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# OUTLINE OF THE LAW OF WILLS

THOMAS A. BYRNE

## DEFINITION, NATURE AND KINDS OF WILLS

I. A will is a gratuitous disposition by a competent testator to a competent donee, of property or rights in property over which the testator has the legal right of disposition, such disposition to take effect upon the death of the testator.<sup>1</sup>

### II. Kinds of wills.

A. Wills may be either written or oral.

B. An oral will is called a nuncupative will.<sup>2</sup>

1. An oral will may be used only to dispose of personal estate and may not be used to dispose of real estate nor the income of real estate yet to accrue.

2. In Wisconsin a nuncupative will may dispose of personal estate up to \$150. After the amount exceeds \$150 the statute must be followed strictly. It provides that the testator must have had testamentary intent, must have been in extremis, and the will must have been made in the last abode of the testator, or where he resided for ten days preceding the making of the will, or in the place where the testator was taken sick when away from home and died before his or her return. The testator, must, at the time of the making of the will, have called upon the three necessary witnesses or some of them to witness that this was his last will and testament.

3. These rules do not apply to soldiers, sailors and marines.

4. A nuncupative will may not be proved for 14 days after death of the testator, nor may it be proved after six months of the speaking of the words unless reduced to writing within six days after the speaking of the words.

### C. Written wills.

1. A holographic will is one made entirely in the handwriting of the testator.<sup>3</sup>

a. The writing must be altogether in the testator's hand; the use of a printed form, or typewriting, or letter heads, to compose the whole or any part of the will renders it no longer holographic.<sup>3</sup>

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<sup>1</sup> *Rood on Wills*, sec. 46; *Costigan's Cases*, 1; 101 Ore. 305, 22 A.L.R. 428.

<sup>2</sup> Sec. 2292 Wis. Stats. As to proof of, see Wis. Stats. 2293; 26 L.R.A.N.S. 1145.

<sup>3</sup> 2282 and 2283 Wis Stats.; L.R.A. 1917F; 4 A.L.R. 727.

- b. A holographic will is not good if made in Wisconsin, but if it is made outside of the state, and is good where made or where testator is domiciled it will be good in Wisconsin.<sup>3</sup>
2. Valid wills may be made even if they contain conditions. These wills are called conditional wills. The failure of the condition to be fulfilled will cause the will to fail of operation. If it is not clear that the condition was incorporated in the will the instrument must operate.<sup>4</sup>
3. There is no doubt of the validity of alternative wills providing for one disposition in one event and another disposition in another event.<sup>5</sup>
4. A joint will is one made and signed by two or more persons disposing of property held jointly.
5. Joint and mutual wills are those made by two persons disposing of property to each other.
6. Reciprocal wills are separate instruments signed separately by two persons and disposing of property to each other.

NOTE. These wills are revocable during the life of the testators in the same manner as are other wills.

#### D. Contracts to make wills.

1. A contract to make a will is not a will since it implies a consideration, whereas a will is a purely voluntary conveyance for which a consideration is not necessary.<sup>6</sup>
2. Where people agree, for a valid consideration, to make a will, or to make a will in a particular way, this is a binding contract which will be held good against the estate.<sup>6</sup>
3. All the requisites of a good contract must be present.
4. Where a will was made in conformity with such a contract and was later revoked the contract still remains enforceable.<sup>6</sup>
5. An agreement without consideration to make a will is void unless it is under seal.<sup>6</sup>

### CAPACITY TO MAKE A WILL

- I. In general any natural person of full age and sound mind who is not under constraint and is possessed of devisable property may make a will.<sup>1a</sup>

<sup>4</sup> 90 Mass. 192, 193 U.S. 411.

<sup>5</sup> *Rood*, sec. 63.

<sup>6</sup> *Rood*, sec. 51-54. See also *Murtha v. Donohoo*, 149 Wis. 481, where it was held that past services were sufficient to support a promise to provide compensation by will. As to quantum meruit on promise to bequeath, see 41 L.R.A.N.S. 246.

<sup>1a</sup> *Rood*, sec. 103-105.

