CHAPTER 238.

WILLS.

238.01 Who may devise lands, etc. Every person of full age and any married woman of the age of 18 years and upward and any other minor who is a member of the military or naval forces of the United States, being of sound mind, seized in his or her own right of any lands or of any right thereto or entitled to any interest therein, descendible to his or her heirs, may devise and dispose of the same by last will and testament in writing; and all such estate not disposed of by will shall descend as the estate of an intestate, being chargeable in both cases with the payment of all his or her debts except as provided in ch. 237 and in s. 238.04.

238.02 Construction of devise. (1) Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate.

(2) Neither the acceptance of a bequest or devise, nor the participation of the legatee or devisee in the probate proceeding, shall constitute an election by him to forego, waive or convey his pre-existing interest or right of survivorship in any property which the will or codicil attempts to bequeath or devise to another person, unless the will or codicil so provides in express terms.

A will required a devisee to elect to purchase real estate within 6 months after the death of a life tenant. An oral election, communicated to the only other heir, is sufficient. The election need not be written, if not required by the will, in view of 240.07. Estate of Russell, 10 W (2d) 346, 102 NW (2d) 768.

Under a will giving the testator's entire estate to named legatees, but providing that if any one of them had passed away "at the time of the probate of this will" the remaining named legatees should take the estate, the testator is deemed to have meant to postpone the effective date of the gifts to the named legatees at least until some proceeding had been commenced toward the probate of the will. Estate of Miller, 10 W (2d) 575, 103 NW (2d) 514.

A devise of real estate subject to a 5-year restriction on alienation or mortgaging is a devise in fee simple and the restriction is inconsistent and void. Unless the will discloses a contrary intent an existing mortgage on devised real estate is to be paid out of sufficient and available personal property. It is not necessary for the devisee to file a claim for exoneration of the mortgage. Estate of Budd, 11 W (2d) 248, 105 NW (2d) 358.

Wisconsin accepts the doctrine of incorporation into a will by reference. The fact, that a document was not in existence in final form, does not prevent it from being incorporated into a will by reference. As a general rule, where a person knowing that a testator, in giving him a devise or bequest, intends it to be applied for the benefit of another, and either expressly provides or, by his action at the time, implies that he will convey the testator's intention into effect, and the property is left to him in good faith on the part of the testator that such promise will be kept, the promisor will be held as a trustee ex maleficio. Estate of Brandenburg, 13 W (2d) 217, 108 NW (2d) 374.

Where evidence clearly indicates a mistake was made as to the middle initial and address of a legatee, so that a stranger is designated, the will should be reformed and the bequest given to the individual intended. Estate of Gibbs, 14 W (2d) 490, 111 NW (2d) 413.

Provisions of will as to payment of benefits out of principal or income discussed. Estate of Odegard, 14 W (2d) 564, 111 NW (2d) 424.

Under a residuary clause which bequeathed the residue of the estate to "my executor. My executor shall pay the sums in his hands in his sole discretion to the person or persons which I have previously indicated to him," the executor took such residue in his official capacity, and not personally, so that testimony to establish what the oral indication to the executor-scrivener was could not be permitted in evidence, with the result that such residue constituted property undisposed of by will and descended intestate. Estate of Liginger, 14 W (2d) 577, 111 NW (2d) 407.

Where an attorney-beneficiary drafted a will for a testator whose eyesight was seriously impaired, and the will, although duly executed in form, was not read to the testator and he was not otherwise informed of its contents at the time of execution, the will was void and could not be admitted to probate. A codicil fell with the will because it expressly referred to such will and was therefore a part of that will. Estate of Barnes, 14 W (2d) 643, 112 NW (2d) 142.

Neither the supreme court nor the

county court may consider whether a will is an "unnatural will," with a view to denying probate to it. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

A bequest in trust, income to be paid to grandnieces and nephews and principal to be distributed to them when the youngest is 50, construed as requiring all to live to date of distribution to have any vested interest in the corpus. Will of Walker, 17 W (2d) 181, 116 NW (2d) 106.

Where a will left nothing to testatrix' son who had disappeared in 1945 while a German soldier fighting in Russia, but the testatrix left a letter with the will requesting the beneficiaries to take care of the son if he returned, the letter was not part of the will and passed nothing to the son since he did not return. Estate of Spenner, 17 W (2d) 645, 117 NW (2d) 641.

