

Wills: Made Pursuant to a Contract: When Parties Bound

Thomas A. Erdmann

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Thomas A. Erdmann, *Wills: Made Pursuant to a Contract: When Parties Bound*, 50 Marq. L. Rev. 549 (1967).
Available at: <http://scholarship.law.marquette.edu/mulr/vol50/iss3/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

tarily. Recognition or organization picketing could be handled as it is under the National Labor Relations Act, with limitations similar to those under section 8(b) (7). This would require state legislative action; however, it would appear to be a worthwhile starting point from which to gain a workable basis for economic improvement as a group.

Without such a foundation it would seem that any teacher picketing could be closely scrutinized by the courts. This is so because of the very nature of their employment, which many courts view as partaking in a share of the state's sovereignty. If one stops to consider the awesome responsibility a teacher has in educating the youth of a given state, this idea is not at all difficult to accept. Traditionally a higher set of standards and a higher degree of care has been demanded of teachers. Their professional responsibilities have never been looked upon lightly by the courts,

The very fact that teachers choose to use such a mode to air their grievances could well lead to a generally unfavorable reaction in their community. Their profession could to a certain degree fall in disrepute in the eyes of parents and local officials. This feeling might well be imparted to the young people whose pliable minds the teacher hopes to educate. Also the very fact that these young people see their teachers using this means to air their grievances could lead to an immediate lowering of esteem by the pupils. The gravest result of such an experience upon immature minds could be a break-down of authority in the classroom.

This seems to be clearly a possibility. If such a result did occur it seems to this author that a state court would find little difficulty in finding that in the balance between free speech and harmful effects, this action posed a ". . . clear danger of substantive evils . . ." ²⁹ and would thus prohibit it.

Upon final analysis, teachers who choose such a method to put their case before the public may be using a means which is fraught with danger. While the courts have often recognized their plight, they and the public in general have frowned upon such activity by professional people. In a profession which commands and requires dignity to accomplish its ultimate end there is little justification for such activity when there is a legislative avenue open and a federal pattern already laid out.

MICHAEL B. RICK

Wills: Made Pursuant to a Contract: When Parties Bound: It is not unusual to find a joint and mutual will¹ or separate mutual wills used when two persons, each owning property individually, desire a common disposition of their property and agree on such a plan.

²⁹ *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

¹ *ATKINSON, WILLS* §49 (1953).

The Wisconsin Supreme Court was presented with wills of this type in *Pederson v. First National Bank of Superior*.² The testator and testatrix, husband and wife and childless, each had living blood relatives on their respective sides. In 1956, they had separate wills drawn which were mutual, reciprocal, and identical in that they bequeathed all of the property of each to the surviving spouse and provided, in the event of the predecease of the other spouse, that the residue would go to an identical group of beneficiaries. These wills were drawn pursuant to a written contract which purported to limit the rights of the parties to alter the mutual wills without mutual consent. The contract was executed at the same time the wills were drawn and was subsequently lost.

In 1957, by mutual consent, new mutual and reciprocal wills were drawn. The provisions made in the two sets of wills were practically the same and, with only minor exceptions, the dispositive scheme of the 1956 wills was continued and preserved. Upon the testator's death in 1958, his will was filed with the probate court but was not admitted to probate, as all the property which was owned by the decedent and his surviving spouse was held in joint tenancy. Subsequently, the testatrix drew at least two more wills, and her last will, drawn in 1961, was admitted to probate at her death. This will was substantially different from the wills she had drawn in 1956 and 1957, in that all of the blood relatives of her deceased spouse were eliminated.

The plaintiffs in the principal case were beneficiaries under the 1957 will of the testatrix who were excluded from the 1961 will which was admitted to probate. They alleged that the 1957 will was executed pursuant to a contract, and asked that the contract be specifically enforced. Plaintiffs demanded that the terms of the 1957 will be substituted for the will admitted to probate.

