CHAPTER 853

WILLS

853.01 Capacity to make or revoke a will. Any person of sound mind 18 years of age or older may make and revoke a will.

Undue influence discussed. Estate of McGonigal, 46 W (2d) 205, 174 NW (2d) 256.

The existence of a fiduciary relationship will cause the courts to scrutinize the evidence more closely. The relationship, plus suspicious circumstances, create an inference of undue influence which establishes a prima facie case which remains even though evidence is introduced to rebut it. Estate of Komarr, 46 W (2d) 230, 175 NW (2d) 473.

Elements of testamentary capacity discussed. Estate of O'Loughlin, 50 W (2d) 143, 183 NW (2d) 133.

The clause "in equal shares to the then living issue of donor's three daughter-beneficiaries in this trust, and/or the then living issue of any deceased issue of donor's three daughter-beneficiaries, by right of representation" requires distribution per capita among his grandchildren and by representation among their children. In re Bowler Trust, 56 W (2d) 171, 201 NW (2d) 573.

Under a will leaving "my homestead which I occupy at the time of my death" to a son, the home in which testator lived when the will is executed should be awarded to the son even though testator became ill and was confined to a nursing home for a year prior to his death and the home was rented. Estate of Gotthart, 56 W (2d) 563, 202 NW (2d) 397.

853.03 Execution of wills. Every will in order to be validly executed must be in writing and executed with the following formalities:

(1) It must be signed (a) by the testator, or (b) in the testator's name by one of the witnesses or some other person at the testator's express direction and in his presence, such a proxy signing either to take place or to be acknowledged by the testator in the presence of the witnesses; and

(2) It must be signed by 2 or more witnesses in the presence of the testator and in the presence of each other.

The alternate requisite in sub. (1) that if not signed by the testator it be signed by some person in his presence and by his express direction, is not met by simply taking the testator's hand as an inanimate object and making his mark or signature where the testator fails or is unable to in any manner expressly authorize another to sign for him. (Will of Wilcox, 215 W 341, overruled.) Estate of Komarr, 46 W (2d) 230, 175 NW (2d) 473.

853.05 Execution of wills outside the state or by nonresidents within this state. A will is validly executed if it is in writing, executed according to s. 853.03 or if it is in writing and executed in accordance with either of the following: (a) the law of the place where the will is executed; or (b) the law of the place where the testator is domiciled at the time of execution of the will. Any such will has the same effect as if executed in this state in compliance with s. 853.03.

853.07 Witnesses. (1) Any person who, at the time of execution of the will, would be competent to testify as a witness in court to the facts relating to execution may act as a witness to the will. Subsequent incompetency of a witness is not a ground for denial of probate if the execution of the will is otherwise satisfactorily proved.

(2) A will is not invalidated because signed by an interested witness; but, unless the will is also signed by 2 disinterested witnesses, any beneficial provisions of the will for a witness or his spouse are invalid to the extent that such provisions in the aggregate exceed in value what the witness or his spouse would have received had the testator died intestate. Valuation is to be made as of testator's death.

(3) An attesting witness is interested only if the will gives to him or his spouse some personal and beneficial interest. The following are not interests which are personal and beneficial:

(a) A provision for employment as executor or trustee or in some other capacity after death of the testator and a provision for compensation at a rate or in an amount not greater than that usual for the services to be performed;

(b) A provision which would have conferred no benefit if the testator had died immediately following execution of the will.

853.09 Deposit of will in county court during testator's lifetime. (1) DEPOSIT OF WILL. Any testator may deposit his will with the register in probate of the county court of the county where he resides. The will shall be sealed in an envelope with the name of the testator, his address, and the date of deposit noted thereon. If the will is deposited by a person other than the testator, that fact also shall be noted on the envelope. The size of the envelope may be regulated by the register in probate to provide uniformity and ease of filing.

(2) DUTY OF REGISTER IN PROBATE. The register in probate shall issue a receipt for the deposit of the will and shall maintain a registry of all wills deposited. The original will, unless withdrawn under sub. (3) or opened in accordance with s. 856.03 after death of the testator, shall be kept on file for a period of 25 years from the date of deposit; thereafter the register may either retain the original will or open the envelope, copy or reproduce the will for confidential record storage purposes by microfilm or other method of comparable retrievability and destroy the original. If satisfactorily identified, the reproduction is admissible in court for probate or any other purpose the same as the original document. Wills deposited with the county judge under former s. 238.15 (Stats. 1967) shall be transferred to the register in probate and become subject to this section.

