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THE LAW OF WILLS
BY JOHN C. ALBERT, OF THE MILWAUKEE BAR.

A will in general is the disposition of property, to take effect on or after the death of the owner, 40 Cyc. 995, or as defined by Gardner on Wills, “The expression, in the manner required by law, and operative for no purpose until death, of that which one may lawfully require to be done after his death.”

A last will and testament is the disposition of one's property, to take effect after death.

1. Redf. Wills, 5.

When a will operates upon personal property, it is sometimes called a “testament” and when upon land a “will”, but the general and popular denomination is that of last will and testament, and so today the terms will and testament are used synonymously.

The term “will” also is construed as including a codicil.

Wis. Statutes, Section 4971-18.

Wills were recognized by the Hebrew, Greek and Roman law, and also under the early English law.

That wills existed and were recognized at an early date, (and one of the oldest wills) we have but to turn to Gen. c. 48, v. 22, when Jacob said to Joseph, “I have given to thee one portion above thy brother.”

Under the early English law or common law, wills as to personalty were valid, also as to lands, until the introduction of the feudal system, when lands could not be devised. To overcome the hardship caused by the feudal system, Statute 32, Henry VIII, Chapter 1 (the original Statute of Wills), was passed, which made possible the devising of all lands, except one-third of lands held under military tenure. While under the Statute 27, Henry VIII, Chapter 10, profits of land could be devised, yet the land itself could not, until the passage of Statute 32, Henry VIII, Chapter 1.

From the time of the passage of Statute 32, Henry VIII, Chapter 1, to Charles I, (1645), there was practically no change on the law of wills, but since Charles I, the Statutes of England have been changed by imperceptible degrees until July 3, 1837, when 1 Vict., Chapter 26, was enacted and which went into effect January 1, 1838, which provided that a person could dispose of by will the whole of his goods and chattels and lands which he shall be entitled to either at law or in equity, at the time of his death.
The right to dispose of one's property, both real and personal, by will has always existed in the United States.

Redf. Wills, page 3, subd. 5.

The right to make a will, not being an inherent right, and not guaranteed by any fundamental law, is in most jurisdictions regulated by statute, and so in Wisconsin the same is regulated by statute.

Sections 2277 and 2281 of the Wisconsin Statutes provide that every person of full age, and any married woman of the age of 18 years and upwards, being of sound mind, may make a will disposing of real and personal property.

Prior to June 24th, 1677, under the common law of England, which includes the statutes up to that time, a will of personal property might be either verbal or written, and, if written, yet it was unnecessary that it should be signed or witnessed in order to be valid.

Redf. Wills, 170-176.

Brunn vs. Schuett, 59 Wis. 262.

The abuses which arose in the attempts to set aside written wills, by proving verbal or nuncupative wills, was finally culminated in Coles vs. Mordaunt, where it appeared at the bar of the King's Bench, that most of the nine witnesses against the will were guilty of deliberate perjury, and that the widow who sought to set aside the will was guilty of subornation of perjury. This case brought about a great and lasting reform in the law of wills, by the enactment of the Statute 29, Car. II, the original Statute of Frauds.

In re Ladd's Will, 60 Wis. 189.

Under the Statute 29, Car. II, all statutes prior to June 24, 1677, giving the right to make nuncupative wills were so far repealed and amended that all verbal and nuncupative wills, even as to personal property, were made invalid in England except as therein provided.

As to nuncupative wills see Sections 2292 and 2293 of the Wisconsin Statutes, which is a substantial re-enactment of Sections 19 and 20 of the Act of 29, Car. II.

The first essential element necessary to the making of a valid will is that of testamentary capacity, which is, that the testator must be of sound mind, legally competent and not under any legal disability.

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The testamentary capacity of the testator is governed as to personal property by the law of the domicile of the testator, and as to real property by the law where the realty is situated; and must exist at the time of the execution of the will. It is not sufficient, if the testator was competent at the time the will was dictated, or drawn, or subsequent to the execution, or if power to execute was created by subsequent legislative enactment.

As a general rule a person under some legal disability to contract, likewise has no testamentary capacity to make a valid will, as infants (except married women of the age of 18 years and upwards) and insane persons, but a will made by a person during sanity will not be revoked by the subsequent insanity of the testator. So also partial insanity or insane delusions, will not defeat a will unless such insanity or delusion directly influenced the provisions of the will. A will made during a lucid interval is also valid.

*Chaffin Will Case*, 32 Wis. 557.

*Will of Cole*, 49 Wis. 179.

*Will of Silverthorn*, 68 Wis. 372.

Spiritualism is not insane delusion.

*Will of J. B. Smith*, 52 Wis. 543.

Under the common law, aliens could not devise real estate, but could bequeath personal property, unless they were at the time alien enemies, then they could not.

Section 2200 of the Wisconsin Statutes gives an alien the right to hold and devise realty, and that in case he should die intestate the same shall descend the same as if such alien were a native citizen of the state or of the United States.

