# *34 M.L.P. 2d WILLS AND ESTATE ADMINISTRATION § 1*

***Michigan Law & Practice > WILLS AND ESTATE ADMINISTRATION > Chapter 1 IN GENERAL***

## § 1. General Considerations

Every person who meets the statutory age and sufficient mental capacity requirements may make a will, devise his or her real and personal property by will, and make such property disposition as he or she sees fit.

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The Estates and Protected Individuals Code (herein, "EPIC")[1] was enacted in 1998, effective April 1, 2000, replacing and revising the Revised Probate Code (herein, "RPC").[2] Section 2501 of EPIC provides that "[a]n

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[1] *MCLS §§ 700.1101 et seq.*

### Court rules

The Michigan Court Rules of 1985 were adopted in 1984, replacing and revising the General Court Rules of 1963 and the Probate Court Rules of 1972. Chapter 5 of the 1985 Michigan Court Rules governs practice in probate court.

*Petorovski v. Nestorovski (In re Estate of Nestorovski), 283 Mich. App. 177, 769 N.W.2d 720, 2009 Mich. App. LEXIS 725 (Mar. 31, 2009)* ("In 1998, our Legislature enacted the Estates and Protected Individuals Code (EPIC), *MCL 700.1101 et seq.*, which took effect in April 2000. EPIC confers on probate courts the 'exclusive legal and equitable jurisdiction' of matters that 'relate[] to the settlement of a deceased individual's estate'. … The current Michigan Court Rules contrarily provide that '[p]rocedure in

individual 18 years of age or older who has sufficient mental capacity may make a will."[3] The right to make a testamentary disposition of property by means of a will is wholly statutory.[4]

The term "will" is defined by Section 1108(b) of EPIC as follows: " 'Will' includes, but is not limited to, a codicil and a testamentary instrument that appoints a personal representative, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to the decedent's property that is passing by intestate succession."[5] Under Michigan common law, a will is recognized as an instrument by which a person makes a disposition of his or her property, to take effect upon the person's death, and which is necessarily ambulatory and revocable during the person's lifetime.[6]

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probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter.' *MCR 5.001(A)*. Thus, the rules of practice in probate courts are now substantially similar to those in the circuit courts.")

[2] *Former MCLS §§ 700.1 et seq.*, enacted in 1978 and effective July 1, 1979.

[3] *MCLS § 700.2501*.

*In re Estate of Zsigo, 2000 Mich. App. LEXIS 2362 (Mich. Ct. App. May 5, 2000)*.

*Cf. In re Thayer's Estate, 309 Mich. 473, 15 N.W.2d 712, 1944 Mich. LEXIS 354 (1944)* ("Any person has the right to make a will.").

[4] *In re Estate of Blanchard, 391 Mich. 644, 218 N.W.2d 37, 1974 Mich. LEXIS 159, 71 A.L.R.3d 1284 (1974)*.

*In re Hill Estate, 349 Mich. 38, 84 N.W.2d 457 (1957)*.

*In re Estate of Shehin, 2013 Mich. App. LEXIS 1082 (Mich. Ct. App. June 18, 2013)*.

*Flury v. Flury (In re Estate of Flury), 249 Mich. App. 222, 641 N.W.2d 863, 2002 Mich. App. LEXIS 14 (Jan. 15, 2002)*.

[5] *MCLS § 700.1108(b)*.

[6] *Smith v. Delta Funding Corp., 2016 U.S. Dist. LEXIS 38405 (E.D. Mich. 2016)* ("An expectant heir has 'a mere expectancy interest' ").

United States v. Four Hundred Seventy Seven (477) *Firearms, 698 F. Supp. 2d 894, 2010 U.S. Dist. LEXIS 22913 (E.D. Mich. 2010)* (potential heirs and legatees do not have a right in an estate until the testator dies).

*In re Estate of Finlay, 430 Mich. 590, 424 N.W.2d 272 (1988)* ("[w]ills, by their nature, are ambulatory until the testator dies").

*In re Boucher's Estate, 329 Mich. 569, 46 N.W.2d 577, 1951 Mich. LEXIS 454 (1951)* (in order to be construed as a will, an instrument "must operate only upon and by reason of the death of the maker").

*In re Henry's Estate, 263 Mich. 410, 248 N.W. 853, 1932 Mich. LEXIS 1052 (1933)* (in order to be construed as a will, an instrument "should have been designed to operate as a disposition of the testator's property").

*Schmidt v. Smith, 2012 Mich. App. LEXIS 609 (Mich. Ct. App. Mar. 29, 2012)* ("no one can be an heir during the life of an ancestor").

*In re Saylor, 2005 Mich. App. LEXIS 3244 (Mich. Ct. App. Dec. 22, 2005)*.

