The Space In Between

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Naomi R. Cahn, Revisiting Revocation upon Divorce?, 103 **Iowa L. Rev.** 1880 (2018).

Professor Naomi Cahn undersells her recent *Iowa Law Review* article, *Revisiting Revocation upon Divorce?* (*Revisiting Revocation*), when she concludes it by saying that "this Article contributes to the ongoing conversations about the relationship between decedents' intent, formality, and function in trusts and estates law." (P. 1949.) While *Revisiting Revocation* surely makes the contribution that Cahn describes, it also does considerably more. In revisiting the increasingly common and expanding state rule that divorce revokes any transfers of probate (and sometimes non-probate) (P. 1887)) assets to a former spouse as well as to a former spouse's family members, (P. 1886) Cahn contributes to the growing literature on the legal "spaces in between" two binaries in the areas of intimate and family life. Other scholars, including Cahn, have investigated the legal spaces in between (or outside of) the perceived extremes of marriage and non-marriage[1] and of male and female.[2] Here, Cahn devotes her attention instead to the legal space in between the perceived extremes of marriage and divorce. In so doing, Cahn sheds light on one of the lesser-known—but tremendously important—ways in which the law treats marriage as a relationship that differs in kind from other species of relationships and as an event that differs in kind from other life events.

The main subject of *Revisiting Revocation* is the rule that "a final divorce settlement or annulment of a marriage revokes all provisions in the will in favor of the former spouse." (P. 1886.) Adopted "in almost all U.S. states,"((P. 1886) the revocation upon divorce rule has expanded over time, applying in some states today to probate as well as to nonprobate transfers and covering even "the ex-spouse's family members." (P. 1887.) The rule assumes that while I might like my sister-in-law enough to include her in my will while I am married to her sister, my testamentary benevolence vanishes upon divorce, which apparently severs all property ties between certain individuals that arise through marriage. (An interesting counter-example in this regard is incest law, which in some states continues to apply to affinity-based relationships even when the very reason for the incest prohibition—marriage—goes away through either divorce or death).[3] While technically a rebuttable presumption, Cahn shows that the revocation upon divorce rule is "rarely rebutted" (P. 1891) in most states and "appears virtually irrebutable" (P. 1889) in some. She tells the story of Jesse and Virginia Lee Suiters, who were married for forty-one years (and separated pursuant to a separation agreement for the last ten of those years). (Pp. 1889-90.) Jesse Suiters died shortly after the couple divorced, and his will, which was drafted *while* Jesse and Virginia Lee were separated (and had been for seven years), devised his residuary estate to "Virginia Lee Suiters."(P. 1889.) Nevertheless, because of the state's revocation rule, a Maryland court declared that Virginia Lee was not an eligible beneficiary of Jesse's residuary estate. (P. 1889.) Cahn tells similar stories where courts have applied their state revocation upon divorce rules in ways that "rendered the decedent's intent irrelevant." (P. 1890.)

After discussing the rule and its near "irrebutability," Cahn turns to the tension that exists between the rule's underlying assumptions and recent trends in family law, including trends favoring a "therapeutic" (P. 1893) and "collaborative" (1895) (rather than an adversarial and antagonistic) model of divorce as well as trends favoring shared parental decision-making and caretaking (rather than assignments of "custody" to one parent and "visitation" to another). (P. 1894.) In addition, Cahn argues that the revocation rule exists in tension with her own empirical research and with emerging sociological

findings, both of which suggest that "ex-family members sustain[] strong ties" (P. 1895) after divorce and that "divorce might not necessarily dissolve kinship ties" relating to property and inheritance. (P. 1896.) She also points out some of the rule's "disparate impacts" (Pp. 1898-1903) based on gender, class, and race, and considers alternative approaches in non-U.S. jurisdictions, many of which "continue to adhere to a system in which divorce has no effect" (P. 1903) on probate and non-probate transfers to former spouses and their families. For all of these reasons, but particularly because of the rule's disconnect with the key animating principles of property law (honoring testator intent) and family law (encouraging collaboration between ex-spouses after divorce), Cahn advocates reform of some kind, including more extreme approaches (like abolishing the presumption altogether) (P. 1907) and less extreme alternatives (including "a more liberal interpretation to the statutory language" surrounding the presumption's rebuttal). (P. 1909.)