The trial court, in holding for the defendants, accepted the testimony of the decedent's attorney and banker as establishing the existence of a contract, and that the 1956 wills were drawn pursuant to the contract. However, the court, as a matter of law, held that the testimony offered was not sufficient to prove the reaffirmation of the contract as to the 1957 wills, nor to establish the terms of the lost agreement³ which, by the mutual act of each party in drafting new wills, had been revoked.

The supreme court, in reversing the decision, agreed with the lower court as to the degree of proof necessary but held that the

² 31 Wis.2d 648, 143 N.W.2d 425 (1966).

³ Here the trial court relied on *Bohnert v. Radke*, 189 Wis. 203, 206, 207 N.W. 284, 285 (1926); and also *Heath v. Cappel*, 163 Wis. 62, 67, 157 N.W. 527, 529 (1916). See also 54 C.J.S. *Lost Instruments* §13e (1948).

evidence was sufficient to establish the contents of the lost agreement.⁴ The court went on to state, in effect, that *if* reaffirmation was necessary, reaffirmation was amply supported by the statements of the testator in the presence of his wife and their attorney at the time the 1957 wills were drafted.⁵ The court, however, concluded that reaffirmation was not necessary.⁶

Section 238.19 of the Wisconsin Statutes⁷ was used by the trial court as a second reason for denying the plaintiff's claim. The supreme court answered this conclusion as it had in the previous case of *Estate of Rogers*,⁸ where the court specifically held that this statute does not apply when recovery is sought, as in the instant matter, under the contract and not under the will. When a separate contract is the vehicle used in the action, rather than a will, the statute can be successfully avoided.

In *Estate of Hoepfner*,⁹ decided a few weeks after the principal case, the Wisconsin statute again came into discussion. In that case, the supreme court stated that a joint and mutual will executed by a husband and wife gave rise to the conclusive *inference* that the will was executed pursuant to a contract. Justice Gordon, while concurring in the majority decision, stated that such an inference would, under the present thinking, bind a young signer of a joint will to leave all of his or her property exactly as required under the joint will regardless of any change that may take place during the life of the survivor, such as remarriage.¹⁰ The Justice said:

The vicissitudes of life are such that it would seem more sensible to me that we ought not to presume such an intent unless the parties clearly declare it.¹¹

The repeal of the so-called joint will exception to 238.19 which permitted the inference found in the *Hoepfner* case was discussed in Justice Gordon's concluding remarks:

The policy followed in the instant decision can, of course, be remolded by the legislature. If our reluctant adherence to a dubious rule is deemed misguided, corrective legislation should

⁴ *Pederson v. First National Bank*, 31 Wis.2d 648, 652, 143 N.W.2d 425, 427 (1966). The supreme court also cited *Estate of McLean*, 219 Wis. 222, 227, 262 N.W. 707, 709 (1935).

⁵ 31 Wis.2d 648, 654, 143 N.W.2d 425, 428 (1966).

⁶ See also, 94 C.J.S. *Wills* §117a (1956).

⁷ WIS. STAT. §238.19 (1956): "No will shall be construed as contractual unless such fact affirmatively appears in express language on the face of the instrument. This section shall not apply to joint wills which exist as a single document."

⁸ 30 Wis.2d 284, 140 N.W.2d 273 (1966).

⁹ 32 Wis.2d 339, 145 N.W.2d 754 (1966).

¹⁰ *Id.* at 349, 145 N.W.2d at 760.