*Korean New Hope Assembly of God v. Haight (In re Estate of Smith), 252 Mich. App. 120, 651 N.W.2d 153, 2002 Mich. App. LEXIS 994 (July 5, 2002)*.

*Bem v. Bem (In re Estate of Bem), 247 Mich. App. 427, 637 N.W.2d 506, 2001 Mich. App. LEXIS 188 (2001)* ("a testator may always change a will during his lifetime.").

A testator who possesses sufficient mental capacity to make a will and who expresses his or her own desires in the will may make whatever testamentary disposition of property he or she chooses.[7] "The right to make a will as a testator chooses is as sacred as any other right … ."[8] "Property owned and possessed by any person of full age and of sound mind and memory may be disposed of by them as they see fit."[9] "[W]here the law leaves every one to dispose of his property as he chooses, the fact that he prefers one to another can have no bearing on the validity of his voluntary and intelligent action. It concerns no one what his reasons may be for doing what he has a right to

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[7] *In re Erickson Estate, 346 Mich. 432, 78 N.W.2d 256 (1956)* ("So long as the testator was of sound mind and expressed his own desires in the instrument, he was at liberty to make whatever disposition he chose."). *In re Kramer's Estate, 324 Mich. 626, 37 N.W.2d 564, 1949 Mich. LEXIS 466 (1949)*.

*In re Livingston's Estate, 295 Mich. 637, 295 N.W. 343, 1940 Mich. LEXIS 699 (1940)*.

*In re Alvord's Estate, 258 Mich. 497, 243 N.W. 40, 1932 Mich. LEXIS 1305 (1932)* ("It was the right of [testator] to make such disposition of her property as she saw fit, notwithstanding the fact that a jury or others might have preferred a different disposition of her property.").

*In re McCarbery, 243 Mich. 39, 219 N.W. 707, 1928 Mich. LEXIS 575 (1928)* ("If testator had sufficient mental capacity to make the will in question he could dispose of his property as he saw fit. … [The law] permits any one of sound mind to make a testamentary disposition of his property.").

*In re Cadieux's Estate, 237 Mich. 240, 211 N.W. 640, 1927 Mich. LEXIS 515 (1927)* ("The testator was of sound mind. It was his property. He could do with it as he chose. He did.").

*Sullivan v. Foley, 112 Mich. 1, 70 N.W. 322 (1897)* ("[T]he testator was at liberty to select in his own discretion the objects of his bounty; he was in a better condition than anyone else to know what disposition ought to be made of his property … [I]f testator was mentally competent to make his will, he had an undoubted legal right to make it … .").

*Bem v. Bem (In re Estate of Bem), 247 Mich. App. 427, 637 N.W.2d 506, 2001 Mich. App. LEXIS 188 (Sept. 14, 2001)* (a testator has a right to attach to a gift in his will any lawful terms or conditions he sees fit).

*In re Estate of Valentino, 128 Mich. App. 87, 339 N.W.2d 698, 1983 Mich. App. LEXIS 3215 (Aug. 16, 1983)* (the probate court had no power to make a new will for the deceased to carry out its view of his unexpressed intentions).

*Accord In re Cox Estate, 13 Mich. App. 108, 163 N.W.2d 680 (1968)*; *Howe v. Comstock, 151 F. Supp. 652 (E.D. Mich. 1957)*.

[8] *In re Littlejohn's Estate, 239 Mich. 630, 215 N.W. 55, 1927 Mich. LEXIS 820 (1927)*.

*In re Doty's Estate, 212 Mich. 346, 180 N.W. 608, 1920 Mich. LEXIS 520 (1920)*.

*Accord Pierce v. Pierce, 38 Mich. 412 (1878)*.

[9] *In re Johnson's Estate, 326 Mich. 310, 40 N.W.2d 163, 1949 Mich. LEXIS 297 (1949)*.

*In re Reed's Estate, 273 Mich. 334, 263 N.W. 76, 1935 Mich. LEXIS 591 (1935)*.

**Undue influence removing choice**

Mere opportunity does not suffice to establish undue influence. Influence, to be classified as undue, must place a testator in such a position that his free agency is destroyed, so that the will which results from his intelligent action speaks not the will of the testator himself but of someone else.—*In re Jennings' Estate, 335 Mich. 241, 55 N.W.2d 812, 1952 Mich. LEXIS 341 (1952)*.

do."[10] "The right to make a will should be carefully vouchsafed to elderly persons who have testamentary capacity."[11]

> [T]he right to give property by will is conferred for the very reason that the owner is supposed to be able to make, in his particular case, a better distribution of his estate than could be made by any general and unvarying rule; that he knows who by their needs, their affection, their care and solicitude for his welfare, their kind regard for himself and for those to whom he has been attached, and by the thousand other circumstances naturally operating upon the mind, should be remembered in his bounty, better than any others can possibly know, and much better than any general legislation can possibly provide.[12]

A testator has the right to make a testamentary disposition that is different than the disposition that would have occurred under the laws of intestacy.[13] "Every person possesses the sacred right to dispose of his property by sale, gift, or devise, as he sees fit. The right to make a will implies the right to change the descent of property from that prescribed by the law."[14]

A testator has no obligation to make a testamentary disposition of property to his or her heirs, adult children, or relatives.[15] "If of testamentary capacity, [testator] had absolute right to dispose of his estate as he chose, even to

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[10] *Latham v. Udell, 38 Mich. 238 (1878)* (action to determine validity of deeds of conveyance used for purpose of making testamentary dispositions of property).