II. The testamentary capacity of the testator over personality is governed by the law of the domicile of the testator, and the testamentary capacity of the testator of real property is governed by the law of the situs of the land.<sup>1b</sup>

III. In general the competency of the testator is to be determined as of the date of the execution or republication of the will, not as of the date of its making or drawing.<sup>1c</sup>

#### IV. Infancy.

A. At common law an infant of eighteen could make a valid will of personality, but no infant could devise real estate.<sup>2a</sup> In the ecclesiastical courts bequests of personal estate could be probated if the male testator was fourteen or the female testator was twelve.<sup>3a</sup> This seems to have been affirmed in the courts of common law jurisdiction and also in courts of equity.<sup>3a</sup>

B. In Wisconsin the full age for males is twenty-one as it is also for unmarried females.<sup>4a</sup>

#### V. Coverture.

A. At common law a married woman could not devise real estate, nor could she dispose of her chattels by will without the consent of her husband.<sup>5a</sup>

B. In Wisconsin a married woman of eighteen may dispose of both realty and personality by will.<sup>4a</sup> This is construed to mean that at the time of the making of the will she must be married, not widowed or divorced.

#### VI. Alienage.

A. At common law an alien friend could make an indefeasible will of personality,<sup>6a</sup> and the property of an alien enemy domiciled within the country was equally protected. The wills of alien enemies domiciled elsewhere were less secure due to the liability of the property to be confiscated after the declaration of war.<sup>7</sup>

B. An alien may acquire lands by purchase but not by descent; and there is no distinction, whether the purchase be by grant or by devise.<sup>8</sup>

<sup>1b</sup> 40 Cyc. 997 and cases cited.

<sup>1c</sup> 40 Cyc. 998 and cases cited.

<sup>2a</sup> Co. Lit. 89b, note 83.

<sup>3a</sup> 1 *Underhill on Wills*, sec. 120.

<sup>4a</sup> Wis. Stats. 2277 and 2281.

<sup>5a</sup> 43 N.J. Eq. 577.

<sup>6a</sup> *Rood*, sec. 139; 1 Bl. Comm. 372.

<sup>7</sup> *The William Bagaley*, 72 U.S. 377.

<sup>8</sup> *Harley v. The State*, 40 Ala. 689.

- C. As aliens have no inheritable blood their lands would escheat to the sovereign without office found if they should die intestate; but the will of the alien, whether he be friend or enemy, passes to his devisee all the estate the alien had; and the title of the devisee can be divested only in a proceeding in the name and behalf of the state.<sup>9</sup>
- D. In Wisconsin no distinction may ever be made between resident aliens and citizens in the possession, enjoyment and descent of property.<sup>10</sup>

#### VII. Conviction for crime.

- A. At common law the wills of traitors, felons, suicides and the like were of no avail, not for want of testamentary capacity, but for the mere lack of anything to bequeath.<sup>11</sup>
- B. In the United States no state may pass any bill of attainder.<sup>12</sup> No bill of attainder against the United States shall work corruption of blood or forfeiture of estate except during the life of the attainted person.<sup>13, 14</sup>
- C. In Wisconsin no conviction shall work corruption of blood or forfeiture of estate.<sup>15</sup>

#### VIII. Mental capacity.

- A. All forms and manifestations of mental unsoundness, whether temporary or permanent, are generally of two classes. The first of these classes is deficiency of power such as mental weakness, lack of vigor, imbecility, idiocy or dementia. The second of these classes occurs where a once strong and normal mind has become deranged, as in the cases of erratic, distorted, delirious or insane mental action.<sup>16</sup>
- B. Deficiency of power.
  - i. Test of mental strength required to make a will. By saying that the testator must have a sound mind is not meant that he must have a fully efficient mind, nor one able to contract or conduct business, but that he must have sufficient mental power and active memory to know his property, the natural

<sup>9</sup> *Rood*, sec. 140; 11. U.S. 603.

<sup>10</sup> Wis. Stats., sec. 2277 and 2281; Wis. Cons. I, 15.

<sup>11</sup> *Rood*, sec. 141; *Shep. Touchstone*, 404.

<sup>12</sup> U.S. Const. I, 10.

<sup>13</sup> U.S. Const. III, 3.

<sup>14</sup> *Wallach v. Van Riskirk*, 92 U.S. 202; *Ill. Cent. Ry. v. Bosworth*, 133 U.S.

<sup>15</sup> Wis. Cons. I, 12.

