

1968

In The Matter of The Estate of Catharine
Armstrong, Also Known As Catharine A.
Armstrong, and as Catherine Mayo, and Being one
and the Same Person and Leroy Mayo v. C. Henry
K. Logan : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of CATH-
ARINE ARMSTRONG, also known
as CATHARINE A ARMSTRONG,
and as CATHERINE MAYO, and
being one and the same person,

Deceased

LEROY MAYO,

Plaintiff-Appellant

vs.

C. HENRY K. LOGAN, Executor,

Defendant-Respondent

CASE NO.
11090

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
for Carbon County,

Hon. F. W. Keller, District Judge

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NATURE OF THE CASE

This is an action to declare that a will executed by a woman who thereafter marries is revoked as a matter of law.

DISPOSITION IN LOWER COURT

The case was heard by the court which granted a motion to dismiss contest of will. From orders dismissing contest of probate of will and admitting the will to probate, plaintiff-appellant appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the orders dismissing the contest and admitting the will to probate and a determination in his favor, as a matter of law, that the contest was valid and the will was revoked.

STATEMENT OF FACTS

Catharine Armstrong, a widow without issue, executed a will on the 18th day of June, 1965 (J.R. 5). On the 29th day of January, 1967, she married LeRoy Mayo (J.R. 11). She died on the 24th day of July, 1967 (J.R. 1). Petition for probate of her will was filed on the 4th day of August, 1967 (J.R. 1). Contest of probate of will was filed August 24, 1967 (J.R. 11). Motion to dismiss contest was filed August 25, 1967 (J.R. 13). Order granting Motion to Dismiss contest was entered November 22, 1967 (J.R. 24). The will was admitted to probate on November 21, 1967 (J.R. 20).

ARGUMENT
POINT I.

THE COMMON LAW THAT THE MARRIAGE OF A WOMAN REVOKED HER PRIOR EXISTING WILL IS STILL THE LAW OF UTAH.

Section 68-3-1, Utah Code Annotated, 1953, provides:

"The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

The fact that the will of a woman was revoked upon her subsequent marriage in common law, is not repugnant to, or in conflict with, the Constitution or laws of the United States or of this state and remains the law in Utah even if no statute were extant. There is nothing in such a rule that is inconsistent with the necessities of the people.

In Thompson on *Wills*, 3rd E., p. 272, paragraph 172 it provides:

"172. Effect of subsequent marriage on will of a woman. . . The common-law rule that the marriage of a woman absolutely revoked her will was very generally adopted as the rule in this country. In many states the incapacity of a married woman to make a will has been removed by statute, but few of such statutes make provisions for the effect of the marriage of a woman upon

her prior will. In most of the states where her incapacity to make a will has been removed, this removal of capacity has been determined to be in effect a removal of all the reasons of the common-law rule, and therefore to make the rule itself, obsolete, and to leave her antenuptial will in full force. (citing cases) But a *majority of the courts*, in jurisdictions where capacity to make a will has been removed by statute, *still adhere to the common-law rule that the will of a feme sole is revoked by her subsequent marriage*, where the statute makes no provision for such case. (citing cases" (Emphasis added.)

The Utah statutes do not mention specifically the effect of marriage of a woman upon her prior will. The Utah legislature has enacted into statute the common-law on revocation of a man's will. Section 74-1-24. It has also enacted into statute the common-law on revocation of a woman's will. See argument under Point III. All that the emancipation statute did was to remove the disability of a married woman.

POINT II.

THE APPEARANCE OF A NEW HEIR REVOKES PRO TANTO A PRIOR EXISTING WILL.

At common-law the marriage of a woman automatically revoked her will. The marriage of a man alone did not revoke a will, but the birth of a child after making of a will, did revoke his will. The *ratio decidendi* behind the common-law rule was that the appearance of a new heir effected such a change of circumstances that a pre-existing will would be revoked as a matter of law. All

the common law rules can be viewed from the point: "the appearance of a new heir not in contemplation on executing the will." The fact that a marriage was not sufficient to revoke a man's will was because under common-law a wife was not considered an heir of the husband. Under the emancipation statutes, a woman is given the same rights as a man. Although the common-law, as such, may have been repealed in regard to a woman, the theory or basis of the common-law still applies, and the appearance of a new heir is sufficient to revoke the will of either a man or woman. This, as far as the man is concerned, has been specifically adopted by statutes in Utah. The difference between the Utah statutes and the common-law rule on men is that in Utah we recognize as heirs some who were not such at common-law and revoke the will as to the new heirs. Many other states have also written into their statutes specifically the approach that the appearance of a new heir will revoke a will previously made, at least as to the new heir. In those states without statutes on the point of revocation, which have considered the matter, the appearance of a new heir automatically revokes the will. In re. *Teopfer's Estate* (N.M.) 78 P. 53. In this case a woman wrote her will devising all her property to her sister. Thereafter she married and died leaving surviving her a husband and no children. The will was declared void. The court stated:

