Wills - Partial Revocation

Clifford K. Meldman

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the policy, undertakes to assist the insured in defending an action without a reservation of rights, estoppel has normally been applicable. In the latter two situations there is little difficulty in finding a detrimental reliance, either in the form of change of position, or expense and inconvenience that has been occasioned by the conduct of the insurer. Hence, if in some manner the injured party were prejudiced by reasonably relying on the SR-21 it would seem to follow that the doctrine of estoppel in pais should be invoked; however, in the usual case it might prove difficult to find such detrimental reliance. The injured party in the Laughnan case argued that he had ceased his investigation upon discovering the SR-21, but in view of the fact that such contention went without comment by the court, and further that there was no alleged prejudicial reliance in the Prisuda case, it would seem that the presence or absence of any detrimental reliance is not a significant factor, i.e., that the court is not utilizing the doctrine of estoppel.

In conclusion, it is submitted that an SR-21 form constitutes more than a mere admission against interest, and that the court is applying the theory of waiver, rather than estoppel, if in fact the court is tacitly employing either doctrine. However, in the event of fraud on the part of either the insured or the injured party, it seems unlikely that the insurer would be precluded from denying liability on the policy.3

JOHN A. HANSEN

Wills—Partial Revocation—In the recent decision of Will of Mattes, a son took a share in his father's estate, notwithstanding the son had been entirely omitted from his father's will. Arthur M. Mattes executed his will leaving the entire residue to his wife, Meta, entirely omitting a living son by a former marriage. When the will was presented to probate, the son filed an objection claiming he was omitted by mistake and should have the same share in his father's estate as if his father had left no will according to Wis. Stats. (1953) §238.11 which states:

"Provision for child omitted by mistake, etc. When any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was made by mistake or accident, such child or the

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31 38 A.L.R. 2d 1151, supra, note 22; but see: Fitzgerald v Milwaukee Automobile Ins. Co., 226 Wis. 520, 277 N.W. 183 (1938).
33 Supra, notes 19 and 21; Koerts v. Grand Lodge, Herman's Sons, 119 Wis. 520, 97 N.W. 163 (1903); Allstate Ins. Co. v. Moldenhauer, 193 F.2d 663 (7th Cir., 1952); Matlock v. Hollis, 153 Kan. 227, 109 P.2d 119 (1941).
3 268 Wis. 447, 68 N.W.2d 18 (1955).
3 Two specific bequests were made. They are not material here.
issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in Section 238.10."³

The trial court entered an order allowing the will to probate subject to the son's share.⁴ The widow appealed claiming that a person has unquestioned power to disinherit his children without cause. Held: Affirmed. The Supreme Court stated that they were not dealing with a will but were interpreting a statute; a statute which does not abrogate a person's right to dispose of his property, but a statute which is designed to protect a child not provided for. The will stands, but the property is reduced by the omitted child's share.⁵ Primary significance was placed on the fact that the testator put his best securities in joint tenancy with his wife so they would pass outside of the will, and the fact established by testimony of disinterested witnesses that testator was under the impression he had provided for his son.

There is a popular misconception that a parent must provide for his offspring in his will, and if he does not, the law presumes the testator forgot, and the child is provided for anyway. It is clear the Mattes case does not say every pretermitted child can recover notwithstanding the will. A digest and discussion of the cases will show this to be the fact, and that a person may disinherit whom he chooses.

First of three previous cases decided under Sec. 238.11 is Newman v. Waterman,⁶ where the sole heir and son of the testator not

³ Wis. Stats. (1953) §238.10 states: "Provision for child born after will made. When any child shall be born after the making of his parent's will and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child."

⁴ The trial court's findings of fact were as follows: The scriviner did not know of the existence of a son until after the will was executed; and the testator was careless. (The Supreme Court found the evidence did not support the finding that the testator was careless, but remarked that they would not set aside the finding unless it was contrary to the great weight of evidence. Citing Swazee v. Lee, 259 Wis. 136, 47 N.W.2d 733 (1951). Testator left a son and wife surviving. (Undisputed) Testator's estate was worth $47,656.57. (Undisputed) Testator and son were on affectionate terms. Testimony shpws testator thought he had provided for his son; and consequently the son was omitted by mistake. Son's net worth was small. Son had three daughters. (Undisputed) Mother, Meta, and son were hostile to each other and testator knew this. After signing will in 1944, testator put his best securities (worth $40-50,000) in joint tenancy with his wife so they would pass outside the will. Testator's conversations while ill indicated testator thought he had provided for his son. (An employee of testator testified that Mattes told him his son would take care of things in the event he died. A neighbor testified Mattes told him his son would have nothing to worry about when he died. An internal revenue man said deceased told him the son would be able to do what he wanted with the business when he took his father's place.)