Revisiting Revocation's look at property law's revocation rule partakes of a much longer narrative about the extent to which the law—and property law in particular—has regulated the family in the shadow of ideas and ideals about marriage and the marital family. It is little surprise that many of the Supreme Court's "illegitimacy" cases from the 1970s concerned property law and its regulation of the non-marital family.[4] For a long time, state intestacy laws prohibited non-marital children from inheriting from their parents, and especially from their putative fathers (and vice versa);[5] some states even voided testamentary bequests from parents to certain non-marital children[6] as well as *inter vivos* and *causa mortis* transfers of certain property between unmarried persons.[7] In cases contesting these and similar laws, courts flagrantly undermined the so-called touchstone of the law of wills—effectuating testator's intent—in an effort to uphold an image of the family that was at once marital and monoracial.[8]

Today, we often talk about the ways in which the law—and especially family law and property law—reflects a respect for "private ordering" over "state moralizing" in our most intimate domains. Cahn's *Revisiting Revocation* reminds us that the "private ordering" interpretation of property law and family law is incomplete, but one piece of a much more complicated mosaic. As it did in the past, the law today continues to undermine property-based private ordering in order to promote a particular image and understanding of the family. To be sure, the revocation rule could stem from something less objectionable and more administrative: the belief that divorced spouses *would have* changed their wills to reflect their true intentions, but simply forgot to. On this view, the revocation rule is a better proxy for testator intent than no rule at all. As Cahn points out, however, recent empirical work by Professor Adam Hirsch belies the "administrative convenience" interpretation of the revocation rule, as Hirsch has found that close to two-thirds of divorcing spouses "did not want to disinherit *entirely* their former partners."[9] In other words, when polled *at likely the most acrimonious phase of their relationship*, most people favored at least some property transfers to former spouses.

The revocation rule likely persists, then, not because it is thought to approximate testator intent, but rather for three reasons. First, the rule reflects and reproduces our belief that marriage (and quasi-marriage in some jurisdictions)[10] is different not just in degree but in kind from other relationships. Second, the rule reflects and reproduces the belief that a breakdown in the marriage co-exists with a breakdown in the personal and emotional bonds that preceded it. While this might be true in some cases, it surely is not true in all; indeed, some spouses might divorce *because of* marriage (and its institutionalization of romance) rather than *in spite of* it, a possibility which problematizes the revocation rule's use of divorce as a proxy for emotional disconnection. Third, the rule reflects and reproduces our general inability to envision a space, even an uncomfortable and counterintuitive space, in between (or outside of) perceived extremes. In this case, those perceived extremes are marriage and divorce, and the interstitial space a place where couples are not married but not quite "divorced"—in all senses of that term—either.

Editor's note: For an earlier review see Solangel Maldonado, *"Renegotiated Families" and Donative Intent*, JOTWELL (April 26, 2019).

1. *See*, *e.g.*, Albertina Antognini, *The Law of Nonmarriage*, 58 **B.C. L. Rev.** 1, 59 (2017); June Carbone & Naomi Cahn, *Nonmarriage*, 76 **Md. L. Rev.** 55 (2016).
2. *See* Jessica Clarke, *They, Them, and Theirs*, 132 **Harv. L. Rev.** 894 (2019).
3. *See, e.g.*, **Mass. Gen. Laws** ch. 207, §3 (2018) (stating that the incest "prohibition … shall continue notwithstanding the dissolution, by death or divorce, of the marriage by which the affinity was created, unless the divorce was granted because such marriage was originally unlawful or void"). On this view, the designation of "family" created by formal marriage does not go away upon the "end" of formal marriage.
4. *See*, *e.g.*, Lalli v. Lalli, 439 U.S. 259, 268-69 (1978) (upholding a paternal illegitimacy classification in state intestacy law on the ground that "[e]stablishing maternity is seldom difficult," whereas establishing paternity involves "peculiar problems of proof"); Labine v. Vincent, 401 U.S. 532 (1971) (upholding a Louisiana law rendering certain non-marital children ineligible as intestate successors of their fathers' estates).
5. *See Lalli*, 439 U.S. at 259.
6. *See Labine*, 401 U.S. at 536 (observing that "[i]n some instances, [a non-marital child's] father may not even bequeath property to [him or her] by will").
7. *See id*. at 536 n.15 (citing a Louisiana law that prohibited "[t]hose who have lived together in open concubinage" from "making to each other, whether *inter vivos* or *causa mortis*, any donation of immovables").
8. *See*, *e.g.*, Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 **SMU L. Rev.** 101 (2009) (discussing these cases).
9. *See* Naomi R. Cahn*, Revisiting Revocation upon Divorce?,* 103 **Iowa L. Rev.**1880, 1897 (2018) (citing Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 **U. Ill. L. Rev.** 235, 259) (emphasis added). Importantly, though, Hirsch did find that about 45% of divorcing persons wished to disinherit their (soon-to-be) former spouses in part (either by half or more). *See* Hirsch, *supra*, at 259.
10. *See* Cahn, *supra* note 9, at 1886 (noting that "couples in registered domestic partnerships or civil unions are covered [by the revocation rule] in some states if the domestic partnership or civil union status confers the same rights as if the couple were married").

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