Where a testator devised his farm to a named son for life, and to the son's lawful issue effective on the termination of the son's life estate, and gave the residue of the estate to the son, and the testator sold the farm to a third person under a land contract after the execution of the will, (1) applied so as to prevent an ademption and permit the devisees to take the same interest in the land contract that they would have taken in the land itself had the testator not sold it prior to his death. Estate of Atkinson, 19 W (2d) 272, 120 NW (2d) 109.

Existing statutory and case law is one of the extrinsic aids which may be consulted in resolving a will ambiguity by construction; and where applicable law is to be looked to as a surrounding circumstance, it is the law in effect at the time of the making of the will, not the time of the death of the testator. Estate of McDonald, 20 W (2d) 63, 121 NW (2d) 245.

A testator's mere knowledge of the birth of an illegitimate child does not rebut the presumption that a bequest to issue means only legitimate children; to rebut the presumption requires not only that the existence of the illegitimate issue was known to the testator, but also (1) that the illegitimate was a part of the family circle or, (2) that the illegitimate was otherwise recognized by the testator as an object of his natural bounty. [Will of Kaufer, 203 W 299, modified.] Estate of Bohnsack, 20 W (2d) 448, 122 NW (2d) 443.

Rule of early vesting of estates; Will of Walker case discussed. 1963 WLR 494.

238.03 After-acquired estate. Any estate, right or interest in lands acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will if such shall manifestly appear by the will to have been the intention of the testator.

A standard residuary clause is sufficient to show an intention to dispose of after-acquired real estate. Estate of Zink, 15 W (2d) 527, 113 NW (2d) 420.

238.04 Devise of homestead, etc. When any homestead shall have been disposed of by the last will and testament of the owner thereof the devisee shall take the same free of all judgments and claims against the testator or his estate, except mortgages lawfully executed thereon and laborers' and mechanics' liens to the extent that the testator shall leave other property subject to payment of the same. When devised to any of the persons mentioned in section 237.025, the same exemptions shall apply as set forth therein.

238.05 Who may bequeath personalty. Every person of full age and every married woman of the age of 18 years and upward and any other minor who is a member of the military or naval forces of the United States, being of sound mind, may, by last will and testament in writing, bequeath and dispose of all his or her personal estate remaining at his or her decease and all his or her rights thereto and interest therein, subject to the payment of debts, and all such estate not disposed of by the will shall be administered as intestate estate.

238.06 How wills to be executed. No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, 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 incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will if it be otherwise satisfactorily proved.

The presumption that a will is valid where duly executed falls where the evidence indicates that the testator did not know the contents of the instrument at the time of its execution. Estate of Barnes, 14 W (2d) 643, 112 NW (2d) 142.

There is nothing legally invalid in the execution of a will because the separate pages of the will have not been fastened together, but it is a requirement that all the pages be present at the time of execution. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

It is improper from the standpoint of professional ethics for an attorney who drafted a will to continue to conduct litigation relating thereto when he knows in advance of the trial that his testimony will be required, but an attorney who violates such rule is not thereby rendered incompetent to testify. If an attorney who drafted and witnessed a will were incompetent to testify in relation thereto, the striking of his testimony would not prevent the admission of the will on the testimony of the other attesting witness. Estate of Weinert, 18 W (2d) 33, 117 NW (2d) 685.

238.07 Foreign wills. A last will and testament executed without this state in the mode prescribed by the law either of the place where executed or of the testator's domicile shall be deemed to be legally executed and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided, said last will and testament is in writing and subscribed by the testator; and provided further, that this section shall not affect such nuncupative wills as are mentioned in this chapter.

238.08 Witnesses to will not to take under it. All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, or to the husband or wife of a subscribing witness thereto, shall be wholly void unless there be two other competent subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will.

238.09 When share of estate to witness saved. But if such witness or the husband or wife of such witness, to whom any beneficial devise may have been made or given, would have been entitled to any share of the estate of the testator in case the will was not established, then so much of the share that would have descended or been distributed to such witness or to the husband or wife of such witness as will not exceed the devise or bequest made to him in the will shall be saved to him, and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

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

238.11 Provision for child omitted by mistake, etc. When any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was not intentional but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in section 238.10.