(3) WITHDRAWAL. A testator may withdraw his will during his lifetime, but the register in probate shall deliver the will only to the testator personally or to a person duly authorized to withdraw it for the testator, by a writing signed by the testator and 2 witnesses other than the person authorized.

The practice of attorneys retaining wills for safekeeping is disapproved State v Gulbankian, 54 W (2d) 605, 196 NW (2d) 733.

853.11 Revocation. (1) SUBSEQUENT WRITING OR PHYSICAL ACT. A will is revoked in whole or in part by:

(a) A subsequent will, codicil or other instrument which is executed in compliance with s. 853.03 or 853.05 and which revokes the prior will or a part thereof expressly or by inconsistency; or

(b) Burning, tearing, canceling or obliterating the will or part, with the intent to revoke, by the testator or by some person in the testator's presence and by his direction.

(2) SUBSEQUENT MARRIAGE. A will is revoked by the subsequent marriage of the testator if the testator is survived by his spouse, unless:

(a) The will indicates an intent that it not be revoked by subsequent marriage or was drafted under circumstances indicating that it was in contemplation of the marriage or makes provision for issue of the decedent; or

(b) Testator and the spouse have entered into a contract before or after marriage, which makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

(3) ANNULMENT OR DIVORCE. Any provision in a will in favor of the testator's spouse is revoked by an annulment of the marriage to such spouse or by an absolute divorce.

(4) OTHER METHODS OF REVOCATION. A will is revoked only as provided in this section.

(5) DEPENDENT RELATIVE REVOCATION. Except as modified by sub. (6) this section is not intended to change in any manner the doctrine of dependent relative revocation.

(6) REVIVAL. When a will, codicil or part thereof has been revoked by a subsequent will, codicil or other instrument under sub. (1) (a), the later revocation of the revoking instrument by act under sub. (1) (b) revives the prior will or codicil or part thereof: (a) if there is clear and convincing evidence that the testator intended to revive the prior will, codicil or part; or (b) if the revoking instrument is a codicil which revoked only a part of the will by inconsistency and not expressly, and the evidence is insufficient to prove that the testator intended no revival. Proof of testator's statements at or after the act of revocation is admissible to establish intent. A will, codicil or part cannot be revived under this subsection unless the original will or codicil is produced in court.

Where a 16 year old will cannot be found, revocation by destruction is presumed despite an expression of satisfaction with it 6 years before death. Estate of Fonk, 51 W (2d) 339, 187 NW (2d) 147.

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

(2) This section applies to a joint will (except if one of the testators has died prior to April 1, 1971) as well as to any other will; there is no presumption that the testators of a joint will have contracted not to revoke it.

After the death of one party, the other party to a will based on contract cannot in effect avoid the will by giving away property. Estate of Chayka, 47 W (2d) 102, 176 NW (2d) 561.

The existence of an irrevocable contract does not prevent the making of a later will and its admission to probate; the

remedy is an action in equity to enforce the contract. Estate of Schultz, 53 W (2d) 643, 193 NW (2d) 655.

Joint and mutual wills. Kroncke, 43 WBB, No 5.

Contracts to make joint or mutual wills. O'Donnell, 55 MLR 103.

853.15 Equitable election if will attempts to dispose of property belonging to beneficiary. (1) NECESSITY FOR ELECTION. If a will gives a bequest or devise to one beneficiary and also clearly purports to give to another beneficiary a property interest which does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation or otherwise, the first beneficiary must elect either to take under the will and transfer his property interest in accordance with the will, or to retain his property interest and not take under the will. If he elects not to take under the will, the bequest or devise given him under the will is to be assigned by the court to the other beneficiary in lieu of the property interest which does not pass under the will. But this section does not require an election in any case where the property interest belongs to the first beneficiary by reason of transfer or beneficiary designation made by the decedent after the execution of the will. This section does not apply to the elective right of the surviving spouse under s. 861.05.

(2) PROCEDURE FOR ELECTION. If an election is required under sub. (1), the following provisions apply:

(a) The court may by order set a time within which the beneficiary is required to file with the court a written election either to take under the will and forego, waive or transfer his property interest in favor of the other person to whom it is given by the will, or to retain such property interest and not take under the will. The time set shall be not earlier than one month after the necessity for such an election and the nature of the interest given to the beneficiary under the will have been determined.

