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# THE EFFECT OF AN ADJUDICATED COMPROMISE OF A WILL CONTEST OR CONTROVERSY UPON THE RIGHT TO DISPOSE OF PROPERTY BY WILL

It has been stated that "no rule regarding wills is more settled than the General Rule that the testator's intent if it is not unlawful must prevail."<sup>1</sup> Testamentary intent is "unlawful," and thus a limitation is imposed upon the right to dispose of property by will, if, for example, it contravenes public policy, violates the rule against perpetuities or attempts to devise a fee simple or absolute estate with unreasonable restraints imposed upon its sale or alienation.<sup>2</sup> It would seem that enforcement of agreements compromising will contests and controversies is an additional limitation upon the right to dispose of property by will. The purpose of this note is to examine the common law rule concerning agreements compromising will contests and controversies,<sup>3</sup> the rationale upon which judicial enforcement or recognition of these agreements is based and the effect upon the common law rule of adjudicated compromise of controversies statutes enacted by eight states and included in the Model Probate Code.<sup>4</sup>

## COMPROMISES AT COMMON LAW

Generally, judicial enforcement or recognition of compromise agree-

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1. *Cannistra Estate*, 384 Pa. 605, 607, 121 A.2d 157, 158 (1956).

2. *Ibid.*

3. For extensive listings and discussion of cases enforcing or recognizing agreements compromising will contests and controversies see generally Annot., 42 A.L.R.2d 1319 (1955); Annot., 97 A.L.R. 468 (1935).

4. IND. ANN. STAT. § 7-301 to 303 (Burns 1953); MASS. GEN. LAWS ANN. ch. 204 §§ 14-18 (1955); MICH. STAT. ANN. § 27.3178 (115)-(118) (1943); N.J. REV. STAT. ANN. §§ 3A: 14-1 to -9 (1953) (this statute permits a fiduciary to compromise certain enumerated claims or to submit them for judicial approval); N.Y. DECED. EST. LAW § 19; PA. STAT. ANN. tit. 20 §§ 320.513, 320.945 (1950); R.I. GEN. LAWS ANN. §§ 33-7-12 to -17 (1956); WIS. STAT. ANN. § 318.31 (1958); MODEL PROBATE CODE §§ 93-95 (Simes 1946). See Annot., 42 A.L.R.2d 1319, 1372-1379 (1955) for a short discussion of several of these enactments.

ments concerns the contesting of a will on the grounds of lack of testamentary capacity,<sup>5</sup> undue influence or fraud,<sup>6</sup> failure to comply with the requisite statutory formalities<sup>7</sup> and presence of interlineations in the will.<sup>8</sup> The presence of two or more documents purporting to be the will of a decedent,<sup>9</sup> conflicting claims to an estate<sup>10</sup> and proceedings to construe a will<sup>11</sup> are controversies which have provided a basis for a compromise agreement.

Despite the willingness of most courts to recognize and enforce these compromise agreements, certain agreements will not receive judicial approval or authorization. It is generally required that compromise agreements be consummated in the absence of fraud, misrepresentation or concealment,<sup>12</sup> by parties who are *sui juris*<sup>13</sup> and by all interested parties.<sup>14</sup> Furthermore, these agreements may not prejudice the interests of minors<sup>15</sup> or creditors.<sup>16</sup>

There is a split of authority concerning the validity of compromise agreements where testamentary trusts are involved. The courts of some jurisdictions adhere to the general rule that the beneficiaries under a will may agree among themselves for a distribution of the estate in a manner different from that provided by the will, but add that the agreements are ordinarily not given effect where there is a trust or specific restriction

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5. *E.g.*, Schaefer v. Thoeny, 199 Minn. 610, 273 N.W. 190 (1937); Wagner v. Honbaier, 248 N.C. 363, 103 S.E.2d 474 (1958).

6. *E.g.*, Schoen v. Wagner, 231 S.W.2d 269 (Mo. App. 1950); In the Matter of Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960).

7. *E.g.*, *In re* Estate of Donlen, 145 Neb. 370, 16 N.W.2d 731 (1944).

8. *E.g.*, McLaughlin v. McLaughlin, 186 Md. 165, 46 A.2d 307 (1946).

9. *E.g.*, Atkins v. Womble, 300 S.W.2d 688 (Tex. Civ. App. 1957); Robbins v. Simmons' Estate, 252 S.W.2d 970 (Tex. Civ. App. 1952).