"By our laws . . . if a husband or wife die, leaving no will and no children, the survivor shall inherit all of the property of the deceased. . .

All of the states, so far as we have been able to discover, which hold that the marriage of a woman does not set aside a will made before such marriage, make such holding on the ground that the law amply provides for the survivor; but in those jurisdictions where the husband and wife are heir to each other, in the event of no children being born, the rule is generally held to be that marriage works such a change in the condition and circumstances of the testator as to revoke a will made prior to such marriage. It is presumed that the intent of the testator was that such a will should not take effect upon the happening of such a contingency. We do not think that the mere marriage of a woman would set aside her will, but it is the coming of a new heir; for under the laws of this territory, by marriage, not only does a man or woman get a wife or husband, but also an heir. We think that under the laws of this territory, by which the surviving spouse is the heir to the other in the event of no children being born of the marriage and no valid will being made during coverture, the common law is so altered that on marriage the ante-nuptial will of a husband would be set aside as well as that of his wife, and that both of them are now on the same footing. Marriage and the coming in of an heir to all the property works such a natural change in the testator's condition that it is not to be expected that the devise was made in view of such changed conditions. . .

'The English law rests on the firm foundation that the birth of an heir who can inherit lands shall be held operative to destroy a will, because it is not to be conceived that the testator has devised his estate in view of such an extraordinary alteration in his condition.' The same

principle and the same rule can be urged with like force in our own legislation, as stated by the English cases, and those which have followed the law which they announce. It is a strained conception to assume that a man who has made a will while unmarried has made it in contemplation of his assumption of the marriage relation. . .

It seems to us that in this territory this reasoning is equally applicable whether the surviving spouse be a man or woman. By the marriage not only a husband or wife, but a new heir capable of inheriting all of the property, comes into existence; and in accordance with what we think is the spirit and reasoning of the doctrine and the purpose and meaning of our laws, we hold that the marriage of a testator, whether or not it be followed by birth of an heir, is operative to revoke any ante-nuptial will."

The Teopfer case was cited with approval in *In re. Lewis' Will*, 71 P.2d 1032 (1937), in which the same court recently stated:

"It is, that by marriage in the territory, the testator not only acquired a new spouse but a new heir, which so changed his or her condition and circumstances that it created a presumption of the testator's intention that the will should be revoked upon the happening of such contingency. That, as under the territorial statutes the law of property and inheritances made no distinction between the rights of husbands and wives, the reason for the common law distinction had disappeared. . .

"Under the laws of New Mexico, the husband and wife, as to property rights and inheritances

(except as to community property) are placed in identically the same situation. Upon marriage each is an heir to the other. The effect of the rule adopted in the Teopfer case is that a will made prior to marriage by either husband or wife is revoked by marriage because of the advent of a new heir who is entitled to share in the property of the other upon his or her decease. It operates the same whether the testator is a husband or wife."

In the case of *Durfee vs. Risch*, 142 Mich. 504, 105 N.W. 1114, the testatrix, being unmarried, made a will, then married and had one child who survived. Women in Michigan at that time were emancipated and there was no statute which mentioned the effect upon a woman's will of her subsequent marriage and bearing of a child. The court held that the will was revoked on the theory that a new heir had appeared and stated, after discussing the common-law rule that marriage revoked a will:

"Where, as in this state, the reason for this rule fails, the rule fails. It does not follow, however, because the marriage alone does not revoke the will, that marriage and birth of issue do not. The abrogation of this rule places the male and the female on the same plane as to this; i.e., that the subsequent marriage does not of itself revoke the will. But it is illogical to say, because the existence of a more restricted rule to the wills of females prevented the application of the general rule of the common law, that such rule should not be applied to male and female alike, when the

removal of the latter's disability makes the general rule applicable. . . In *Noyes vs. Southworth*, supra, we said: 'Our constitution has done away with all disabilities of coverture, and expressly authorized every married woman to make wills of her estate as if she were sole. This leaves her case to be governed by the same rule which would apply to any one else on change of condition.'