See also Wisconsin Constitution, Section 15, Article 1, which provides that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property." And Id. Section 14, Article 1, provides that, "all lands within the state are declared to be allodial, and feudal tenures are prohibited."

Criminals under the common law could not make a will, but the freeholds of inheritance which at the time of the death belonged to a man who died a delo de se escheated to the crown. But this rule was finally changed so as to become obsolete except as to treason and felonies.
Constitution U. S., Section 10, Article 1, declares that, "no state shall * * * pass any bill of attainder or ex post facto law." And Id. Section 3, Article 3, "but no attainer shall work a corruption of blood or forfeiture of estate," but gives congress the power to punish for treason. So the Wisconsin Constitution declares that no conviction shall work corruption of blood or forfeiture of estate.

From the above it will be seen that a person does not lose his property or forfeit his estate by being convicted of a crime, except when congress may prescribe a law punishing treason by forfeiture of his estate for life.

So also under the common law a married woman, unless acting under a power of appointment, could not make a valid will as to her real or personal property, without her husband's consent, but today under statute in most all jurisdictions a married woman can dispose of her property, both real and personal, by will, the same as if she were a feme sole.

Section 2342 of the Wisconsin Statutes gives a married woman the right to receive and hold for her sole and separate use, and to convey and devise real and personal property, or any interest therein.

The law as to whether a drunkard can make a valid will seems to be pretty well settled that he can, as drunkenness is merely evidence of insanity, but not conclusive. As stated in Cyc. Vol. 40, pages 1017 and 1018: "If one knows what he is about he may make a will, although intoxicated at the time of the execution or of intemperate habits to such an extent as to have become a habitual drunkard, or judicially declared a drunkard; and this is so even though his mind was so weakened by intoxicants that he could not take care of his estate, but one does not possess testamentary capacity where he is suffering from chronic alcoholic insanity or where the will is made when deprived of judgment and reason from the use of intoxicants. One who is frequently intoxicated may still have testamentary capacity when sober, and capacity at the time of the execution of the will is the point in issue."

Extreme old age will not of itself prevent the making of a valid will, unless the testator is so enfeebled mentally as to not understand what he is doing, as when he is suffering from hallucinations, paralysis or softening of the brain, but a mere failing of memory is not sufficient, especially where the will is fairly made and apparently emanating from free will.
In re Will of Mullan, 140 Wis. 291, where the testatrix's faculties were somewhat impaired by age, the court held that testatrix, having sufficient mental power to call to mind the particulars of her business and hold them in mind for such a time so as to perceive their obvious relations, and to form a rational judgment in respect to them, was competent to make a will.

Field vs. Pichard, 126 Wis. 229.

In re Boumann's Will, 133 Wis. 494.

Gavitt vs. Moulton, 119 Wis. 35.

A will executed by a person under some legal disability will not become valid upon removal of the disability, unless the will is republished.

MENTAL CAPACITY.

When has a person sufficient mental capacity to make a valid will?

In re Butler's Will, 110 Wis. 70, at page 78, the court said: "The test is not whether the testator did the best or the wisest or the theoretically just thing in his will; but, did he have sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to his children and other persons who might properly be his beneficiaries, and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in relation to them." Also citing In re Lewis' Will, 51 Wis. 101.

The testator having mental capacity, what are the requisites necessary to the execution of a valid will?

First of all, a will being a creature of the statute, the statute must be strictly followed. Section 2282 of the Wisconsin Statute provides that no will made within this state since the first day of January, 1896, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other; if the witnesses are competent at the time of such attesting their subsequent incompe-
tency, from whatever cause it may arise, shall not prevent the 
probate and allowance of the will if it be otherwise satisfactorily 
proved.

Secondly, the testator must not be under any undue influence, 
but must have the free use of his mind and will power.

The wording of the statute being self-explanatory, will dis-

cuss only that which requires the will to be “attested and sub-
scribed in the presence of the testator by two or more competent 
witnesses.”

What is in the presence of the testator, and when is it in his 
presence, is more or less a question of fact in each particular 
instance.

In re Downie’s Will, 42 Wis. 66, the will was witnessed in 
an adjoining room, and out of the testator’s vision, and then 
shown to testator, who assented and approved of same. The court 
held that this was not in the testator’s presence, as the testator 
was not in a position (not being blind) to see the witnesses sign 
if he so desired.

In re Will of John Meurer, 54 Wis. 392, the will was wit-
nessed in a room adjoining testator’s bedroom, the door leading 
to said adjoining room being open, and the table in the adjoining 
room was so situated that the testator, sitting in his bed, could 
see the table and the persons sitting at the table. The court held 
that the fact that the witnesses signed in an adjoining room, and 
not in the room where the testator was, was wholly immaterial 
as it appeared that it was done in his view. In other words, if 
the testator be in a position where, by the mere act of volition, 
and without materially changing his position, he can witness the 
attestation, it is sufficient.

From the above cases, in Wisconsin today a will is executed 
in the testator’s presence, if the testator be in such a position, that 
if he so desires (not being blind) that he could have seen by 
attempting to see without materially changing his position, the 
witnesses sign. That is, the signing must have been in his unob-
structed vision.