10. *E.g.*, Love v. Rennie, 254 Ala. 382, 48 So.2d 458 (1950); Youngelson v. Youngelson's Estate, 114 So.2d 642 (Fla. Dist. Ct. App. 1959); Bergman v. Bergman, 247 Iowa 98, 73 N.W.2d 92 (1955); Muller v. Sprenger, 105 N.W.2d 433 (N.D. 1960).

11. *E.g.*, Gray v. Trust Co., 211 Ga. 332, 85 S.E.2d 721 (1955); Smith's Ex'r v. Crush, 296 S.W.2d 688 (Ky. 1956).

12. *E.g.*, Youngelson v. Youngelson's Estate, 114 So.2d 642 (Fla. Dist. Ct. App. 1959); Bakke v. Bakke, 242 Iowa 612, 47 N.W.2d 813 (1951); In the Matter of Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); Culpeper Nat'l Bank v. Morris, 168 Va. 379, 191 S.E. 764 (1937).

13. *E.g.*, Love v. Rennie, 254 Ala. 382, 48 So.2d 458 (1950); Skelly v. Graybill, 109 Ohio App. 277, 165 N.E.2d 218 (1959).

14. See, *e.g.*, In the Matter of Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); Cook v. Morrison, 202 Okla. 693, 217 P.2d 810 (1950); Fore v. McFadden, 276 S.W. 327 (Tex. Civ. App. 1925); Hunter v. Jordan, 158 Wash. 539, 291 Pac. 471 (1930).

15. *E.g.*, Wagner v. Honbaier, 248 N.C. 363, 103 S.E.2d 474 (1958); Rice v. Wachovia Bank & Trust Co., 232 N.C. 222, 59 S.E.2d 803 (1950).

16. *E.g.*, In the Matter of Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); Skelly v. Graybill, 109 Ohio App. 277, 165 N.E.2d 218 (1959); Robbins v. Simmons' Estate, 252 S.W.2d 970 (Tex. Civ. App. 1952).

placed upon the property by the terms of the will.<sup>17</sup> These courts maintain that to modify or terminate the trust before its objectives were achieved would be to defeat the intention of the testator. The courts of other jurisdictions enforce compromise agreements which modify or terminate testamentary trusts primarily for the reason that they maintain family harmony and eliminate costly litigation.<sup>18</sup>

The courts do not regard compromise agreements as a limitation upon the right to dispose of property by will. In fact, there is a striking absence of discussion of such a limitation. It appears that the estate is considered as passing to the legatees and devisees immediately at the time of the testator's death, so that any rights acquired by a compromise agreement are the result of concessions made by the beneficiaries to themselves or the intestate successors and are not acquired by a change in the will. That is, a compromise agreement is considered a valid contract which will be enforced by the courts. Many agreements provide that the will is to be probated and the estate administered according to its terms so that the parties are relegated to their contractual rights to enforce these agreements. This prompts some courts to maintain that any compromise agreement is enforceable solely to the extent of a recovery for a breach of contract.<sup>19</sup> The more liberal courts, however, still regarding the agreement as a contract, issue a probate decree which recognizes the compromise agreement and which provides for a distribution of the estate in accordance with its terms.<sup>20</sup>

Some courts maintain that the surrendering of a doubtful claim or right,<sup>21</sup> the forbearance of the right to institute judicial proceedings<sup>22</sup>

17. *Smith's Ex'r v. Crush*, 296 S.W.2d 688 (Ky. 1956); *Schoen v. Wagner*, 231 S.W.2d 269 (Mo. App. 1950); *Skelly v. Graybill*, 109 Ohio App. 277, 165 N.E.2d 218 (1959). For unenforceable agreements compromising a contest of a will which affect a testamentary trust see, *e.g.*, *Adams v. Link*, 145 Conn. 634, 145 A.2d 753; *Altmeier v. Harris*, 903 Ill. 345, 86 N.E.2d 229 (1949) (spendthrift trust). For unenforceable agreements compromising a controversy concerning a testamentary trust duly established see, *e.g.*, *Peiter v. Degenring*, 136 Conn. 331, 71 A.2d 87 (1949); *Hopp v. Rain*, 249 Iowa 891, 88 N.W.2d 39 (1959); *Estate of Mowinkel*, 130 Neb. 10, 263 N.W. 488 (1935).