<sup>16</sup> See *Rood*, secs. 108-137, inc.

objects of his bounty, and be able, without prompting, to make a rational disposition as to each.<sup>17</sup>

2. By senile dementia is meant the weakening of the mind due to old age. To constitute senile dementia there must be such a failure of the mind as to deprive the testator of intelligent mental action. Despite the weakened capacities, if the testamentary act be understood and appreciated, and the transaction be understood, the capacity to make a will remains.<sup>17a</sup>
3. The fact that the testator has been deaf, dumb, or blind, even from birth, raises no presumption of mental weakness. The existence of these defects goes only to the ability of the testator to make his wishes known and to signify that he understands the contents of the will and approves of them. If it can be shown that he fully understood and approved, his will should be entitled to probate.<sup>17b</sup>

### C. Mental derangement.

1. In general, derangement of a man's mentality may be shown by referring to his actions, desires, aversions, conduct and beliefs.<sup>18</sup>
2. The thoughts, actions and aversions which are relied upon to prove mental derangement or insanity must not be compared with any hard and fast standard of propriety but must be compared with the conduct of the same person when he was sane.<sup>18</sup>
3. Any prolonged departure from the usual state of a man's feelings and tastes when in a normal state, when the peculiarities cannot be explained by the habits, environment, temperament and education of the party, are evidences of mental derangement; and the inference of insanity from them becomes stronger as the peculiarities appear more unnatural.<sup>19</sup>
4. An unexplained hatred for the offspring who would be the natural objects of the testator's bounty may be the basis of a finding of insanity,<sup>20</sup> but there is no doubt that if the testator is found sane the will is valid no matter how unjust and unnatural it may be.<sup>21</sup>
5. "The fact that a man is affected with insanity, or labors under a delusion, believes in witchcraft, clairvoyance, spiritual in-

<sup>17</sup> *Rood*, sec. 111; *In re Butler*, 110 Wis. 70.

<sup>17a</sup> See note 9, *Marquette Law Review*, 206.

<sup>17b</sup> See note 9, *Marquette Law Review*, 206.

<sup>18</sup> *Rood*, 119.

<sup>19</sup> *Müller v. White*, 5 Redf. Sur. (N.Y.) 320.

<sup>20</sup> Ann. Cas. 1917E, 130-132.

<sup>21</sup> 1 L.R.A. 161.

fluences, pre-sentiments of the occurrence of future events, dreams, mind reading, and so forth, will not affect the validity of the will on the ground of insanity. Manifestly, a man's belief can never be made the test of insanity."<sup>22</sup>

6. An insane delusion is a belief in something extravagant or impossible in the proper order of things, or impossible under the circumstances surrounding the affected person, which belief refuses to give way to evidence or reason.<sup>23</sup>
7. The error of a belief is merely the means of detecting a delusion which may possibly prove to be an insane one. The error is not the delusion. No erroneous belief can be said to be an insane delusion if it might possibly be based on any kind of reasoning whatever, no matter how wrong or unreasonable that reasoning might be.<sup>24</sup>
8. A person suffering from an insane delusion, whether such delusion be permanent or intermittent, may make a will, and the will is valid unless the delusion touches the property to be bequeathed, the beneficiaries, or those to whom the property would descend if the will were not made.<sup>25</sup>

#### D. Evidence and burden of proof of mental capacity.

1. The burden is on the proponent to prove all those facts which are essential to entitle the will to probate and among these facts is mental capacity.
2. But the presumption that all men are sane makes a prima facie case without the introduction of any testimony.<sup>26</sup>

### FRAUD, UNDUE INFLUENCE AND MISTAKE

- I. Fraud is any imposition, pretense, device, or false statement by which the testator is induced to make a will in a way in which he did not want to make it.<sup>27</sup>

<sup>22</sup> *Whipple v. Eddy*, 161 Ill. 114, cited in 228 Ill. 380, 119 Am. St. Rep. 442. ACCORD—*Chafin Will Case*, 32 Wis 577; *In re Smith*, 52 Wis. 543, 38 Am. St. Rep. 756.

<sup>23</sup> *Riggs v. A.H.M.*, Soc. 35 Hun. (N.Y.) 656. This definition is criticized by *Rood* in Section 126 et seq.

<sup>24</sup> *Medill v. Snyder*, 61 Kan. 15, 5 Prob. Rep. An. 216; *Cole's Will*, 49 Wis. 181; *Potter v. Jones*, 20 Ore. 251, 12 L.R.A. 165.

Also see 5 Prob. Rep. An. 369, and 3 Prob. Rep. An. 1.

<sup>25</sup> 63 Am. St. Rep. 94; *Amer. Bible Soc. v. Price*, 115 Ill. 623, Ann. Cas. 1916C, 4-21; *Ballantine v. Proudfoot*, 62 Wis. 216.