¹¹ *Ibid.*

be undertaken. For example, a reversal of policy could be indicated by a repeal of the last sentence of 238.19, Stats.¹²

However, since the holding in the *Rogers* case, it is obvious that any attorney, having a will or wills coupled with a contract, would bring the action on the contract and thereby avoid the statute. If the desire of the legislature in passing the statute was to require any contractual agreement to be at least referred to in the will or wills, it appears that new legislation to that effect is necessary.¹³

When a will and contract are joined in the same transaction, it must always be remembered that it is the contract and not the will that is or may become irrevocable.¹⁴ A will is, as a testamentary instrument, ambulatory and revocable throughout the lifetime of the maker. It is the contract and its effectiveness as a binding instrument that has caused the confusion present in the courts. Many jurisdictions permit revocation of the contract upon proper notice to the other living party.¹⁵ When this is permitted, one of two principal theories is used to justify the procedure. The first, and least common theory, is that the transaction consists of nothing more than two unilateral offers. Until one party or the other has performed by leaving a will based on the agreement, the offer is revocable.¹⁶ The second theory, and the one most commonly relied upon by the courts, is that a bilateral contract has been formed upon execution of the will or wills. The execution of one will is consideration for the execution of the other.¹⁷ Courts using this theory permit revocation upon proper notice, upon the principle that a person should be free until death to dispose of his property as he sees fit. The courts reason that one should not be denied this right by an *inter vivos* contract, the consideration being only the other's promise, with no real value having been transferred. It is doubtful that any contract

¹² *Id.* at 349-350, 145 N.W.2d at 760.

¹³ During the publication of this article, legislation was proposed which, if enacted, would clarify the nature of §238.19 and also remove any inference that joint wills are made pursuant to a contract not to revoke. Assembly Bill 280, among other things, would repeal §238.19 and replace it with the following statute:

§853.13 WHEN WILL IS CONTRACTUAL. (1) A contract not to revoke a will can be established only by: (a) provisions of the will itself sufficiently stating the contract; (b) an express reference in the will to such a contract and evidence proving the terms of the contract; or (c) if the will makes no reference to a contract, clear and convincing evidence apart from the will.

(2) This section applies to a joint will (except if one of the testators has died prior to July 1, 1968) as well as to any other will; there is no presumption that the testators of such a joint will have contracted not to revoke it.

¹⁴ *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

¹⁵ Cases cited in ATKINSON, *WILLS* §49 (1953), 4 PAGE, *WILLS* §1708 (lifetime ed. 1950), 97 C.J.S. *Wills* §1367 (1957).

¹⁶ *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925).

¹⁷ *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924). See also Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORN. L.Q. 358 (1930).

theory would justify the finding that a contract, not illusory, can be revoked unilaterally upon proper notice. No cases have been found in Wisconsin that specifically raise the problem of revocation upon proper notice. However, our court has said:

When two testators enter into a contract to make a joint will, or two mutual and reciprocal wills, they undoubtedly intend such contract to be effectual, which it would not be if either party had the right to revoke or modify the contractual testamentary disposition without the consent of the other.¹⁸

Thus, it is doubtful that such notice would be deemed sufficient to revoke an express contract to make mutual wills in Wisconsin.

The problem just considered does not arise when one of the parties to the agreement has died and left a will in accordance with the terms of the agreement. The supreme court, while stating that one party cannot revoke after the other dies leaving a will in accordance with the agreement, has always supplemented this idea with the so-called "acceptance of benefits"¹⁹ theory. Wisconsin has expressed this doctrine in a number of cases, as in *Schwartz v. Schwartz*:

It is the duty of equity to grant such relief where, as here, the survivor of the two testators to a joint will or to two mutually reciprocal wills, has directly benefited from the will of the first of such two testators to die *by receiving property* thereunder to which such survivor would not otherwise have been entitled.²⁰ (Emphasis added.)

In both the principal case and *Hoepfner*, no property was taken by the survivor under the will of the first to die, but rather as surviving joint tenant. The court said in *Hoepfner*, while reaffirming the *Schwartz* case, that the benefit received by the survivor was the "benefit of the bargain." He received that which he bargained for when the other party died, leaving a will in effect that met the requirements of the agreement. There was, therefore, no added requirement that property actually be received under the will. With the exception of meeting one of the respondent's arguments in the *Hoepfner* case, it does not appear that it was necessary for the court to discuss the acceptance of benefits theory. This theory is used mainly when wills are executed pursuant to an oral contract to will real estate, and it is subsequently alleged that such an oral contract is void under the Statute of Frauds. The application of the theory would remove the contract from the Statute. However, the important point in cases of oral contracts to make wills is that the contract itself does not pass the real estate, but only requires the making of wills according to a specific plan. The real estate passes

¹⁸ *Schwartz v. Schwartz*, 273 Wis. 404, 410, 78 N.W.2d 912, 915 (1956).