18. Non-spendthrift trusts: *E.g.*, *Hobbs v. Cobb*, 339 S.W.2d 318 (Ark. 1960) (proceeding to construe; modification); *Estate of Nicholson*, 104 Colo. 561, 93 P.2d 880 (1939) (contract to terminate); *White v. Bourne*, 151 Fla. 12, 9 So.2d 170 (1942) (will contest; termination); *Redwine v. Clodfelter*, 226 N.C. 366, 38 S.E.2d 203 (1946) (will contest; modification); *Rice v. Wachovia Bank and Trust Co.*, 232 N.C. 222, 59 S.E.2d 803 (1950) (will contest; modification). Spendthrift trust: *Johnson v. Morawitz*, 292 F.2d 341 (10th Civ. 1961) (dictum).

19. *E.g.*, *Rogers v. Benz*, 136 Minn. 83, 161 N.W. 395 (1917); *Schoen v. Wagner*, 231 S.W.2d 269 (Mo. App. 1950).

20. *E.g.*, *Kennedy v. Quinn*, 177 Ark. 1069, 9 S.W.2d 315 (1928); *Gray v. Trust Co.*, 211 Ga. 332, 85 S.E.2d 721 (1955); *Fore v. McFadden*, 276 S.W. 327 (Tex. Civ. App. 1925).

21. *E.g.*, *In re Estate of Donlen*, 145 Neb. 370, 16 N.W.2d 731 (1944).

22. *E.g.*, *Benner v. Lunt*, 126 Me. 167, 136 Atl. 814 (1927); *Ewing v. Waddington*, 62 S.D. 166, 252 N.W. 28 (1933).

or the mutual promises of refraining from judicial action and the transferring of a portion or larger portion of the estate to parties to the agreement<sup>23</sup> supply sufficient consideration to enable these compromise agreements to be enforced as contracts. Other courts stress that compromise agreements are to be supported as they preserve family harmony<sup>24</sup> or avoid litigation whereby the estate would be wasted away.<sup>25</sup> An Iowa court has stated that when considering the compromise of "family disputes where the motive is to preserve the honor or peace of the family, or the family property, the courts will not closely scrutinize the consideration or look into the merits of the dispute where all is fair and above-board."<sup>26</sup>

The courts in recognizing compromise agreements have, in fact, imposed a limitation upon the right to dispose of property by will. Even if a contract theory is adopted, the indisputable fact remains that when a probate decree distributes an estate in conformity with a compromise agreement, the wishes of the testator stated in his will are being contravened.

#### EFFECT OF STATUTES ON COMMON LAW

Contrary to what might be expected, the adjudicated compromise of controversy statutes which have been enacted do not, with the known exception of one state, establish an entirely new limitation upon the right to dispose of property by will. These statutes do, however, have some effect upon judicial treatment of compromise agreements which involve testamentary trusts. The adjudicated compromise statutes are generally regarded as based upon the same contract rationale as that of the common law. For example, the stipulations or interpretations of some of these statutes that an agreement effectuated pursuant to the statute shall not affect assessment of state inheritance taxes presupposes that a testator's property does pass according to the provisions of the will.<sup>27</sup> Any devia-

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23. *E.g.*, *Williams v. Williams*, 185 Miss. 53, 187 So. 209 (1939); *Schoen v. Lange*, 238 S.W.2d 902 (Mo. App. 1951).

24. *In re Estate of Noble*, 141 Kan. 432, 41 P.2d 1021 (1935); *In the Matter of Will of Pendergrass*, 251 N.C. 737, 112 S.E.2d 562 (1960); *Skelly v. Graybill*, 109 Ohio App. 277, 165 N.E.2d 218 (1959).

25. *Wolf v. Uhlemann*, 325 Ill. 165, 156 N.E. 334 (1927); *Irwin v. Irwin*, 15 Ill. App. 2d 52, 145 N.E.2d 284 (1957) (abstract only); *Bakke v. Bakke*, 242 Iowa 612, 47 N.W.2d 813 (1951); *Smith's Ex'r v. Crush*, 296 S.W.2d 688 (Ky. 1956).

26. *Bergman v. Bergman*, 247 Iowa 98, 104, 73 N.W.2d 92, 96 (1955).