2 Page on *Wills*, Bowe Parker Revision at page 517 states:

"In many states, statutes are in force which provide that a married woman has capacity to make a will and that, under certain specified circumstances, the husband may be the heir of his wife. The corresponding provision that the wife may be the heir of the husband has been held, in many states, to abolish the common law rule that the marriage of a man does not, of itself, revoke his will; and such marriage has been held to revoke his will on the theory that, under the statute, the marriage has at once brought into existence a new heir, whose existence was not fairly within the contemplation of testator when he made his will. If such a statute abolishes the common-law rule with reference to the marriage of a man, it would seem that it ought to keep alive the common-law rule that the marriage of a woman revokes her will, even though the legislature has by another statute given a married woman the capacity to make a will."

The husband is made an heir of his wife in the state of Utah by virtue of Section 74-4-5, UCA 1953.

POINT III.

THE UTAH CONSTITUTION AND STATUTES CAUSE THE REVOCATION OF A WILL OF A WOMAN UPON HER MARRIAGE.

Utah has two constitutional provisions which are applicable to the case at bar. Article IV, Section 1 of the Constitution of the State of Utah provides:

“The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges.”

Article XXII, Section 2 of the Constitution provides:

“Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.”

This last provision of the Constitution has been interpreted by the Utah Supreme Court in *In re. Petersen's Estate*, *Petersen vs. Parry*, 97 Utah 325, 93 P.2d 445, in a decision written by Mr. Justice McDonough and concurred in unanimously by the balance of the court. This was a case in which a wife made a will leaving her property to her sister and in substance disinheriting her

husband. The husband demanded the homestead right and various items of personal property which would be exempt from execution. The court held for the husband in the case and Mr. Justice McDonough, in discussing the above mentioned constitutional provision, stated:

"This means that she may deal with her property in the respects enumerated, as she might deal with it at common law were there not disabilities in the wife and estate vested in the husband by reasons of marriage. . .

Looking at the provision against its common law background, there is nothing in its wording which evidences an intention upon the part of its authors to go further and inhibit the Legislature from placing upon the right to devise the limitation here in question. *Its evident aim was to bring about equality not inequality* between the parties to a marriage contract. . .

We adhere to the position that the *constitution of this state effects equality between husband and wife insofar as disposing of his or her separate property by will is concerned*, and hence the statute reserving to the survivor of either a homestead is not in contravention of the constitution." (Emphasis added.)

In the light of this case's interpretation of the constitution, it is necessary that all statutes dealing with the devise or bequest of property must be interpreted as applying equally to men and women. This interpretation is reemphasized by the provision of the constitution quoted above of Article IV, Section 1, which states

that both male and female citizens of this state shall enjoy equally all civil rights and privileges.

2 Page on Wills, Bowe Parker Revision 515:

“The rule that marriage revokes the will of a woman has been enacted in many states. If it is expressly provided by statute that marriage of a man revokes his will, and if, by the provisions of another statute or by the general principles of statutory construction, words of the masculine gender are to be regarded as including the feminine gender, the marriage of a woman will also operate as a revocation of her will.”

Section 68-3-12 UCA 1953, the Construction Statute, says:

“In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

(7) Words used in one gender comprehend the other.”

There are several cases interpreting the effect of such a statute upon probate statutes. A case applying the above rule is the *Estate of Stark*, 52 Ariz. 416, 82 Pac. 2nd 894. The statutes in that case provide that the will of a man was revoked by subsequent marriage, were silent as to the revocation of the will of a woman by her subsequent marriage. By another statute providing that wherever the statute used the “masculine” gender,

the "feminine" gender would also apply, added to the fact that in Arizona a man and woman had been made equal by the emancipation statute, a woman's will, by implication, was revoked by her subsequent marriage.

In the case of *Parker vs. Swain*, Tex. 223 S.W. 231, Mrs. Swain executed a will. Twelve months thereafter a new child was born. The question as to the validity of the will was before the court. The Texas statute provides:

"If a testator having a child or children born at the time of making his last will and testament, shall, at his death, leave a child . . . born after the making of such last will and testament, the child or children so afterborn and pretermitted shall, unless provided for by settlement, succeed to the same portion of the father's estate as they would have been entitled to if the father had died intestate. . ."

