatives; they inherit the 'entire net estate or share' alongside any other children of the decedent." *Id.* (citing N.C. Gen. Stat. §§ 29-13, -15, -16). However, this conclusion from the Court of Appeals addresses only one possible scenario out of many. What if the testator's named beneficiaries were not children or was a trust for the benefit of a child? What if the testator had a second spouse? What if the will contained a provision stating broadly that all property not otherwise disposed of pursuant to the terms of the will should be distributed to charity? All of these situations would result in substantially different outcomes than if the will were construed to treat the spouse as having predeceased the testator.

Interestingly, if this were a revocable trust instead of a will, a different result would have occurred. North Carolina's Trust Code provides that

Dissolution of the settlor's marriage by absolute divorce or annulment after executing a revocable trust revokes all provisions in the trust in favor of the settlor's former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as trustee. *Property prevented from passing to the former spouse because of revocation by divorce or absolute annulment passes as if the former spouse failed to survive the settlor*, and other provisions conferring some power or

office on the former spouse are interpreted as if the former spouse failed to survive the settlor. If provisions are revoked solely by this section, they are revived by the settlor's remarriage to the former spouse. The reference to "former spouse" in this section includes a purported former spouse.



N.C. Gen. Stat. § 36C-6-606 (2021) (emphasis added). Note the language in the statute that provides that if a marriage ends in divorce, the divorced spouse will be treated as predeceasing the settlor of the trust. No such corresponding language exists in the same statute for wills in N.C. Gen. Stat. § 31-5.4. Had it existed, the divorced spouse's sister would have taken half of the husband's estate.

In summary, divorce results in the revocation of any provision in a will "in favor of" the divorced spouse. This would include any provision that provides a direct benefit to the divorced spouse. However, application of the *Parks* decision could result in unintended consequences, especially for any children from a marriage that resulted in divorce. Potential drafters can prevent a divorced spouse from having any effect on their will after their death by including a provision like "if I have divorced my spouse at the time of my death, then they are to be treated as if they predeceased me for all purposes of this will."

If you are divorced and have a will that provides for or mentions a divorced spouse, you should consult with qualified legal counsel to review your will and make any changes to ensure that your intent and desires are carried out.

Related links:

- John N. Hutson, Jr.
- S. Wesley Tripp, III
- Estate Litigation & Fiduciary Dispute Resolution
- A Guide to Wills, Estate, Trust and Guardianship Litigation.

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