(b) If a written election by the beneficiary to take under the will and transfer his property interest in accordance with the will has not been filed with the court within the time set by order, or if no order setting a time has been entered, then prior to the final judgment, the beneficiary is deemed to have elected not to take under the will.

(c) Except as provided above, participation in the administration by the beneficiary does not constitute an election to take under the will.

853.17 Effect of will provision changing beneficiary of life insurance or annuity. (1) Any provision in a will which purports to name a different beneficiary of a life insurance or annuity contract than the beneficiary properly designated in accordance with the contract with the issuing company, or its bylaws, is ineffective to change the contract beneficiary unless the contract or the company's bylaws authorizes such a change by will.

(2) This section does not prevent the court from requiring the contract beneficiary to elect under s. 853.15 in order to take property under the will; nor does it apply to naming a testamentary trustee as designated by a life insurance policy under s. 701.09.

853.18 Designation of beneficiary, payee or owner. (1) The written designation in accordance with the terms of any insurance, annuity or endowment contract, or in any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, or the written designation made under a contract, plan, system or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing or death benefits, or an employment or commission contract, of any person to be a beneficiary, payee or owner of any right, title or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing, shall not be subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift or intestacy, even though such designation or assignment is revocable or the rights of such beneficiary, payee, owner or assignee are otherwise subject to defeasance.

(2) This section applies to such designations or assignments made either before or after June 25, 1969, by persons who die on or after that date. This section creates no implication of invalidity as to any designation or assignment, of the nature described in sub. (1), made by any person who dies before that date or as to any declaration, agreement or contract for the payment of money or other transfer of property at death not specified under sub. (1).

853.19 Advancement in testate estate. (1) WHEN GIFT DURING LIFE IS DEDUCTED FROM WILL. If a testator by his will makes a provision for a beneficiary and later makes a gift during lifetime to that beneficiary, the gift is not to be deducted from the provision in the will as an advance unless: (a) the testator by his will provides for deduction of the gift, or (b) the testator by writing clearly states that the gift is an advance, whether or not such writing is contemporaneous with the gift, or (c) the beneficiary states by writing or in court that the gift was an advance.

(2) ADVANCE WHEN GIFT LAPSES. If the provision in the will fails because of the death of

the beneficiary, and issue of that beneficiary take by the terms of a substitutional gift in the will or by reason of s. 853.27, the provision in the will to which the issue become entitled shall be reduced by the amount of the advance unless the contrary intent is apparent from the will or the writing by the testator evidencing the advance.

(3) VALUATION. The value of a gift established as an advance under sub. (1) is determined as of the time when the beneficiary comes into possession or enjoyment of the property advanced, or the time of death of the testator if that occurs first.

853.21 Renunciation of gift under will. Any person to whom property is given by the terms of a will may renounce all of the property, or any part of such property unless the will expressly prohibits partial renunciation. In addition to other methods, a renunciation may be made, by filing a signed declaration of renunciation with the court and serving a copy on the personal representative, if any, within 6 months after the date of the decedent's death. For cause shown, the court may grant additional time by order entered within or after the 6-month period. Property includes rights of a beneficiary of a trust under the will, including right to receive discretionary or contingent distributions; and any provision in the will attempting to restrict alienability of the interest of a beneficiary, whether under a trust or otherwise, does not restrict the power to renounce such interest under this section. Unless the will provides otherwise, no interest in the property renounced vests in such person, but the renounced property passes as if such person had predeceased the testator. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the probate court a copy of the assignment or contract and serves a copy on the personal representative.

History: 1973 c. 233.

853.23 Renunciation of power of appointment or appointed property. (1) If a will purports to create any power of appointment, as defined in s. 702.01 (1), the donee may renounce the power entirely, or partially renounce to the same extent that he may partially release the power under s. 702.09 (1) (b), by filing a renunciation in the manner and time provided in s. 853.21. To the extent that he renounces, the power is deemed not to have been created in the donee at any time.

(2) Unless the will expressly provides otherwise, any person to whom property is appointed by will may renounce all or any part of the property by filing a renunciation as provided in s. 853.21 within 180 days from admission to probate of the will making the appointment. The renounced property or part passes: (a) if the donee has made an alternate appointment to take effect in event of renunciation, to the alternate appointee; (b) if no alternate appointment is made and the power is a general power as defined in s. 702.01 (4), in the same manner as if the donee owned the appointed property; (c) if no alternate appointment is made and the power is not general, as if no appointment had been made to the renouncing person.

