1953

The Right to Dispose of Property by Will

Arthur Scheller Jr.

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Arthur Scheller Jr., The Right to Dispose of Property by Will, 37 Marq. L. Rev. 92 (1953).
Available at: https://scholarship.law.marquette.edu/mulr/vol37/iss1/12

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 editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE RIGHT TO DISPOSE OF PROPERTY BY WILL

The purpose of this article is to analyze the concept of natural rights in general and particularly to determine whether there is a natural right to dispose of property by will; to set forth the Wisconsin law on the right to dispose of property by will; and to evaluate two recent Wisconsin statutes.

I. NATURAL RIGHTS

Although natural law and natural right are not interchangeable, they do express different aspects of the same thing. In terms of morality, a right is an inviolable moral claim to some personal good. This claim may be created by civil authority (legal right) or it may be derived from man's rational nature (natural right). Essentially "rights" are means enabling the possessor of them to obtain some end. It follows then, that natural rights are means by which man attains the end appointed to him by nature (rational life). Therefore, the extent, number and existence of man's natural rights are determined by the exigencies of rational living.

The natural rights of man are absolute in a certain sense, but it is in the sense that their validity is not dependent on the will of anyone except the individual in whom they reside and not in the sense that they are subject to no limitations. To put it another way, abstractly, natural rights are absolute when the individual is considered as an entity, but in the concrete order, an individual's natural right is not absolute in extension or exercise (although it is absolute in existence) because of the common good. Consequently, although natural rights are correlative with natural duties necessitated by the natural moral law—and, natural rights are absolute in existence—yet there are limitations which come

1 J. Maritain, The Natural Law, Commonweal, May 15, 1942: 84— "... the natural law and the light of moral conscience within is not only prescribe certain things to do and not to do; they also recognize rights, and particularly rights linked to the very nature of man. The human person has rights by the very fact that it is a person, a whole, master of itself and of its acts, and which is consequently not only a means, but an end, an end which must be treated as such. The dignity of the human person—this phrase means nothing if it does not mean that through the natural law the human person has the right to be respected and is the subject of right, possesses rights."

2 Cf. I-II, q. 71, a.6 ad.4
   I-I, q. 91, a.2
   I-II, q. 94, a.4; a.5; a.6
   I-II, q. 96, a.2; a.4
   II-I, q. 96, a.2; ad.3
   II-II, q. 57, a.2

3 J. Maritain, note 1 supra: "There are certain things which are owed to man by the very fact that he is man: The notion of right and the notion of moral obligation are correlative: they rest upon the freedom proper to spiritual agents. If a man is morally bound to do the things necessary for the accomplishment of his destiny, it is because he has the right to accomplish that destiny, and if he has the right to accomplish his destiny, he has the right to do the things necessary therefor."
from the ends of natural rights and from their reciprocal relations. To deny the absoluteness of natural rights, as properly understood, would be a violation of nature itself, in fact it would be a denial of the possibility of a moral order. The logical corollary is to substitute a mechanical or physical end and order.  

In the abstract, all men are equal with respect to their natural rights since all are equal in the rational nature from which these rights are derived; but in the concrete, they are unequal because the concrete natures from which these rights spring are unequal—i.e., individual men have varying capacities and this endowment of different powers necessitates a variance in degree. Consequently, men are equal as regards the sacredness, kind and number of their natural rights but in extension their rights are relative to their particular subjects. To put it succinctly: natural rights inhere in all men without distinction as to person but they do not necessarily have the same extension or content in all men.

The origin of natural rights is found in the dignity of personality which imposes upon the individual the duty of self-perfection; this is the proximate source of the sacredness of natural rights and their ultimate source is God who has decreed self-perfection as an end of man. Consequently, the means (human rights) are sacred and inviolable. Thus the basis of natural rights is man's duties, inasmuch as individual perfection is the end and rule of conduct—i.e., the inherent sacredness of man's personality or, to put it another way, derivation and determination by man's nature.  