<sup>26</sup> 23 Mich. Law Rev. 422; *Allen v. Griffin*, 69 Wis. 529. This is the weight of authority some states holding, however, that the burden is on the contestant to show incapacity, while still others hold that the proponent must produce positive testimony that the testator was sane.

<sup>27</sup> *Bigelow on Fraud*, sec. 571, cited in *Rood*, 169.

- A. Fraud invalidates the will or that part of it which was fraudulently obtained, whether such imposition relates to the subject matter of the will or to the inducement which caused the testator to make it.<sup>28</sup>
  - B. The person benefited need not be a party to the fraud.<sup>29</sup>
  - C. There must be an intention to defraud.<sup>30</sup>
  - D. The provision must have been caused or induced by the deception.<sup>31</sup>
  - E. When a will has been probated without knowledge of a fraud which had been perpetrated on the testator, the remedy is not in a court of equity to avoid the will on account of fraud, but is in a court of probate to have the decree of probate reopened.<sup>32</sup>
  - F. A person who has been deprived of a bequest because of the fraud of a third person on the testator cannot have an action in tort on account of the wrongdoing.<sup>33</sup>
- II. Undue influence occurs where a situation is brought about in which the testator is coerced into making a will against his will.
- A. Coercion is a necessary element of undue influence.<sup>34</sup>
  - B. The coercion must destroy the free agency of the testator.<sup>34</sup>
  - C. Such coercion may consist of physical violence, or threats, or harassing importunings which the testator is too weak to resist, or to which he submits in a desire to obtain peace.<sup>34</sup>
  - D. As undue influence usually operates artfully it cannot ordinarily be shown directly but must arise from the facts and circumstances of each case. The points to be noted in a showing of undue influence are: first, an unnatural result in the will; second, a fit subject for the exercise of the influence; third, a person who would have a motive for exercising it, and fourth, an opportunity for the use of the unlawful influence.
  - E. But it is not the law that all influences are unlawful. There are some appeals which may be legitimately addressed to the testator. Persuasion, arguments, appeals to sentiments of love and gratitude for past services, or pity for future poverty, and the

<sup>28</sup> 31 Am. St. 680, as to heirs disinherited by fraud; 17 A.L.R. 239.

<sup>29</sup> *Coghill v. Kennedy*, 119 Ala. 641.

<sup>30</sup> *Abbott*, p. 261.

<sup>31</sup> 68 Am. Dec. 150.

<sup>32</sup> 18 Ann. Cas. 807, et seq.

<sup>33</sup> 8 L.R.A.N.S. 698-703; 31 L.R.A.N.S. 176-178; 41 L.R.A.N.S. 109; 122 Am. St. 261

<sup>34</sup> *Rood*, secs., 175-191; 140 Wis. 291; 31 Am. St. Rep. 670-691; 16 Am. Dec. 257-263.

like are proper unless they overwhelm the testator's will without convincing his judgment.<sup>35</sup>

- F. The influence of a wife who has so captivated the affections and confidence of her husband that he relies on her judgment and good feeling to the extent, even, of making a will in her favor, to the exclusion of the rest of the family, is not a ground for setting aside the will as obtained by undue influence.<sup>36</sup>
- G. The same rule applies to a child who is benefited by a will on account of the trust and confidence which was reposed in him by the parent.<sup>37</sup>
- H. Wills made to persons who have obtained a place in the affections of the testator by reason of the kind and considerate treatment which they gave to him are not subject to be attacked on the ground of undue influence.<sup>38</sup>
- I. Wills made depriving the natural beneficiaries of their expected bequests and made under the spell of a hatred fostered by the beneficiaries under the will cannot be denied probate on the ground of undue influence unless the will does not express the true wish of the testator.<sup>39</sup>
- J. Wills made in favor of mistresses will not be avoided on the ground of undue influence as long as they express the free desire of the testator.<sup>40</sup>
- K. A will procured by undue influence does not become valid by reason of the subsequent ratification of the testator.<sup>41</sup>
- L. If a will has been procured by the lawful argument or persuasion of the beneficiary or someone in his interest it does not later become void by reason of the testator regretting that he made it.<sup>42</sup>
- M. Undue influence invalidates the whole will if the entire instrument is the result of the unlawful imposition; but if only a part of the will is the result of such means the rest of the instrument must be admitted to probate.
- N. Where a will makes a bequest in favor of one who stands in a position of confidence to the testator the general rule is that there is no presumption of undue influence if that beneficiary did not

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<sup>35</sup> 16 Am. Dec. 257; 31 Am. St. Rep. 678; 4 Am. St. 593; 82 Am. St. Rep. 809.