¹⁹ *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924); *Schwartz v. Schwartz*, 273 Wis. 404, 78 N.W.2d 912 (1956); *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929).

²⁰ *Schwartz v. Schwartz*, 273 Wis. 404, 409, 78 N.W.2d 912, 915 (1956).

under the will, and section 240.07 of the Wisconsin Statutes²¹ specifically exempts wills from the Statute of Frauds. The court answered the problems of oral contracts to will real estate in yet another manner when, with reference to *Estate of Rogers*, it said:

We have recognized that, under those circumstances, equity will not permit the statute to be used to work a fraud where there has been such a change in position of the parties that enforcement of the Statute of Frauds would result in injustice and hardship.²²

In the principal case, as well as in *Hoepfner*, the court stated that the contract became effective and irrevocable, except by mutual consent, when wills were made pursuant to it. The Iowa court, in *Steward v. Todd*, came to a similar conclusion:

Inasmuch as their original contract rested on the mutual promise of the contracting parties, carried out and recognized by the making of reciprocal wills, it cannot be rescinded except by the consent of both. As it takes the mutual consent of both to make a contract, so it takes the mutual consent of both to rescind or destroy the contract.²³

It is interesting to note that the contract found by inference in the *Hoepfner* case was given wording exactly the same as the expressed contract in the *Pederson* case. The court said:

The contract that under these circumstances we find by inference is precisely like the expressed contract of the parties in *Pederson v. First National Bank* which provided, "it is . . . agreed . . . that these wills will not be changed unless it is mutually agreeable to each party."²⁴ (Citation omitted.)

The court, therefore, was not only willing to infer a contract to make a joint and reciprocal will but also to infer that the contract removed the power of the parties to revoke in the absence of mutual consent. Since the contract became effective when the will or wills were made pursuant to it, the court, in both cases, declared that the terms of the last will made in accordance with the expressed or inferred contract would be enforced in equity.

The next step in the problem of wills coupled with contracts will be reached when the validity of a contract to make mutual wills is

²¹ WIS. STAT. §240.07 (1965): "Section 240.06 shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament nor to prevent any trust from arising or being extinguished by implication or operation of law." WIS. STAT. §240.06 (1965) provides: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

²² In Re Estate of Hoepfner, 32 Wis.2d 339, 346, 145 N.W.2d 754, 758 (1966).

²³ 190 Iowa 283, 288, 173 N.W. 619, 622 (1919).

²⁴ 32 Wis.2d 339, 344, 145 N.W.2d 754, 758 (1966).

challenged during the life of the parties. The cases under discussion seem to suggest that the court will find such contracts effective as long as the parties have not mutually agreed to change the wills or contract, and the challenging party maintains a will in accordance with the contract.²⁵ A holding of this nature will create additional problems. What remedies would be available to the nonbreaching party? There would be the question as to whether the breach is immediate or merely anticipatory, and in either event how monetary damages are to be measured. It is possible that difficulties in conferring any effective legal remedies might induce a court to grant equitable relief by way of specific performance or injunction.