Various formulae have been suggested to prescribe the limitations

---

4 An illustration of this is found in Huxley's comparison of life to a game of chess in A LIBERAL EDUCATION included in SCIENCE AND EDUCATION 77 (1907): "The chess board is the world, the pieces are the phenomena of the universe, the rules of the game are what we call the laws of nature. The player on the other side is hidden from us. We know that his play is always fair, just and patient. But also we know, to our cost, that he never overlooks a mistake or makes the smallest allowance for ignorance. To the man who plays well, the highest stakes are paid, with that sort of over-flowing generosity with which the strong show delight in strength. And one who plays ill is checkmated—without haste, but without remorse.”

5 In opposition to this is the basic theory (although there are many variations of it) that all rights are derived from society and are contingent upon social welfare insofar as society gives them social organization. See D. C. RITCHIE, NATURAL RIGHTS. For one of the philosophic sources of this theory, see HEGEL, GRUNDLINIIEN DU PHILOSOPHIIIC DES RECHTS: very superficially, its philosophic basis is that the State is a good in itself because it is a highest manifestation of Universal Reason (the only final reality) and consequently the good of the social organism is the end and rule of conduct—therefore, all rights are derived and intended for the glory of the State. Also see: III BENTHAM, WORKS 219: “Natural rights is simple nonsense. Natural and imprescriptable rights, rhetorical nonsense—nonsense upon stilts”; John Dewey, Nature and the Supernatural, 4 included in Yervant Krikovian, ed., NATURALISM AND THE HUMAN SPIRIT (1944): “The idea that unless standards and rules are absolute, and hence eternal and immutable, they are not rules and criteria at all is childish.”
on the exercise of human rights, but a very satisfactory formula is that a person has the right to those things which are necessary or essential for the development of his personality in a reasonable manner insofar as they are consonant with the rights of others and the moral law.

II. RIGHT TO MAKE A WILL

The right to dispose of property after death obviously stems from and depends upon the nature of rights in property and requires some investigation of the nature of property rights. From man's position in the order of the universe, it follows that he has a natural right to use those material things which are necessary for the attainment of his end: that is to say, man has a natural dominion over those material things which are necessary to satisfy the reasonable needs of his nature (but this natural dominion is only in reference to the power to use material things). Consequently, man has a natural right to the possession of material things, but there is no natural right as to the forms of possession or ownership. Thus, on a logical basis, the possible forms of possession and use of property are: common possession and use by all persons, common possession and use by the community and individual possession and use by individuals. However, the form of possession which is best for man, although not a natural right, is private property, because:

1. Metaphysically, one of the "properties" of man, as a spiritual agent, is the free and rational disposition of external goods.
2. Psychologically, external possessions are the foundation for the development of man's personality and consequently the age in the form of "mine" has an intimate relationship with the "it."
3. Socio-ethically, a man will care more for what belongs to him and hence greater order and peace will exist in society.

III. WISCONSIN DOCTRINE OF RIGHT TO MAKE A WILL

The Wisconsin doctrine of a right to make a will is not only commensurate with the power of disposal by contract or gift, but is more sacred and one of the highest equities which courts can consider. This right is a natural right in the form of a constitutional guarantee

---

6 For example: a man has the right to do anything that is consonant with the liberty of others. See I. KANT, METAPHYSILS DER SITTEN Sec. C, or J. FICHTO, SCIENCE OF RIGHTS 161.
7 SUMMA THEOL., II-II, q. 66.
8 34 MARQ. L. REV. 151.
9 SUMMA THEOL., II-II, q. 66, a.2, c.
10 Dodge v. Williams, 46 Wis. 70, 1 N.W. 92, 50 N.W. 1103 (1879).
11 Will of Rice: Cowie v. Strohmeyer, 150 Wis. 401, 136 N.W. 956 (1912); Will of Duncan: Duncan v. Metcalf, 154 Wis. 39, 141 N.W. 1002 (1913); Estate of Williams: Whaley v. Avery, 192 Wis. 111, 211 N.W. 652 (1927); Will of Szperka: Okzewski v. Borek, 254 Wis. 153, 35 N.W.2d 209 (1948).
under the "pursuit of happiness" section of the Wisconsin Constitution. This right also includes the concomitant right to have the will carried out. It is one which neither courts, parties nor legislature can invade nor destroy and can only be taken away by constitutional change; but it is subject to reasonable regulation—e.g., the state may, under proper circumstances, determine the manner of execution of wills, levy inheritance taxes, and limit within reason the extent of testator's beneficiaries.