(3) A general renunciation of all interest under a will is construed to include any power of appointment and any appointed property unless the renunciation expressly provides otherwise.

853.25 Unintentional failure to provide for issue of testator. (1) CHILDREN BORN OR ADOPTED AFTER MAKING OF THE WILL. If a testator fails to provide in his will for any child born or adopted after the making of the will, that child is entitled to receive a share in the estate of the testator equal in value to the share which the child would have received if the testator had died intestate, unless: (a) the testator left all or substantially all of his estate to the mother of the child, or (b) the testator eliminated all of his children known to him to be living at the time of execution of the will from any share under the will, or (c) the testator provided for the subsequently born or adopted child by transfers outside the will and the intent that the transfers be in lieu of a testamentary gift is either shown by statements of the testator or inferred from the amount of the transfers and other circumstances, or (d) in any other case it appears from the will or evidence outside the will that the omission was intentional. If a child entitled to a share under this section dies before the testator, and the child leaves issue who survive the testator, the issue who represent the child are entitled to his share.

(2) LIVING ISSUE OMITTED BY MISTAKE. If clear and convincing evidence proves that by mistake or accident the testator failed to provide in his will for a child living at the time of making of the will, or for the issue of any then deceased child, the child or issue is entitled to receive a share in the estate of the testator equal in value to the share which he or they would have received if the testator had died intestate. But failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

(3) TIME FOR PRESENTING DEMAND FOR RELIEF. A demand for relief under this section must be presented to the court in writing not later

than (a) entry of the final judgment, or (b) 6 months after allowance of the will, whichever first occurs.

(4) FROM WHAT ESTATE SHARE IS TO BE TAKEN. Except as provided in sub. (5), the court shall in its final judgment assign the share provided by this section:

(a) From any intestate property first;

(b) The balance from each of the beneficiaries under the will in proportion to the value of the estate each would have received under the will as written, unless the obvious intention of the testator in relation to some specific gift or other provision in the will would thereby be defeated, in which case the court may adopt a different apportionment and may exempt a specific gift or other provision.

(5) DISCRETIONARY POWER OF COURT TO ASSIGN DIFFERENT SHARE. If in any case under sub. (1) or (2) the court determines that the intestate share is a larger amount than the testator would have wanted to provide for the omitted child or issue of a deceased child, because it exceeds the value of a provision for another child or for issue of a deceased child under the will, or that assignment of the intestate share would unduly disrupt the testamentary scheme, the court may in its final judgment make such provision for the omitted child or issue out of the estate as it deems would best accord with the probable intent of the testator, such as assignment, outright or in trust, of any amount less than the intestate share but approximating the value of the interest of other issue, or modification of the provisions of a testamentary trust for other issue to include the omitted child or issue.

853.27 Rights of issue of beneficiary dying before testator (lapse). (1) Unless a contrary intent is indicated by the will, if provision in the will is made for any relative of the testator and the relative dies before the testator and leaves issue who survive the testator, then the issue as represent the deceased relative are substituted for him under the will and take the same interest as he would have taken had he survived the testator.

(2) For purposes of this section, a provision in the will means:

(a) A gift to an individual whether he is dead at the time of the making of the will or dies after the making of the will;

(b) A share in a class gift only if a member of the class dies after the making of the will; or

(c) An appointment by the testator under any power of appointment, unless the issue who would take under this section could not have been appointees under the terms of the power.

A bequest to a wife "and to her heirs and assigns forever", where the wife predeceased the testator, held ambiguous where the words were in a residuary clause so that the effect would be intestacy if strictly construed, the draftsman testified that the words were not used in a technical sense and the will acknowledged testator's debt to his wife. Estate of Mangel, 51 W (2d) 55, 186 NW (2d) 276

853.29 After-acquired property. A will is presumed to pass all property which the testator owns at his death and which he has power to transmit by will, including property acquired after the execution of the will.

853.31 Presumption that will passes all of testator's interest in property. Any gift of property by will is presumed to pass all the estate or interest which the testator could lawfully will in the property unless it clearly appears by the will, interpreted in light of the surrounding circumstances, that the testator intended to pass a less estate or interest.