It was claimed, as it is in the case at bar, that because the statute did not mention "testatrix" but specifically refers to wills made by testators and mentioned the word "father," that such statute had no bearing upon the mother's will. A married woman was authorized by the laws of the state of Texas to dispose of her estate by will. Texas also had the provision of a statute providing:

"The following rule shall govern in the construction of all civil statutory enactments. . . The masculine gender shall include the feminine and neuter."

The court held that the statute applied to the mother's will, and that it was revoked as to the pretermitted child, and used this language:

"We think the true interpretation of our statute is that in testing and determining whether the unborn child is mentioned in the will, the language of the testator, (testatrix in this case) should be construed and considered with reference to the situation and facts within his knowledge, and having in mind the considerations on which and with reference to which he was then acting.' Judge Ramsey seems to assume that the statute is applicable to wills made by either the father or mother of afterborn child. The authorities are not in perfect accord upon the question. A similar statute, under a state of facts such as we have in this case, was discussed by the Supreme Court of Georgia in *Ellis vs. Darden*, 86 Ga. 368, 12 SE 652, 11 LRA 51. The conclusion was reached that the word "testator" also included "testatrix." To the same effect is *Durfee vs. Risch*, 142 Mich. 504, 105 NW 1114. . . In the light of these cases, which are sustained by the weight of authority, we think the judgment should be affirmed, and it is accordingly so ordered affirmed."

In the case of *Ellis vs. Darden*, Ga. 12 SE 652, the Georgia court said:

"In construing the Code, it is necessary to bear in mind section 4 which declares that 'The masculine gender shall include the feminine.' Nothing can be more manifest than that this rule was intended to apply to the provisions of the

Code on the subject of wills. . . From the first to the last of these sections on wills, with few, if any exceptions, the masculine includes the feminine. . . It cannot be doubted that in many of the sections the word 'testator' includes testatrix. As to most of the sections in which the word occurs, no other construction is possible. . . Section 2477 reads: 'In all cases the marriage of the testator or the birth of a child to him, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will.' We can have no reasonable doubt that the rule that the masculine includes the feminine applies to this section as well as to so many others touching the subject of wills, and consequently that in sense and meaning it has the same scope as if it read thus: 'In all cases the marriage of the testator or testatrix or the birth of a child to him or her, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will. . . The act of 1834 put a man's will, in this respect, upon the footing of a woman's, with an implied saving in favor of wills in which provision was made for the prospective wife. It also made the birth of a child operate as a revocation of any prior will in which the child was not provided for. Then came the code, in 1863 and after varying the phraseology of the act of 1834 so as to make it wider and more general, incorporated its principle of revocation into the legal system of wills, with an implied saving in favor of wills in which, not the wife or the child, but the event of marriage or the birth of a child was provided for. . .

We can be sure, at any rate, that the code nowhere declares that the will of a woman is not

revoked by marriage or by the birth of a child. Thus no contradiction is involved in our construction of section 2477. . .

A man may bequeath his entire estate to strangers. . . All legal rights of the wife and family, such as dower and a year's support, are as secure against a will made at one time as at another. The object of the provision is to secure a specific moral influence upon the testamentary act, the moral influence of having before the mind a contingent event so momentous as marriage or the birth of a child, and so deserving of consideration in framing a testamentary scheme. A public policy which rejects the will of a prospective husband or father because it affords no evidence of the presence of this influence may well reject that of a prospective wife or mother for the same reason. . . There is as much reason in requiring one as the other to furnish evidence in the will itself that the testamentary act was performed with the future event of marriage or birth of a child in actual and present contemplation. Now that women, . . . have substantially the same testamentary freedom as men, the wills of both sexes made before or after marriage ought to stand on the same footing . . . the harmony of the whole testamentary system will be better preserved by treating the wills of both sexes alike. When the woman's rights touching the disposition of property are those of a man, her disabilities should also be those of a man. . . In order to save a will from revocation by subsequent marriage, the will itself must contain the requisite evidence that the event was contemplated. At least, such evidence must appear on the face of some document offered for probate as part of a will."

In the case of *Owens vs. Haines*, 199 Penn. 137, 48 Atl. 859, a woman was the owner of real estate and was married. She executed her will giving her entire estate to her husband. After execution of the will, their only child, Florence, was born and the mother died. The child claims the property as against the father by the laws of intestacy as to her. Pennsylvania statutes provide:

“When any person shall make his last will and testament and afterwards shall marry or have a child or children not provided for in such will, and die, leaving a widow and child or either a widow or child or children although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate; and such widow, child or children, shall be entitled to such purports, shares and dividends of the estate . . . of the deceased, as if he had actually died without any will.”