Fundamentally in the United States there is a basic split as to the validity of compromises which provide for a distribution in a manner other than that provided by will—whether a contested or uncontested will. The majority rationale for recognizing the validity of such agreements is that since the property belongs to the beneficiaries and would be subject to any transfer that they would deem fit after the distribution, then a realistic view should recognize that they be allowed to divide it by agreement before they received it—such an agreement of division is in no sense a new will because it is based on the assumption that the property will be distributed as directed by the will; hence, it is a contract disposing of what one rightfully has. On the other hand, Wisconsin refuses to recognize the validity of such a compromise on the basis that the right to make a will and have it carried out is a natural right in the form of a constitutional guarantee under the "pursuit of happiness" section, although there have been indications by the Wisconsin court that the real basis is public policy.

IV. EFFECT OF RECENT WISCONSIN STATUTES

In view of the long established and clearly enunciated Wisconsin doctrine, an interesting problem arises as to the constitutionality of Sections 45.37(3) (Chapter 399, Laws of 1949) and 318.31 (Chapter 367, Laws of 1951).

The only known determination under Section 45.37(3) is the case of In re Estate of Fred Luck decided by the County Court of Waupaca

13 Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906); Will of Rice, op.cit.; In re Estate of Ogg, 262 Wis. 181, 54 N.W.2d 175 (1952); Cf. Wis. Const. Art. I, §1; Art. XIV, §13.

14 Will of Dardis, 135 Wis. 457, 115 N.W. 332 (1908); Will of Rice, op.cit.; Boardman v. Lorentzen, 155 Wis. 566, 145 N.W. 750 (1914); Will of Schaefer: Schaefer v. Ziebell, 207 Wis. 404, 241 N.W. 382 (1932); In re Estate of Svendsø, 257 Wis. 335, 43 N.W.2d 343 (1950).

15 Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 (1913); Nunnemacher v. State, op.cit.; Will of Boardman: Chase v. Amadon, 178 Wis. 517, 190 N.W. 355 (1922).

16 Beals v. State, 139 Wis. 544, 121 N.W. 347 (1909)—overruled on different point by 184 Wis. 88, 197 N.W. 344 (1924); Will of Ball: Ball v. Boston, 133 Wis. 27, 141 N.W. 8 (1913); Will of Griffith: Enright v. Griffith, 165 Wis. 601, 163 N.W. 138 (1917).

17 97 A.L.R. 468 (1935).

18 205 Wis. 597, 238 N.W. 377 (1931).
County. The facts of the case were: testator died on December 12, 1949, unmarried, with no relatives in this country, and as a resident of the Grand Army Home for Veterans at King, Wisconsin. Under the provisions of his will, he devised all of his estate, with the exception of a reservation of one hundred dollars for Masses for the repose of his soul, equally to his two brothers and sisters or their heirs, all of whom resided in Germany. On the same day of the execution of his will (January 24, 1940) testator made a written application for admission to the Grand Army Home for Veterans at King. At the time of his admission to the Home as a member, section 45.37(2)(j) of the Wisconsin Statutes was in force and effect, which section provided:

"All members who enter the home shall sign an agreement as follows: 'I, in consideration of having received domiciliary care, agree that in event of my death, leaving no heirs at law or next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by Will, whether such property be the proceeds of pension, compensation, or life insurance; or otherwise derived, shall vest in and become the property of the state of Wisconsin for the sole use and benefit of the Grand Army Home for Veterans, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within one year after my death.'"

In 1949, the Wisconsin State legislature by virtue of Chapter 399, Laws of 1949, repealed section 45.37(2)(j) and enacted section 45.37(3) which provided:

"If any member of the home shall die without legal dependents, his real property shall descend and his personal property shall be distributed to the state of Wisconsin as sole heir for the sole use and benefit of the home, and no Will, previously or hereafter drawn, making a contrary disposal shall be valid. A wife or mother residing at the home shall be included among and considered as a legal dependent for the purpose of this subsection."