Where a testatrix in a single dispositive paragraph divided her estate one half to her sister and the other to 2 nieces, who were her only then living full-blood relatives, and was survived by only the one niece of the whole blood and brothers and sisters of the half blood, provision in the will that it was her intention that all of her estate be inherited by her named "kindred of the whole blood, and none shall go to my brothers and sisters of the half blood" did not permit strict application of the rule of disinheritance so as to create an intestacy in favor of the half brothers and sisters because such literal application would defeat the intention of the testatrix which was that her estate be given to her relatives of the whole blood (here her surviving niece) and none to her brothers and sisters of the half blood. (Rule of disinheritance as enunciated in Will of Ziehlke, 230 Wis 574, and Will of Rosnow, 273 Wis 438, modified.) Estate of Farber, 57 W (2d) 363, 204 NW (2d) 478

853.33 Gift of securities construed as specific. Every gift of a stated number of shares or amount of securities is construed to be a specific gift if the testator owned the same or a greater number of shares or amount of the securities at the time of execution of the will, even though the will does not describe the securities more specifically or qualify the description by a possessive pronoun such as "my", unless the will expressly empowers the personal representative to purchase securities to satisfy the bequest. "Securities" is used in this section in the broadest possible sense and includes but is not limited to stocks, bonds and corporate securities of any kind, shares in an investment trust or common trust fund, and bonds or other obligations of the United States, any state, other governmental unit or agency, foreign or domestic.

853.35 Nonademption of specific gifts in certain cases. (1) SCOPE OF SECTION. It is the intent of this section to abolish the common law doctrine of ademption by extinction in the situations governed by this section. This section is inapplicable if the intent that the gift fail under

the particular circumstances appear in the will, or if the testator during his lifetime gives property to the specific beneficiary with the intent of satisfying the specific gift. Whenever the subject of the specific gift is property only part of which is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property owned by the testator at the time of his death is not affected by this section; but this section applies to the part which would have been adeemed under the common law by the destruction, damage, sale or condemnation.

(2) PROCEEDS OF INSURANCE ON PROPERTY. If insured property which is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to: (a) any insurance proceeds paid to the personal representative after death of the testator, with the incidents of the specific gift; and (b) a general pecuniary legacy equivalent to any insurance proceeds paid to the testator within one year of his death; but the amount hereunder is reduced by any amount expended or incurred by the testator in restoration or repair of the property.

(3) PROCEEDS OF SALE. If property which is the subject of a specific gift is sold by the testator within 2 years of his death, the specific beneficiary has the right to: (a) any balance of the purchase price unpaid at the time of death (including any security interest in the property and interest accruing before death), if part of the estate, with the incidents of the specific gift; and (b) a general pecuniary legacy equivalent to the amount of the purchase price paid to the testator within one year of his death. Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on his death, is a sale by the testator for purposes of this section.

(4) CONDEMNATION AWARD. If property which is the subject of a specific gift is taken by condemnation prior to the testator's death, the specific beneficiary has the right to: (a) any amount of the condemnation award unpaid at the time of death, with the incidents of the specific gift; and (b) a general pecuniary legacy equivalent to the amount of an award paid to the testator within one year of his death. In the event of an appeal in a condemnation proceeding, the award is for purposes of this section limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale within the meaning of sub. (3).

(5) SALE BY GUARDIAN OR CONSERVATOR OF INCOMPETENT. If property which is the subject of a specific gift is sold by a guardian or conservator of the testator or a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary legacy equivalent to the proceeds of the sale or the condemnation award as defined in sub. (4) or the insurance proceeds, reduced by any amount expended or incurred in restoration or repair of the property. This provision does not apply if testator subsequent to the sale or award or receipt of insurance proceeds is adjudicated competent and survives such adjudication for a period of one year; but in such event sale by a guardian or conservator within 2 years of testator's death is a sale by the testator within the meaning of sub. (3).

(6) SECURITIES. If securities are specifically willed to a beneficiary, and subsequent to execution of the will, other securities in the same or another entity are distributed to the testator by reason of his ownership of the specifically bequeathed securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange, or any other similar transaction, and if such other securities are part of testator's estate at death, the specific gift is deemed to include the additional or substituted securities. "Securities" has the same meaning as in s. 853.33.

(7) REDUCTION OF RECOVERY BY REASON OF EXPENSES AND TAXES. Throughout this section the amount the specific beneficiary receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.