Although the contract in both the principal case and *Hoepfner* was considered binding and irrevocable as to the parties to it, the question concerning the rights of the beneficiaries of the various dispositive plans which existed from time to time still must be decided. Each pair of testators in the cases under consideration mutually agreed to change and did change the dispositive provisions at least once during their joint lives, and each survivor changed the plan again after the first party's death. Various beneficiaries were brought into the plan or dropped out of it at various times. What rights did they have and when did these rights become enforceable? It is settled law in Wisconsin that unless a right to modify is expressly reserved, a contract which creates rights in third parties cannot be altered by the parties to the agreement without the consent of the third parties, if the change will in any way effect the rights created for the third parties.²⁶ However, the contracts in the cases under consideration, as previously stated, were contracts to make joint and mutual or separate mutual and reciprocal wills and not to revoke the same without the consent of the other party. The right to mutually change the dispositive plan was expressly or inferentially reserved by the respective parties. Thus, the contract conferred no rights upon any third party when made, and the dispositive plan was subject to change or complete revocation at any time the respective testators mutually agreed to do so. When, however, one of the parties to the agreement died, the rights of the beneficiaries named in the will or wills last made in accordance with the agreement arose and became fixed. The court ended its discussion of this problem in the *Hoepfner* case saying:

The rights of the claimants arise from the will of 1949 and only become fixed and irrevocable (the rights, not the will) upon the

²⁵ The supreme court said: "A contract to make a will or to enter into a mutually satisfactory disposition remains in effect until the contract is discharged by performance or is abandoned by mutual consent or rescinded by agreement." *Pederson v. First National Bank of Superior*, 31 Wis.2d 648, 654-55, 143 N.W.2d 425, 428 (1966), citing 94 C.J.S. *Wills* §117 a (1956).

²⁶ *Estate of Cochrane*, 13 Wis.2d 398, 108 N.W.2d 529 (1961); *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903).

death of Elsie Hoepfner. It is this last mutually agreeable will that binds the hand of Emil Hoepfner and determines the disposition of the estate of Emil Hoepfner in a court of equity.²⁷

The two cases discussed have shown the problems that arise when a will or wills are made pursuant to a contract. When, and if, such contracts are held effective during the lives of the respective testators, additional problems will be created.

THOMAS A. ERDMANN

Constitutional Law: Libel and Slander: Extent of Comment About Public Official Under the First Amendment: *Rosenblatt v. Baer*: On March 9, 1964, the United States Supreme Court decided *New York Times Co. v. Sullivan*,¹ holding that under the First Amendment a public official may not recover damages for false and defamatory statements about his public conduct unless he shows that the statement was motivated by actual malice. The *Times* case thus ended a division among American courts on the question of whether the immunity protecting fair comment on the conduct of public officials and the qualification of candidates for public office should be supplemented by a qualified privilege to make false and defamatory statements about them.²

The question of how far beyond candidates for public office the designation "public official" went was then left for later decision. The Court in the *Times* case stated it would not at that time "determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule or otherwise to specify categories of persons who would or would not be included."³ The *Times* case therefore is said only to apply to debate on "public issues" designed to bring about "political and social changes desired by the people."⁴

The Court made its first attempt to further define the term "public official" in *Rosenblatt v. Baer*,⁵ in which a former supervisor of a county-owned ski resort had recovered a \$31,500 judgment from an unpaid columnist for the *Laconia (N. H.) Evening Citizen*. The columnist had made statements about the relatively low profits realized by the ski area when the plaintiff was the supervisor. The main question in the article, which could be understood to imply speculation, was, "What happened to all the money last year and every other year?"

²⁷ 32 Wis.2d 339, 347, 145 N.W.2d 754, 759 (1966).

¹ 376 U.S. 254 (1964).

² Note, 113 U. PA. L. REV. 284 (1964). Also see Noel, *Defamation of Public Officers and Candidates* 49 COL. L. REV. 875 (1949) and Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910). For the development of the law of defamation generally, see Lewis, *The Individual Members Right to Recover for Defamation*, 17 U. MIAMI L. REV. 519-525 (1963).

³ 376 U.S. 254, 283 (1964).

⁴ Note, 113 U. PA. L. REV. 284, 288 (1964).

⁵ *Rosenblatt v. Baer*, 383 U.S. 75 (1966).