[11] *In re Paquin's Estate, 328 Mich. 293, 43 N.W.2d 858, 1950 Mich. LEXIS 349 (1950)*.

*In re Alvord's Estate, 258 Mich. 497, 243 N.W. 40, 1932 Mich. LEXIS 1305 (1932)*.

*Accord* *In re Vallender's Estate, 310 Mich. 359, 17 N.W.2d 213, 1945 Mich. LEXIS 472 (1945)*.

[12] *Fraser v. Jennison, 42 Mich. 206, 3 N.W. 882 (1879)* (internal citation omitted).

[13] *In re Paquin's Estate, 328 Mich. 293, 43 N.W.2d 858, 1950 Mich. LEXIS 349 (1950)*.

*In re Reed's Estate, 273 Mich. 334, 263 N.W. 76, 1935 Mich. LEXIS 591 (1935)*.

*Accord* *In re Hannan's Estate, 315 Mich. 102, 23 N.W.2d 222, 1946 Mich. LEXIS 307 (1946)*.

Restrictions on Testamentary Disposition, *infra* § 5, as to statutory share of testator's spouse and statutory exemptions.

[14] *Prentis v. Bates, 93 Mich. 234, 53 N.W. 153 (1892)* (dissenting opinion).

[15] *See* *In re Langlois Estate, 361 Mich. 646, 106 N.W.2d 132 (1960)* (following In re Bulthuis's Estate, *infra*); *In re Erickson Estate, 346 Mich. 432, 78 N.W.2d 256 (1956)* ("[T]estator was not under any legal obligation to provide anything for his [adult] daughter … ."); *In re Johnson's Estate, 326 Mich. 310, 40 N.W.2d 163, 1949 Mich. LEXIS 297 (1949)* ("[I]t was not the duty of testator to leave all of his property to his relatives … ."); *Brereton v. Estate of Glazeby, 251 Mich. 234, 231 N.W. 566 (1930)* (following In re Marx's Estate, *infra*); *In re Bulthuis' Estate, 232 Mich. 129, 205 N.W. 191, 1925 Mich. LEXIS 824 (1925)* ("[Testator] could make such disposition of [her property] as she saw fit. She had the legal right to bestow her bounty where and as she desired, to favorites in her own family or to others."); *In re Allen's Estate, 230 Mich. 584, 203 N.W. 479, 1925 Mich. LEXIS 562 (1925)* ("The law no longer considers the child a co-owner with the father of any part of the father's estate and leaves division and right of participation to the dispensation of the father … ."); *In re Marx's Estate, 201 Mich. 504, 167 N.W. 976, 1918 Mich. LEXIS 760 (1918)* ("It was for the testator to select the objects of his bounty. His to give and his to withhold. What nephews or nieces, if any, should enjoy that bounty was for his determination, not for courts and juries."); *Campbell v. Campbell, 75 Mich. 53, 42 N.W. 670 (1889)* (action to determine validity of deeds of conveyance used for purpose of making testamentary dispositions of property) ("[W]e must not be insensible to the absolute right which a parent has to dispose of his property in such manner as he sees fit; [a parent] is most capable of determining which of his children are most deserving in his estimation … ."); *Fraser v. Jennison, 42 Mich. 206, 3 N.W. 882 (1879)* ("[N]othing is more unquestionable than that, by the Statute of Wills, it was

the total exclusion of his heirs or to give it to any one of them whom he preferred."[16] "The general rule is that every person of full age and sound mind is at liberty, in making a will, to select the objects of his bounty among his relatives at discretion, or pass them all by, if he is so disposed."[17]

> [W]hile it may be said that a testator's blood relations are the natural objects of his bounty, his bounty is not limited by blood relationship, nor have his blood relations any natural or inherent right to his property. He may dispose of his property as he pleases, and it is not an indication of mental incapacity that he distributes it among certain of his relations and entirely omits others.[18]