The claim was made that since the statute provides only for the death of a man, under such circumstances, and said nothing about the woman, that it did not apply to the will of the woman. The court, however, held that it did apply to the will of the woman and stated:

“The objection is made by the appellant that the act applies only to the wills of males, and not to those of females. This is technical and unreasonable. In the reasonable interpretation of statutes, the words “he,” “his,” and “him” have repeatedly been held to include women as well as

men; and the word "any person," in this act, even if followed by "his," "widow," "father," and "as if he had actually died without any will," must, in the case of a testatrix, be read as if they were followed by "her," "widower," "mother," and "as if she had actually died without any will."

In the case of *Walker vs. Hyland*, 56 A. 268 (NJ 1903) a married woman died. The revocation statutes read only in the male sex. Held that it applied to females as well. The court stated that by virtue of the statutes:

"... a married woman in this state may make a will devising her real estate in the same manner as she might if she were unmarried. . . That any will or testament hereafter made in due form of law by any married woman above the age of 21 . . . shall be held to be as valid and effectual in law as if she were . . . an unmarried woman. . .

The 21st section of the act re. Wills of 1846 reads: ". . . That if a testator having a child or children born at the time of making and publishing such last will and testament, shall at his death, leave a child or children born after the making and publishing of said last will or any descendant of such after born child . . . if neither provided for by settlement nor disinherited by said testator, shall succeed to the same portion of the father's estate, as such child . . . would have been entitled to if the father had died intestate; . . ."

Defendant contended that the statute by its terms is confined to the case of a married man and a father

and this intentionally so, for at the time it was passed no married woman could make a will.

“The method for the execution of a will was provided for by the act of 1851 . . . was a supplement to the act of 1846. It was never questioned between 1852, when the act was passed permitting a married woman to make a will, and the reenactment of the act of 1851 by the revision of 1874 that the provisions of the act of 1851 applied to the execution of a will by a married woman. Yet section 1 of the act of 1851 uses the word ‘testator’ only. But it is clear that the word ‘testator’ applies to testatrix irrespective of our act concerning statutes, because ‘testatrix’ as Webster defines it, means ‘a female testator.’ We should have no hesitation in construing testator to include testatrix if we possessed no act for the construction of statutes.

* * *

Statutes must be construed reasonably, that they may be given their self evident legislative intent. When the Legislature conferred the power upon a married woman to make a will, and failed to provide any specific method therefor, that necessarily carried with it the right to execute the instrument and devise property thereunder as other persons might lawfully do. The right to devise property was also subject to the limitations imposed upon other natural persons in making such a devise.

Nor do we see any force in the contention that, because section 21 of the act uses the word ‘father’ for that reason an after born child of the ‘mother’ dying testate, would not succeed to any portion of the mother’s estate. Speaking for

myself alone, if I were compelled to determine this case upon the words of the 21st section of the act concerning wills, only, I should feel it was a matter of construction, not legislation, as the defendants contend, to hold that since 1852 the word 'father' in this statute, must be given no more force than 'testator' or 'testatrix' and that it applied to either. . .

With that section gone, and the power given to a married woman to make a will, she took that power subject to all the limitations contained in the act as to other testators similarly situated, and with the further limitation contained in the proviso of section 9 of the married woman's act as to her husband's estate by the curtesy.

But if the construction just suggested cannot be sustained, still will we all agree that the word father, as used in the 21st section of the act concerning wills should be held to apply to mother, by virtue of the 9th section of an act relative to statutes . . . that whenever, in describing or referring to any person, party, matter or thing, any word importing the singular number or masculine gender is used in any statute, the same shall be understood to include, and shall apply to several persons and parties, as well as one person or party, and females as well as males and bodies corporate as well as individuals and several matters and things as well as one matter or thing, unless it be otherwise provided, or there be some thing in the subject or context repugnant to such construction. . . It declares that the masculine gender, when used in any statute, shall include females as well as males. It cannot be said that father, as used in the 21st section of the act, does not relate to males; and, if that be conceded, how

can it be said that 'mother' which relates to females, is not embraced in the statute? . . . The result here reached is consonant with justice. To have reached any other conclusion would have compelled us to do violence not only to the law, but to our natural instinct of humanity."