⁶ 63 Wis. 612, 23 N.W. 696 (1885).
provided for in the will appeared in a proceeding to admit the will to probate and is now trying to eject the step-daughter devisee named in the will from the devised premises. In holding for the defendant, the court said the devisee's right was complete from conclusive probate judgment and could not later be questioned. In *Moon v. Evans*, the testatrix died 3 years after executing her will entirely omitting petitioner son. The son had been convicted of murder, was later pardoned, and his mother spent money defending him. In finding against petitioner the court said there was no evidence in petitioner's favor, and he was intentionally omitted. It is pointed out in this case that the fact of omission does not raise a presumption of mistake, but rather there is a presumption the deceased knew what was in his will, and the omissions were intentional. There is no presumption of mistake or accident. Mistake or accident must be established by the petitioner. The burden of proof in the primary sense is with the petitioner who must go forward with the evidence, rebut the presumption of mistake, and convince the court of the truth of his contention by a preponderance of the evidence. A similar result was reached in *Will of Kurth* where the testator died 10 days after he executed his will omitting daughter of a deceased daughter. The court said that in Wisconsin intentional or accidental omission is determined on the evidence, not from the will alone.

All the decisions take into primary cognizance declarations made by the testator, not only about the will itself, but about how the deceased acted and felt towards all the parties concerned, prior to and after the making of the will. It should be noted, the court properly took into consideration all the facts and circumstances surrounding the making of the will. If for example, in the principal case, Mattes had provided for his son by naming him as a beneficiary in a substantial insurance policy or put some securities in joint tenancy or paid for his home; this consideration would cause the case to be held against petitioner.

Problems similar to those raised under Sec. 238.11 are raised by Sec. 238.10. While Sec. 238.11 provides for omitted children living at the time of the execution of the will but omitted by mistake, Sec. 238.10 provides for omitted children born after the execution of the will. *Bresee v. Stiles* is the first of four cases decided under the latter statute. Testator devised to his widow and 3 children omitting 3 after-born children by a third wife. The fact the parent lived many years after the will was made was held not to deprive the after-

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7 69 Wis. 667, 35 N.W. 20 (1887).
8 241 Wis. 426, 6 N.W.2d 233 (1942).
9 57 Am.Jur., Wills, pp. 411-12, §§599-600.
10 e.g., An advancement.
11 22 Wis. 116 (1867).
born children of the benefit of the statute which the testator was
demed to know about. Verinder v. Winter11 and Sandon v. Sandon12
followed the Bresee case and both placed particular emphasis on con-
struction of the will to reasonably meet the circumstances, without
going outside of the will. These cases indicate that the will itself must
show an intention to make no provision for the child or the child
will take. After-born children seem to be in a better position than
children omitted by mistake. First, because if they are omitted along
with the mother, this change of circumstance will revoke the will en-
tirely, and the child will take as if there was no testamentary disposi-
tion.13 Secondly, if there are other living children mentioned, it is a
strong indication, in the absence of other circumstances, that the testa-
tor wanted to provide for all of his children, including the after-born.
Finally, if the wife is given the entire estate to the exclusion of all the
children, the petitioning child is in no different position than the rest
of the children. In this situation it is most beneficial for the child
to be on good terms with the parent. This was the case in Will of
Read,14 where it was held that the most reasonable construction of the
will was to exclude the children as a class. Here the petitioning child
was born several years after execution of the will which made no
provision for him or 5 other living children. The mother took an estate
worth over a million dollars.

In these type cases then, it is clear the petitioner has the burden of
proof to show the omission or mistake was accidental in order to take
under the will from which he was omitted. This question of fact has
two distinct interests to balance; protection of the omitted child’s
interest, and prevention of numerous claims by irresponsible children
forcing settlements out of court. Years ago the popular device of be-
queathing one dollar was used to disinherit undeserving children. How-
ever, this was found to sometimes present obstacles. The suggested
omitting provision should simply say, “I have intentionally made no
provision for my son . . . .” If the class is subject to open these children
should also be mentioned. This would alleviate any further problems.

Clifford K. Meldman

11 98 Wis. 287, 73 N.W. 1007 (1898).
12 123 Wis. 603, 101 N.W. 1089 (1905).
13 According to Wis. Stats. (1953) §238.14 “Wills, how revoked.” “. . . Nothing
contained in this section shall prevent the revocation implied by law from sub-
sequent changes in condition or circumstances of the testator.” Will of Ward,
70 Wis. 251, 35 N.W. 731 (1887); In re Will of Lyon, 96 Wis. 339, 71 N.W.
362 (1897); Glascott v. Bragg, 111 Wis. 603, 87 N.W. 853 (1901); Will of
Battis, 143 Wis. 234, 126 N.W. 9 (1910); Bailey v. Brown, 169 Wis. 444, 171
N.W. 945 (1919); Will of Kendrick, 210 Wis. 218, 246 N.W. 306 (1933); Will
of Wehr, 247 Wis. 98, 18 N.W. 709 (1945); Estate of Kort, 260 Wis. 621, 51
N.W. 2d 501 (1952). Children’s rights are also protected by Wis. Stats.
(1953) §§238.12, 287.41, 313.29.
14 180 Wis. 497, 193 N.W. 382 (1923).