In the case the testator should be prevented from actually 
seeing the act of subscription of the witnesses by a physical 
infirmity, such as blindness or an injury which prevents him from 
looking in the direction of the witnesses, the signing is in his
presence, when he is aware of it through his other senses, such as hearing, and is done in such close proximity to him that he could see but for the physical infirmity.


**UNDEU INFLUENCE.**

In re Jackman's Will, 26 Wis. 104, the court in defining undue influence, and quoting from Davis vs. Calvert, 5 G. & J. 270, 302, said, "undue influence, legally speaking, must be such as in some measure destroys the free agency of the testator; it must be sufficient to prevent the exercise of that discretion which the law requires in relation to every testamentary disposition. It is not enough that the testator be dissuaded, by solicitations, or argument, from disposing of his property as he had previously intended; he may yield to the persuasions of affection or attachment, and allow their sway to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion; it must constrain its subject to do what is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist; and when this is so, the act which is the result of that influence, is vitiated," or "that undue influence in such a case is such an influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person."

In re Loennecker's Will, 112 Wis. 461, it was held that inequal distribution, or favoring one child does not of itself raise a presumption of undue influence, even though the parents be living with the favored child. That in order to raise that presumption the evidence must clearly show that the testator was susceptible to undue influence and that there was opportunity and a disposition on the part of the beneficiary to exert it.

In Elliott vs. Fisk, 162 Wis. 249, the four elements necessary to justify the setting aside of a will on the ground of undue influence are mentioned, namely, there must be clear and satisfactory evidence establishing the susceptibility of the testator to such influence, an opportunity for the exercise thereof, a disposition to exercise it, and a result indicating its exercise.
While there are numerous other cases that might be referred to, the cases mentioned sufficiently state the law on the subject, and in summing up the same, I conclude, that in order to set aside a will on the ground of undue influence, the influence must be such so as to destroy the free will power of the testator and prevent him from expressing his wish and desire as to what is to be done with his property after his death; but being a disposition of testator's property by the person exerting the influence, the testator must be susceptible to said influence, there must have been an opportunity to exert it, and the testator must have acted as a result of such influence.

**REVOCATION.**

How may a will be revoked?

Section 2290 of the Wisconsin Statutes practically answers the question, which provides that no will or any part thereof shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence and by his direction, or by some other will or codicil in writing, or by some other writing, signed, attested and subscribed in the manner provided for the execution of a will; excepting that nothing contained in said section shall prevent a revocation implied by law from subsequent changes in the condition or circumstances of the testator.

The statute being very specific, will merely by way of illustration cite the following cases.

*In re Ladd's Will,* 60 Wis. 187, the testatrix wrote on the fourth sheet of her will, "I revoke this will," with her signature and the date, but the writing was not attested or subscribed by witnesses. The court held that this was not a revocation within the meaning of the statute even though the same was made with intention to revoke.

*In White vs. Casten,* 1 Jones Law, 197, which is one of the cases reviewed in the Ladd case, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing and a large part was scorched, but the writing was not interfered with when it was rescued against the testator's wish, and preserved against his knowledge, it was held to be a revocation, but that the mere act of burning, tearing, canceling or obliterating the will itself, without intention to revoke is not enough.
In *Deck vs. Deck*, 106 Wis. 470, the court held that the only way in which a will can be revoked is by complying with Section 2290, and that the mere expression on the part of the testator to change his will was not a revocation.

As to a revocation of a will implied by law from subsequent changes in the condition or circumstances of the testator, the same is governed by the rules of the common law, except so far as the same has been changed by statute or decision.

Under the common law the marriage of a feme sole revoked a will made by her before marriage, but as to a male person, marriage alone was not sufficient, but marriage with birth of issue was necessary to revoke a will made before marriage.

The common law rule as to a feme sole has been abrogated in Wisconsin. The law today being that in order to work a revocation of a will made before marriage, both as to male and female, there must be marriage and birth of issue.

*In re Will of Lyon*, 96 Wis. 339.

In *Glascott vs. Bragg*, 111 Wis. 605, the court held that marriage and adoption of a child will revoke a will made before marriage.

*In re Will of Ballis*, 143 Wis. 234, it was held that divorce alone was not sufficient to revoke a will made during coveture, but stated, quoting from a Michigan case, "a divorce and settlement of their property rights between husband and wife operates ipso facto to revoke his will previously made."

*In re Will of Fischer*, 4 Wis. 254, it was held that the making of a subsequent will, will, if inconsistent with a former will, revoke the former, even though such former will be only inconsistent in part and contains no revocation clause; but if both wills can be considered as one and dispose of testator's property without conflicting, both are valid.

**REVIVAL OF WILL.**

*In re Noon's Will*, 115 Wis. 299, the court laid down the rule that a will once revoked is forever revoked, and that the destroying of a second will, will not revive the first. That to revive such former or first will it must be either re-executed or re-adopted by a subsequent writing in accordance with the statute, and that the re-filing of same with the county judge will not revive same after it had once been revoked.