The Michigan Supreme Court has stated that a child who is disinherited under the will of the child's parent may not challenge the validity of the will on the grounds that it is contrary to natural justice, unless the child is a minor or mentally or physically disabled: "A father may disinherit his children and the children may not be heard to say that his act in doing so is contrary to natural justice; except in case a child be so helpless because of tender age or mental or physical infirmity that no father, except his mind be perverted, would so far forget parental affection or lose sight of duty, saying nothing about pity, as to send his estate entirely away from such [a] one."[19]

In cases where the disinherited child is a minor or mentally or physically disabled, the fact that a will is contrary to natural justice may apparently be considered, together with other evidence, in determining the validity of the will: "In such a case the law still permits consideration of natural justice, in connection with justifying evidence, on the theory that some cause imagined, some coercion by or dominance of another, or want of mental capacity to recognize the common dictates of humanity brought forth such an unnatural will."[20]

*Alien.* An alien has the statutory right to devise real property by will. "Any alien … may … devise [lands, or any right thereto or interest therein] … and in all cases such lands shall be … devised … in like manner, and with like effect, as if such alien were a native citizen of this state, or of the United States."[21]

*Married woman.* Michigan statute provides that a married woman has the right to devise children or relatives her separate real or personal property by will. "[A married woman] may … devise, or bequeath [her separate] property in the same manner and with the same effect as if she were unmarried."[22]

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intended that every man should be at liberty to select the objects of his bounty among his relatives at discretion, or even to pass them all by if so disposed.").

[16] *In re Fay's Estate, 197 Mich. 675, 164 N.W. 523, 1917 Mich. LEXIS 644 (1917)*.

*Accord In re Langlois Estate, 361 Mich. 646, 106 N.W.2d 132 (1960)*.

[17] *In re Teller's Estate, 288 Mich. 193, 284 N.W. 696, 1939 Mich. LEXIS 507 (1939)*.

*Accord In re Hannan's Estate, 315 Mich. 102, 23 N.W.2d 222, 1946 Mich. LEXIS 307 (1946)*.

Restrictions on Testamentary Disposition, *infra* § 5, as to statutory share of testator's spouse and statutory exemptions.

[18] *Hayman v. Wakeham, 133 Mich. 363, 94 N.W. 1062, 1903 Mich. LEXIS 510 (1903)*.

*Spratt v. Spratt, 76 Mich. 384, 43 N.W. 627 (1889)*.

*See generally Dahl v. Lawrence (in Re Estate of White), 2008 Mich. App. LEXIS 2295 (Mich. Ct. App. Nov. 18, 2008)*.

[19] *In re Allen's Estate, 230 Mich. 584, 203 N.W. 479, 1925 Mich. LEXIS 562 (1925)*.

[20] *In re Allen's Estate, 230 Mich. 584, 203 N.W. 479, 1925 Mich. LEXIS 562 (1925)*.

[21] *MCLS § 554.135*.

[22] *MCLS § 557.21(1)*.

*Emancipated minor.* An emancipated minor has the statutory right to make a will. "A minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an adult, [including] [t]he right to make a will."[23]

*Joint will.* A joint will is a single testamentary instrument that operates as the will of two or more persons and is jointly signed by them. "[A joint will is] a single document expressing the individual intentions of [two or more] testators."[24]

*Mutual will.* "Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions, or wills executed in pursuance of a compact or agreement between two or more persons to dispose of their property, to each other or to third persons, in a particular mode or manner."[25]

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[23] *MCLS § 722.4e(1)(n)*.

[24] *White v. Blow (In re Estate of White), 260 Mich. App. 416, 677 N.W.2d 914, 2004 Mich. App. LEXIS 193 (Jan. 22, 2004)* (holding that improper execution of a joint will by one party has no effect on the validity of the will as to other party).

### In general

A will, although jointly executed by two persons, is not a contract, strictly speaking, since it is subject to change and represents simply a statement of the wishes of the testators as they exist at the time of execution. A will jointly executed by two testators containing reciprocal bequests may be, under some circumstances, sufficient evidence to establish a contract to make the testamentary dispositions contained in such a will. The mere fact alone that two identical wills are made by a husband and wife does not suffice to establish an oral agreement to make mutual reciprocal wills, each binding on the other.—*White v. Blow (In re Estate of White), 260 Mich. App. 416, 677 N.W.2d 914, 2004 Mich. App. LEXIS 193 (Jan. 22, 2004)*.

[25] *In re Thwaites Estate, 173 Mich. App. 697, 434 N.W.2d 214, 1988 Mich. App. LEXIS 735 (Dec. 19, 1988)*.

For a decision suggesting that a will must be irrevocable in order to be mutual, *see* *White v. Blow (In re Estate of White), 260 Mich. App. 416, 677 N.W.2d 914, 2004 Mich. App. LEXIS 193 (Jan. 22, 2004)* ("[W]e agree with the probate court that [testators] did not execute a mutual will. Nothing in the language of the will indicates that the will is irrevocable.").