On the question whether section 45.37(3) was unconstitutional as offending against Art. I, Section I of the Wisconsin Constitution, in that it deprived a resident of the right to make a testamentary disposition of his property of which he dies possessed, the court held: that in determining the relationship existing between a member of the Home and the people of the State of Wisconsin, a brief review of the history of the Home indicated an intent by the GAR and the state legislature "to provide a Home for those disabled or diseased veterans who were not possessed of sufficient means to support themselves and who, in the absence of this provision by the State would be without the necessities and comforts of life." Hence there was no "contractual relationship
between the State as the grantor of a bounty and the member of the Home who is a recipient of such bounty. Certainly the support in the Home is a gift upon the part of the State. This being true, it follows that the State may make the enjoyment of its benefaction dependent upon any reasonable conditions.\(^{20}\) Therefore, 45.37(3) is constitutional because it “did not deprive the deceased of his right to make a Will, it merely limited his beneficiaries to his legal dependents.” It is also well settled that constitutional rights as well as any other personal or property right may be waived. \(\text{Osborn v. State, 143 W. 249; Finsky v. State, 176 W. 481.}\) If the State of Wisconsin by legislative enactment

> “had in fact provided that a member of the Home would have no right to make a Will disposing of his property, the acceptance by the member of the benefits of the Home, would effectively waive the constitutional right involved. The Courts have frequently said that, ‘One may not enjoy the benefits and privileges of a statute and after so doing escape its burden by attacking its validity—the individual need not accept the benefits, but if he does so he subjects himself to whatever condition the legislature may see fit to impose.’ Fresbe v. U.S. 157 U.S. 160.”\(^{21}\)

Thus the court sustained the constitutionality of 45.37(3) on the theories of “gift” and “waiver of rights.” The principles and decision in this case do not seem to offend the constitutional guarantee of private property which is considered as a natural right, inasmuch as a constitutional right is subject both to reasonable regulation and waiver. Nor does the decision contravene any philosophical conception of rights to private property, inasmuch as man’s form of possession is contingent on its reasonable determination by the society in which he lives: thus, in our society, the form of possession, by virtue of historical development based on a perspicuity through experience, is private property, whose only limitations are the dictate of reason in view of a constitutional mandate.

There are no known determinations under section 318.31. An analysis of 318.31 reveals that it provides for a compromise (which \textit{may} be approved by the court and \textit{must} be approved by the court before binding) in two basic situations:

1. The first situation is where there are controversies between different claimants in an estate where either the deceased died testate or intestate (since the court may authorize executors, administrators, or trustees). All those claiming parties whose interest are affected by the compromise must join with the executor, administrator or trustee in the compromise. If one of these necessary parties is subject to guardianship, then the court must appoint a guardian who shall execute all the

\(^{20}\) \textit{Ibid.}, 9.

\(^{21}\) \textit{Ibid.}, 10.
proper instruments necessary for the compromise. In addition, the court must appoint persons to represent persons unknown or future contingent interests of persons not in being if it appears to the satisfaction of the court that their interests may be affected by the compromise (under these circumstances, any money or property set aside, may be deposited, in a proper case, with a trust company, a state or national bank authorized to exercise trust powers, or a public administrator, subject to orders of the court). In order for the compromise to be valid and binding, it must be found by the court to be just and reasonable in its effects upon the interests of all the necessary parties to the compromise—i.e., any person whose interest is affected regardless of whether he is a person subject to guardianship, an unknown person, a person not in being, or an adult person of sound mind.

2. The second situation is where there are controversies between devisees and legatees and persons claiming under the statute of descent and distribution (hence only where the deceased died testate). All of these persons whose interests are affected by the compromise and the executor (except where the executor named in the will renounces) must be parties to the compromise. The same rules in this situation apply as in the first situation as to persons subject to guardianship, unknown persons, and persons not in being, and further the same criteria is applicable—i.e., just and reasonable in its effects.