<sup>36</sup> 53 L.R.A. 387; *Armstrong v. Armstrong*, 63 Wis. 162; *Deck v. Deck*, 106 Wis. 470; *Ball v. Boston*, 153 Wis. 27.

<sup>37</sup> *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. 552; *In re Butler*, 110 Wis. 70.

<sup>38</sup> *Riley v. Sherwood*, 144 Mo. 354, 3 Prob. Rep. An. 519, (38).

<sup>39</sup> See note, 31 Am. St. Rep. 680.

<sup>40</sup> Notes in 4 Prob. Rep. An. 75; 31 Am. St. Rep. 677; 16 A.L.R. 457.

<sup>41</sup> *Rood*, sec. 185.

<sup>42</sup> *Deck v. Deck*, 106 Wis. 470.

prepare the will;<sup>43</sup> but if the confidant took part in the preparation of the will there may be a case for the jury.<sup>44</sup>

- O. Undue influence cannot be presumed. The burden is on the contestant to show it, and slight evidence will be sufficient on the part of the contestant to give the case to the jury.<sup>45</sup>

### III. Mistake.

- A. Any provision in a will, which was induced by mistake, can be corrected only when the mistake appears on the face of the will, and when there appears on the face of the will what the provision would have been but for the mistake.<sup>46</sup>
- B. A mistake as to an extrinsic or collateral fact will not invalidate the instrument.
- C. The words in the will must be the words of the testator and not merely the inferences of others as to what the words were or what their meaning was.<sup>47</sup>
- D. The general rule is that the written will is not to be altered or explained by parol evidence. But this rule is excepted to in the following cases.<sup>48</sup>
1. Where a latent ambiguity arises outside the will and is brought to the attention of the court by parol testimony it may be removed by such testimony. A patent ambiguity in the will itself may not be so explained.
  2. Parol evidence may be admitted to rebut a resulting trust.
  3. Parol evidence is admissible in case of fraud, to show the instrument void.
  4. It may be shown that the testator thought he was executing one instrument when in fact he was executing another. This rule is also followed where the testator did not know he was signing a will and did not intend it to operate as such.<sup>49</sup>
- E. Where a technical or legal word is used in the will by the testator or his agent or attorney evidence will not be admitted to show that the testator meant otherwise, and the court will give effect to the words as they are in the will.<sup>50</sup>

<sup>43</sup> *Bancroft v. Otis*, 91 Ala. 279, 24 Am. St. Rep. 904.

<sup>44</sup> See notes in 71 Am. Dec. 129, 28 L.R.A.N.S. 270; *Morgan's Will*, 110 Wis. 7.

<sup>45</sup> *Derussean's Will*, 175 Wis. 140, 16 A.L.R. 1412; *Baker v. Baker*, 102 Wis. 226; *Bryant v. Pierce*, 95 Wis. 331.

<sup>46</sup> *Rood*, 168; *Gifford v. Dyer*, 2 R.I. 99, 57 Am. Dec. 708.

<sup>47</sup> *Waite v. Frisbie*, 45 Minn. 361.

<sup>48</sup> *Iddings v. Iddings*, 7 Serg and R. (Penn.) 111, 10 Am. Dec. 450.

<sup>49</sup> 1 Mass. 258, 2 Am. Dec. 16.

<sup>50</sup> 110 Mass. 477 at 488; *Sherwood v. Sherwood*, 45 Wis. 357.

- F. Where the testator reads the will or has it read to him he is presumed to know the contents of it and hence any omission not clear from the face of the will does not constitute a mistake.<sup>51</sup>
- G. The English rule is that words inserted in a will by mistake may be stricken out but that words omitted by mistake may not be supplied.<sup>52</sup>
- H. In spite of the lack of American cases on the subject, the weight of authority seems to follow the English rule.<sup>53</sup>
- I. It is generally the rule by statute that if the name of a child is omitted from a will by mistake the child shall take as if no will had been made.<sup>54</sup> The Wisconsin statute makes the same provision for a child born after the will is made.<sup>54</sup>
- J. There can be no relief in a court of equity to reform a will so that it expresses the intention of the testator.<sup>55</sup>

### WHO MAY TAKE BY WILL

- I. In general a devise or bequest may be made to any person, unless forbidden by express statute, or opposed to good morals, or opposed to public policy.<sup>56</sup>
- II. Artificial persons may take by will; corporations are generally enabled to take; and public corporations are no exception to the rule.<sup>57</sup> Foreign corporations may take by devise or bequest except where the devise is forbidden by the law of the state where the land is situated.<sup>58</sup> Corporations may take in trust.<sup>59</sup>
- III. Married women, infants and insane persons,<sup>60</sup> and persons civilly dead by reason of conviction for a felony who are serving sentence

<sup>51</sup> *Mitchell v. Gard*, 3 Sw. & Tr. 75, cited in *Costigan's Cases*, 56.