We are now faced with the statutes of the state which are applicable to this case. Section 74-1-3 provides:

"A married woman may dispose of all her estate by will without the consent of her husband, and may alter or revoke her will in the same manner as if she were single. Her will must be executed and proved in the same manner as other wills."

This statute merely abolishes the common law restriction upon the rights of married women to make a will, and as such, is in support of our constitutional provisions providing for equality between the sexes.

There are four provisions in the Utah statutes which deal with revocation of a will by law. The sections are:

74-1-24. *Effect of marriage, and issue after making will.* If after making a will the *testator* marries and has issue of such marriage born either in his life time or after *his* death, and the wife or issue survives him, the will is conclusively presumed to be revoked, unless provision is made for such issue by some settlement, or unless such issue is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no evidence of other

facts to rebut the presumption of such revocation can be received.

74-1-25. *Effect of marriage, if wife survives.* If after making a will the *testator* marries and the wife survives him, the will is conclusively presumed to be revoked, unless provision has been made for her either by marriage contract, or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in *her* favor in his will, or unless she is provided for in the will or in such provision; and no evidence of other facts to rebut the presumption of revocation can be received.

74-1-31. *Child born after making will.* When a *testator* has a child born either in *his* lifetime or after his death, or adopted, after the making of his will, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in *his* will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

74-1-32. *Failure to provide for child or child's issue.* When any *testator* omits to provide in his will for any of his children, natural or adopted, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section."

The theory of the plaintiff-appellant is that these four sections apply to a woman as well as to a man,

in light of the foregoing cases, and particularly so in light of Section 68-3-12 (7).

If the word "testator" in Section 74-1-24, does not mean the woman as well as the man who dies, a single woman could make a will leaving everything to a third party, thereafter marry, have two children and die without changing her will and her children and husband would be disinherited. This can only be avoided by having the word "testator" mean also "testatrix." Webster and Black's Law Dictionary define "testatrix" as "a female testator," so the word "testator" includes both male and female.

Under Section 74-1-31, if the word "testator" does not mean a woman as well as a man, a married woman can make a will, leave her estate to her surviving child, thereafter have another child, and if she fails to make a new will, the new child is disinherited; also, under the same section a married woman can make a will, die at childbirth, have the baby delivered after death, and although she might like to change her will, it would be impossible and the baby would be disinherited.

Under Section 74-1-32 a man may not accidentally disinherit a child. If the word "testator" in this section does not apply to a woman, as well as a man, a woman may accidentally disinherit a child. The writers can conceive of no reason why a woman should be permitted accidentally to disinherit her child, when a man may not.

We now come to Section 74-1-25, which is the specific section which may control the issue before the court. This section is written in the masculine only, but by virtue of Section 68-3-12 (7) should read: "If after making a will the testatrix marries and the husband survives her, the will is presumed to be revoked, unless . . ."

If the above statutes mean "male" only, they are unconstitutional. To be constitutional they must be interpreted to mean both sexes. A basic rule of construction is that a statute must be construed, if at all possible, in a manner that makes the statute constitutional.

The position of plaintiff-appellant is that the Utah Constitution states that a man and woman are equal in regard to testamentary dispositions, and its interpretation in *In re. Petersen's Estate* (supra) makes it mandatory that all of the four Utah statutes in regard to revocation of wills, by implication, be read in both the masculine and feminine genders. The Utah Constitution in the case of *In re. Petersen* and Section 68-3-12 (7) merely reaffirmed and put a constitutional basis under the theories used by the courts heretofore cited, in placing men and women on exactly the same footing, and in interpreting that any statutes dealing with revocation of wills applies equally to men and to women and should be so read.

CONCLUSION

The united Utah Court held in *Mower's Estate*, 93 U. 390, 73 P.2d 967, that it was desirable and imperative that the statutes on descents and distribution be "a unified whole, each provision fitting into the general plan for protection of the family unit, and dependent spouse and minor children, in accordance with the constitution, legislature, history and policy. . ." In re. Petersen (supra) implemented this public policy.

If this court reverses the probate of the instant will, the statutes and constitution of Utah will be made clear, unified, fair and workable. Now that the matter has come to this court's attention, any decision to the contrary will create havoc and inequities. The will must not be permitted to be probated, and this court should reverse the lower court.

Respectfully submitted,

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