The procedure for the approval of the compromise is the same in both situations:

(a) The compromise must be in writing.
(b) The application for approval must be by a verified petition.
(c) The petition must set forth
   1. Provisions of the instrument or document;
   2. All facts relating to claims;
   3. Possible contingent interests of persons not in being;
   4. All facts which make it proper or necessary that the proposed compromise be approved.
(d) The application may be made prior to execution of proposed compromise.
(e) The court will make inquiry into all circumstances which justice requires.

Arguments pro and con may be reasonably advanced to support the constitutionality or unconstitutionality of the statute. Thus, in a recent, ably-written article appearing in the Wisconsin Bar Bulletin, the writer, although conceding that other states have compromise statutes,

and that there are situations in Wisconsin where the wishes of the testator are not carried out; and, in addition, indications by the Wisconsin court that the right is not a constitutional right, yet 318.31 should be declared unconstitutional because:

1. It will leave the law of wills unsettled and create troublesome litigation.
2. There is no criteria to determine what compromises should be approved and hence there will be a great variance in those approved by courts.
3. The compromise factor affords great opportunities for "black sheep" to utilize blackmail and duress.
4. A compromise may always be effected after the estate has been distributed.
5. The doctrine of natural right to make a will has long been entrenched in Wisconsin jurisprudence and only affects Wisconsin citizens so that compromise statutes in other jurisdictions have no bearing: further, since it is a constitutional right, it can only be taken away by constitutional change.
6. The few remaining natural rights retained by the citizenry should not be readily sacrificed.

On the other hand, strong arguments are advanced, largely on the ground of practical and efficient probate practice, to support such provisions. It should be emphasized again that in those jurisdictions which accept these arguments, a problem does not arise which does in Wisconsin, namely, the interpretation that such a right is a natural right in the form of a constitutional guarantee. Thus, in the early Massachusetts case of Clarke v. Cordis, the court said the compromise must be just, reasonable, judicious and expedient and prescribed certain circumstances making a controversy a subject of compromise to be:

1. Must properly be the subject of adjustment and compromise.
2. Involves difficult and doubtful questions both of fact and law.
3. Its determination by a regular course of legal proceedings would be attended with great uncertainty as to its final result.
4. From various causes it might be difficult, if not impossible, to accomplish thereby perfect justice to all the parties interested.

24 Illustrations: An executor may decline to act: 310.16; Beneficiaries may decline to take under Will: 319.03; Widows election: 233.13; Immediate vesting in remaindermen where refusal by beneficiary to take under trust—259 W. 361.

25 205 Wis. 597, 238 N.W. 377 (1931).

26 Merchants National Bank of Boston v. Merchants National Bank of Boston, 318 Mass. 563, 62 N.E.2d 831 (1945); "Distribution of property by will or descent is not a natural right but a privilege conferred by the state, which may impose any conditions not in conflict with Federal or State constitution"; Irving Trust Company v. Day, 314 U.S. 556 (1942): "The Federal Constitution nowhere forbids Legislative of state to Limit, condition or even abolish power of testamentary disposition over property within its jurisdiction."

7 Allen 466 (1862).

28 Cf. Wis. Stats. (1951), sec. 318.31(5): "—if found by the court to be just and reasonable in its effects."
Thus, restrictive areas are staked as to what may be compromised and the criteria in those areas is “just and expedient.” In a subsequent Massachusetts case, the court said that an approved agreement of compromise is not a modification of the will but rather a modification of the rights of the parties under the will. The will stands by itself and the changes wrought in the disposition of the property are not the result of changes in the will, but of concessions by the parties. Thus, it is not a situation where the parties make a new will for a testator, but rather a facilitating of the “making of valid contracts by competent legatees and devisees as to what they will do with that which they may receive under a will, subject to the supervisory power of the court to see that such contracts are just and reasonable toward all interests whether in being or future contingent.” Further arguments advanced are that the testator should not have unlimited freedom of testamentary disposition of property so as to pauperize his dependents and public policy as to conserving and insuring harmony among the living members of a family is stronger than any policy preserving the wishes of the dead.