<sup>52</sup> *In re Goods of Louis Schott*, (1901), p.190.

<sup>53</sup> *Patch v. White*, 117 U.S. 210, 45 Wis. 257 and 45 Wis. 211 apparently contra.

In 165 Wis. 601 the testatrix bequeathed all her property, 580 acres, Van Buren Street, Milwaukee, to her sister. Court took testimony that she did not own any other property but did own one half of a double house at 580 Van Buren Street, and struck out the word acres.

See the authorities pro and contra in 6 L.R.A.N.S. 942; *Wigmore on Evidence*, 2477; 22 L.R.A.N.S. 450.

<sup>54</sup> These statutes are discussed in 39 Am. Dec. 740. Wisconsin Statutes 2286, 2287, 2288. The Wisconsin Statute seems to put the burden on the claimant of showing that the omission was unintentional. See *Moon v. Estate of Evans*, 69 Wis. 667.

<sup>55</sup> 65 Am. St. Rep. 521, 50 Am. St. Rep. 283.

<sup>56</sup> *Rood*, 192.

<sup>57</sup> *Rood*, 193, 197, 200.

<sup>58</sup> 116 Ill. 375; 126 N.Y. 537.

<sup>59</sup> *Vidal v. Girard's Executors*, 43 U. S. 127.

<sup>60</sup> 1 *Bigelow's Jarman*, 75.

at the time of the death of the testator, may take by devise or bequest.<sup>61</sup>

- IV. Subscribing witnesses are generally forbidden by statute from taking under the will.<sup>62</sup>
- V. In general gifts in furtherance of illegal objects or immoral purposes are void as against public policy.<sup>63</sup>
- VI. Aliens may now receive by will. This is by statute.<sup>64</sup> But in the interpretation of most forbidding statutes the gifts are held only voidable.

## WILLS DISTINGUISHED FROM CERTAIN OTHER DISPOSITIONS OF PROPERTY

### I. From deeds.

A deed passes a present title; it is irrevocable unless such power is reserved in the instrument; it must be executed and acknowledged as prescribed by the statute; it takes effect upon delivery; and is operative during the life of the grantor.

A will passes no present title; it must be executed and acknowledged as prescribed by the statute; it is ambulatory and revocable during the life of the testator and takes effect only upon his death; and it need not be delivered.

If an instrument is clearly intended to be a will it must stand or fall as such; if it is intended clearly to be a deed it must stand or fall as a deed. If the intent is not clear it is a question for the jury as to whether it is a will or a deed.<sup>65</sup>

### II. From gifts *causa mortis*.

A gift *causa mortis* resembles a will in that it is made in contemplation of death; but it requires delivery, either actual or symbolic, to pass title. It is revocable during the life of the donor and is revoked by the recovery of the donor from the sickness in which he made it. If once delivered it is not revocable except by the recovery of the donor.<sup>66</sup>

<sup>61</sup> 69 Hun. 436.

<sup>62</sup> Wis. Stats. 2284 and 2285 provide that bequests to witnesses shall fail unless there shall be two other competent subscribing witnesses; except that if the persons witnessing would have taken under the laws of intestacy they may take under the will.

<sup>63</sup> Ann. Cas. 1917B, 1917 as to bequests subversive of religion.

Ann. Cas. 1917B as to bequests tending to separate husband and wife.

<sup>64</sup> Wis. Const. I, 15.

<sup>65</sup> 11 Am. St. Rep. 28.

<sup>66</sup> 13 Allen (Mass.) 43.