238.12 From what estate provision in such cases taken. When any share of the estate of a testator shall be assigned to a child born after the making of a will or to a child, or the issue of a child, omitted in the will as hereinbefore mentioned, the same shall first be taken from the estate not disposed of by the will, if any; if that shall not be sufficient so much as shall be necessary shall be taken from all the devisees or legatees in proportion to the value of the estate they may respectively receive under the will unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in which case such specific devise, legacy or provision may be exempted from such apportionment and a different apportionment may be adopted in the discretion of the county court.

238.13 Rights of issue of deceased legatee. When a devise or legacy shall be made to any child or other relation of the testator and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator unless a different disposition shall be made or directed by the will.

238.135 Disposition of renounced legacy. (1) If any legacy other than a bequest of the residue or any interest therein is renounced or refused, such legacy shall not escheat but in the absence of other directions in the will shall become part of the residue of the estate.

(2) If any legacy consisting of the residue of an estate or any interest therein including legacies which have become a part of the residue under subsection (1) shall be renounced or refused, such residue or legacy of an interest therein shall not escheat but in the absence of other directions in the will shall descend or be distributed as intestate property.

238.136 Escheat of intestate property on failure of heir. If there is no known heir of the decedent, the residue of the estate, not disposed of by will, shall escheat and shall be ordered paid into the state school fund.

Cross Reference: For escheat procedure, see 318.02 and 318.03.

238.14 Wills, how revoked. No will nor 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, executed as prescribed in this chapter, or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. The power to make a will implies the power to revoke the same.

Changes in a will in testator's handwriting after execution do not necessarily revoke a will nor are the attempted changes effective. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

Where only the second page of a will was found in testator's safe-deposit box and only he had access to the box, and where it appeared that the first page had been torn off and was never found, the will was revoked. Estate of Slama, 18 W (2d) 443, 118 NW (2d) 923.

238.15 Deposit of wills with county judge; redelivery. Any will, being enclosed in a sealed wrapper and having indorsed thereon the name of the testator and his place of residence and the day when and the person by whom it is delivered, may be deposited by the person making the same or by any person for him with the judge of the county court of the county where the testator lives, and such judge shall receive and safely keep such will and give a certificate of the deposit thereof. A will so deposited shall, during the lifetime of the testator, be delivered only to himself or to some person authorized by him, by an order in writing, duly proved by the oath of a subscribing witness, to receive the same.

238.16 Nuncupative wills, when good. (1) No nuncupative will shall be good when the estate bequeathed shall exceed the value of $150 that is not proved by the oath of 3 witnesses, at least, that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will or to that effect; nor unless such nuncupative will were made at the time of the last sickness of the deceased and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of 10 days or more next before the making of such will except where such person was unexpectedly taken sick, being from home, and died before he or she returned to the place of his or her habitation.

(2) Except when the bequest is to a spouse, the value of an estate bequeathed by a nuncupative will shall not exceed $500 and if it exceeds that value the bequest shall be invalid and of no effect as to such excess. This limitation shall not apply to the disposition by a soldier in actual service or by a mariner on shipboard of his wages and other personal estate by nuncupative will. Where the bequest by a nuncupative will is solely to the spouse there shall be no limitation as to the value of the estate bequeathed.

238.17 How same proved. After six months shall have passed after speaking any pretended testamentary words no testimony shall be received to prove the same as a nuncupative will unless the said words or the substance thereof were reduced to writing within six days after the same testamentary words were spoken. Nor shall letters testamentary or probate of any nuncupative will be issued by any county court until fourteen days, at least, after the decease of the testator be fully expired; nor shall any nuncupative will be at any time approved and allowed unless notice shall have first been given to the widow and other persons principally interested, if resident within the state, to the end that they may contest the same if they please. Nothing herein contained shall prevent any soldier being in actual service nor any mariner being on shipboard from disposing of his wages and other personal estate by a nuncupative will.

238.18 Wills must be proved. No will shall pass either real or personal property unless it has been admitted to probate as provided in these statutes, or unless a certificate of assignment has been issued under section 310.075; and the admission to probate of a will shall be conclusive as to its due execution.

238.19 Wills not to be construed contractual. 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.

238.20 Certificate of proof and record. Every will, when proved and allowed as prescribed by statute, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of the county court and attested by the seal of such court. An attested copy of every will devising lands or any interest therein and of the certificate of proof thereof and of the final judgment in the estate assigning such lands or interest therein, shall be recorded in the office of the register of deeds of the county in which the lands so devised and assigned are situated. This section shall not apply to wills proved and allowed before April 10, 1903.