It can be seen that most of the arguments on both sides hinge around the nature of a public policy as to the essence of a testamentary power. Since the public policy on this power in Wisconsin has been interpreted in the form of a constitutional guarantee, most of the arguments on both sides do not seem in point as to the constitutionality of 318.31. The constitutionality of the statute is contingent on the precise nature of the constitutional guarantee. The constitutional guarantee is “the establishment of every valid will” and its being carried into effect. Hence the constitutional guarantee will be fulfilled once the validity of the will is established, admitted into probate and the property distributed according to the terms of the will. Consequently, since the rights of any parties to a compromise under 318.31 are contractual, it will not displace the will or the testamentary rights of any beneficiaries, but rather, as the court said in *In re Ellis*:

---

29 In re Ellis, 228 Mass. 39, 116 N.E. 956 (1917).
30 Ibid.
31 Cf. 13 Cornell L. Rev. 559 (1928); 19 Green Bay 607, 613.
32 128 Miss. 699, 91 So. 394 (1922).
33 Rice's Will, op.cit. 446.
34 In re Ellis, op.cit. 956.
made, not in the expression of the will but in the violation of legatee or
deviser as to what he is to do with the benefaction which he has re-
ceived under the will." Therefore, 318.31 should be declared constitu-
tional, because it does not impinge or conflict with the wholesome
document of natural right to make a will.

A very practical problem arising under 318.31 is who may test the
constitutionality of the statute. Thus, assuming that the probate judge
would deny the verified petition for approval of the compromise, who
could appeal? Since all of the necessary parties (those whose interests
are affected by the compromise) must join the compromise; there would
be no adversary on appeal. In addition, assuming that an appeal were
allowed, the appellants would be in no position to deny the constitu-
tionality of the statute, nor would they want to, but rather, their argument
would be based on an abuse of discretion. On the other hand, assuming
that the probate judge approved the compromise, who could appeal?
Certainly none of the necessary parties to the compromise would want
to appeal and they are the only parties involved in the litigation. Two
situations suggest themselves as to how the constitutional question may
be raised: in the first situation, one of the beneficiaries who was a
necessary party to the compromise could regret and try to escape the
burdens of the agreement by arguing on appeal that the statute (318.31)
authorizing the compromise was unconstitutional. But in such a
situation, the court could apply the principle that he who accepts the
benefits of a statute cannot escape its burdens by subsequently attacking
its constitutionality: and such a beneficiary would have received a
benefit in the form of a quid pro quo such as forbearance of suit. In
the second type of situation, there is a possibility that the Attorney
General could intervene because "the proceedings to probate a Will is a
proceeding in rem, binding all the world, and in which even public
welfare and policy is involved" and hence represent the public as "the
whole body of the people being parties." But who would give the
Attorney General notice and where is the authorization for such notice
or intervention?

Further problems, outside the scope of this article, which will arise

---

25 Wis. Bar Bull. No. 2, 35: "It would seem that the most likely manner
in which it might come before the Supreme Court would be where the heirs
and beneficiaries under a will would introduce a stipulation as provided for
in Chap. 367; that they would present the matter to a county judge who
would refuse to accept the compromise and who would merely enter findings
which were prepared by stipulating parties. . . . If an appeal is made under
a state of facts as above, both sets of attorneys are interested in the
stipulation, and while it becomes probably the duty for the attorney for
the executor to uphold the will, it must be remembered that he was chosen
almost invariably by those who want the stipulation to be accepted.

36 Will of Dardis, 135 Wis. 457, 115 N.W. 332.
37 Will of Rice, 150 Wis. 401, 136 N.W. 956.
under 318.31 are the effect of will contest compromises on inheritance taxes\textsuperscript{38} and the effect of any extinguishment of contingent interests.\textsuperscript{39}

V. SUMMARY

On a philosophical level, there is no natural right as to the form of possession; but on a legal level, in Wisconsin, there is a natural right to dispose of private property by judicial interpretation in the form of a constitutional guarantee. It is suggested that the two recent Wisconsin statutes should be declared constitutional, inasmuch as they do not impinge upon this constitutional guarantee.

\textbf{Arthur Scheller, Jr.}

\textsuperscript{38} 139 A.L.R. 1524.

\textsuperscript{39} 69 A.L.R. 924.