## EXECUTION OF WRITTEN WILLS AND TESTAMENTS

- I. The Wisconsin statute requires that no will shall be valid to pass title to any real or personal estate (except such noncupative wills as are excepted by the statute) unless the will shall be in writing, signed by the testator, or by some other person in his presence and by his express direction, and unless it shall be attested and subscribed in the presence of the testator by two competent witnesses in the presence of each other.<sup>67</sup>
- II. In Wisconsin the testator need not sign in the presence of the witnesses, but if he does not he must acknowledge his signature by some overt act. If he signs in their presence he need not inform them of the contents of the instrument.
- III. Some other person may sign for the testator in his presence and by his express direction.
- IV. The testator may sign by mark. The signature need not be the full name of the testator spelled out. But the testator must intend to sign by mark; to start to sign his name and then, by reason of weakness, and so forth, leave it unfinished is not a sufficient signing.<sup>68</sup>
- V. In the absence of a requirement in the statute that the will be signed at the end, it is generally held that a signing any place in the instrument is sufficient.<sup>69</sup>
- VI. An attestation clause is not necessary since it neither adds to nor detracts from the will.
- VII. If another signs for the testator he may also sign by any mark or writing which is approved by the testator, unless restricted by statute.
- VIII. The testator need not request the witness to attest and subscribe the will; it is sufficient if the testator know the witness is signing the will and that he acquiesce in the signing.<sup>70</sup>
- IX. What is meant by the presence of the testator is a question of fact. Most of the courts hold that presence means the ability of the testator to see the signing without any pronounced change of position.<sup>71</sup> Ordinarily a signing in the same room with the testator is presumed to be in his presence, and a signing out of the room is out of his presence.<sup>71</sup>

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<sup>67</sup> Wis. Stats. 2282.

<sup>68</sup> 22 L.R.A. 370; 31 A.L.R. 682; *Knapp v. Reilly*, 3 Dem. Sur. 427.

<sup>69</sup> 29 L.R.A.N.S. 63; 29 A.L.R. 891.

<sup>70</sup> *Meure's Will*, 44 Wis. 392, 28 Am. Rep. 591.

<sup>71</sup> 28 Am. Rep. 595; *Downies Will*, 42 Wis. 66; 31 N.J. Ep. 242.

- X. A witness is competent under the statutes if he is able to testify in court and understands the solemnity of the oath.<sup>72</sup>
- XI. The provision requiring that the will be in writing is satisfied if the will is on a printed form, or if it is written in pencil, or type-written.<sup>73</sup>
- XII. A will may be written on any material which is capable of retaining the impression of the writing.<sup>74</sup>
- XIII. The requirements of the statute are fulfilled by a will written on several disconnected sheets of paper on only one of which the names of the testator and the witnesses are affixed.<sup>75</sup> However, all the sheets must be present when the will is signed.
- XIV. The only exception to the rule that the whole will must be present when it is signed occurs when independent documents are said to be incorporated into the will by reference. To have a good incorporation by reference there must be the following essentials.
- A. A clear, understandable reference which sufficiently identifies the instrument to be incorporated.
  - B. The reference must be a present reference to an existing document.
  - C. If the reference is in the present tense and then the document is prepared, and later a codicil is made, the reference will be good. But if the reference is in the future it is not good unless the later codicil contains a perfect reference.<sup>76</sup>
  - D. The documents sought to be incorporated into the will need not be testamentary in character.<sup>76a</sup>

## REVOCATION OF WILLS

- I. Revocation of a will may take place in two ways.
- A. By act of the testator.
    - i. A later writing.
      - a. A later will or codicil in which other and inconsistent provisions are added to the former will amending it or revoking it in part and affirming it.
      - b. A later will by which the former will is completely revoked and displaced.

<sup>72</sup> 45 Am. St. Rep. 434; L.R.A. 1916D, 179.

<sup>73</sup> 24 Am. Rep. 227; 19 Am. St. 637.

<sup>74</sup> 30 A.L.R. 424.

<sup>75</sup> *Rood*, 248 and cases cited.

<sup>76</sup> *Rood*, 250 and cases cited.

<sup>76a</sup> Ann. Cas. 1913D, 309.

c. A revoking instrument which is not testamentary in character but which is intended merely to annul the former will.

2. An act of destruction performed on the former will.

B. By operation of law.

This takes place only when the circumstances of the testator have changed, such as by marriage and the birth of children.

II. Revocation by the act of the testator.

A. In order to have a good revocation by the act of the testator there must be:

1. A doing by him or his agent in his presence and by his direction of some act sufficient in law to revoke the will, and

2. Accompanying the act there must be an intention to have such an act operate as a revocation.

B. The revocation of wills is entirely governed by statute.<sup>77</sup>

C. Section 2290, Wisconsin Statutes, provides that no will or any part of a will may be revoked unless by burning, tearing, obliterating the same, with an intention to revoke the same, by the testator or by some one in his presence and by his direction, or by some other will or codicil in writing, executed as prescribed in the statute, or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; except that nothing in the section shall be taken to prevent the revocation implied by law from the subsequent changes in the conditions or circumstances of the testator. The power to make a will implies the power to revoke the same.<sup>77</sup>

D. A nuncupative will cannot convey property already provided for in a written will.<sup>78</sup>

E. It may be shown that the will was destroyed or revoked by mistake, accident or inadvertence.<sup>79</sup>

F. An express clause of revocation will operate to revoke all former wills even if for some reason the revoking will is inoperative.<sup>80</sup>

G. In the absence of any express clause of revocation in a later will, the general rule is that the former will is revoked by the latter in so far as the latter is inconsistent with it.<sup>81</sup>

H. As to what is a complete destruction under the statute there can be no set rule; but, in general, it may be said that the act of destruction must be a completed act, in which there has been no

<sup>77</sup> Wis. Stats. 2290.

<sup>78</sup> *Brooks v. Chappell*, 34 Wis. 405.

<sup>79</sup> See notes in L.R.A. 1916C, 101, and L.R.A. 1918A, 914.

<sup>80</sup> L.R.A. 1916C 101; 20 Ann. Cas. 1001.

<sup>81</sup> Ann. Cas. 1914D. Apparently contra, *In re Fisher*, 4 Wis. 254.

change of intention, or interference.<sup>82</sup> The will must have on its face evidence of the act. It follows that a will which is scorched but is still legible has been revoked. The same is true of a will which is torn but still readable. A cancellation need not obliterate the whole matter of the instrument. To write across the will that it is cancelled is not a cancellation within the meaning of the statute.<sup>83</sup>

#### I. Presumptions as to revocation.

1. If it is shown that the testator made a will and later possessed it, and, upon his death, the will is not found, or is found in a mutilated condition, the presumption will arise that the testator destroyed the will with an intention of revoking it.<sup>84</sup> This presumption may be confirmed by declarations of the testator that the will was revoked.<sup>85</sup>
2. If the will was made and after the death of the testator is not found, the presumption as to revocation will not arise if it is shown that the will was accessible to someone who would have had the desire to destroy it.
3. The doing of what the statute prescribes is prima facie evidence of an intention to revoke, but this is rebuttable.<sup>86</sup>

#### III. Revocation by operation of law.

- A. At common law the marriage of a woman was a sufficient change of circumstances but under the married women's enabling acts it is generally held that marriage alone is not sufficient to revoke a will made before it.<sup>87</sup>
- B. An ordinary change of financial circumstances will not revoke a will, nor will the ordinary change of relationship, except as provided by statute. In Wisconsin neither the marriage nor the birth of issue will alone revoke the will, but together they will revoke the will, both as to males and females.<sup>87a</sup>
- C. In Wisconsin it is provided that afterborn children shall take as if there was no will.<sup>88</sup>
- D. A divorce and a complete property settlement will act as a revocation of a will made by the divorcee.<sup>89</sup>

<sup>82</sup> *Rood*, 342-354.

<sup>83</sup> *Ladd's Will*, 60 Wis. 187.

<sup>84</sup> *Valentine's Will*, 93 Wis. 45.

<sup>85</sup> 20 Ann. Cas. 214.

<sup>86</sup> *Will of Lyons*, 96 Wis. 339.

<sup>87a</sup> *Will of Lyons*, 96 Wis. 339.

<sup>88</sup> Wis. Stats. 2286.

<sup>89</sup> 143 Wis. 234 and 156 Wis. 517. See Note 9 MARQUETTE L. REV. 208.

- E. In Wisconsin there is no way in which a man can bar his wife's dower by will.
- F. In Wisconsin marriage and adoption of a child will act as a revocation of a will.<sup>90</sup>
- IV. In Wisconsin the clause of revocation operates as soon as it is executed.
- V. In Wisconsin a will once revoked is forever revoked and the destruction of a later will does not operate as a revocation of a former will. In order to revive such a former will it must be re-executed or re-adopted in accordance with the statute. The mere filing of a former will with the county judge will not revive the same.<sup>91</sup>

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<sup>90</sup> *Glascott v. Bragg*, 111 Wis. 605.

<sup>91</sup> *In re Noon's Will*, 115 Wis. 299.