27. IND. ANN. STAT. § 7-301 (Burns 1953); MODEL PROBATE CODE § 93 (Simes 1946); *Baxter v. Treasurer & Receiver General*, 209 Mass. 459, 95 N.E. 854 (1911) (construing MASS. GEN. LAWS. ANN. ch. 204 § 15-18 (1955)). *But cf.* *Lyeth v. Hoey*, 305 U.S. 188 (1938) where the United States Supreme Court refused to apply for federal income taxation the Massachusetts rule that the state succession tax is applied to the property that passes by the terms of the will and not as changed by a compromise

tion from provisions of a will is a result of concessions made by the beneficiaries who contract with reference to their own property which they have received by the will. The notes to section 93 of the Model Probate Code point out that in most states there seems to be no obstacle at common law to interested persons who are *sui juris* consummating an agreement concerning a decedent's estate, but that legislation is desirable to embrace situations where incompetent, unascertained or unborn persons are interested parties.<sup>28</sup> By this analysis, an adjudicated compromise statute is considered merely as a means of facilitating contracts when these special interests are present. The refusal of some courts to apply an adjudicated compromise statute to testamentary trusts under certain circumstances on the theory that to do so would be to nullify testamentary intent further supports the conclusion that the statutes are based upon a contract rationale. On the other hand, courts of some of the states which have adopted statutes now hold that an agreement receiving judicial approval or authorization does limit the right to dispose of property by will. An examination of the states adopting these statutes supports these general conclusions.

### *Michigan*

*Common Law; Rationale.* Prior to the enactment of the statute providing for the settlement of the contest of wills and the compromise of rights thereunder, Michigan courts enforced such agreements, considering them not to contravene public policy unless they were made collusively or in fraud of other parties.<sup>29</sup> Early cases held that the termination of the controversy or a promise to forebear from contesting a will was a sufficient consideration for an agreement which resulted in a distribution of an estate different from that stipulated in a will.<sup>30</sup>

### *Effect of the Statute Upon Common Law.* The wording of the

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agreement); *In re Cress' Estate*, 335 Mich. 551, 56 N.W.2d 380 (construing MICH. STAT. ANN.: 27.3178 (115)-(118) (1943)); *Estate of Jorgensen*, 267 Wis. 1, 64 N.W.2d 430 (1954) (construing WIS. STAT. ANN. § 318.31 (1958)).

IND. ANN. STAT. § 7-301 (Burns 1953); MASS. GEN. LAWS ANN. ch. 204 § 17 (1955); MICH. STAT. ANN. § 27.3178 (115) (1943); MODEL PROBATE CODE § 93 (Simes 1946) stipulate that an adjudicated compromise shall not impair the rights of creditors.

28. MODEL PROBATE CODE § 93, comment (Simes 1946). Section 94(c) provides for the appointment of a guardian ad litem for a minor, or persons otherwise incompetent, unascertained persons or future contingent interests that may be affected by a compromise agreement.

29. See, e.g., *Sellers v. Perry*, 191 Mich. 619, 158 N.W. 144 (1916); *Conklin v. Conklin*, 165 Mich. 571, 131 N.W. 154 (1911).

30. E.g., *Baas v. Zinke*, 218 Mich. 552, 188 N.W. 512 (1922); *Layer v. Layer*, 184 Mich. 663, 151 N.W. 759 (1915).

present Michigan Statute,<sup>31</sup> as well as the title to the original enactment<sup>32</sup> coupled with judicial interpretation of the statute,<sup>33</sup> indicate that the purpose of the enactment was to provide a means of facilitating settlements when minors, incompetents, unborn or unascertained persons were involved, and that by Michigan law no legislation was needed to enable persons *sui juris* to enter into compromise agreements. Consequently agreements between persons legally competent to act in their own behalf have been enforced or recognized without resort to the adjudicated compromise statute.<sup>34</sup>

Similarly, the statute may not always be needed when those interests specifically protected are or may be affected. It appears the Michigan courts have, without depending upon statutory authority, decreed the specific performance of a compromise agreement negotiated by a guardian or guardian ad litem of a minor.<sup>35</sup> Likewise the court before which a compromise agreement is sought to be enforced could conceivably appoint a guardian ad litem to represent incompetents or unascertained or unborn persons on its own authority by analogy to agreements involving minors. Further, a court might consider the persons specified in the statute as

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31. MICH. STAT. ANN. § 27.3178 (115) (1943).

The compromise, settlement or adjustment of any good faith contest of the admission to probate of any instrument propounded as the last will and testament of any decedent, or of any good faith controversy (a) as to the construction, validity or effect of such instrument or any provision thereof, whether such controversy shall arise before or after such instrument has been admitted to probate, or (b) as to the rights or interests in the estate of such decedent of any person as beneficiary under such will, or of any child or issue of a deceased child claimed to have been intentionally omitted from such will, or of the widow claiming to exercise any right of election, or (c) otherwise arising in or growing out of the administration of the estate of any decedent under such will, or of any trust created thereby . . . or any distribution under such will or of any trust, when there is or may be any person interested who is a minor or otherwise without legal capacity to act in person, or whose present existence or whereabouts cannot be ascertained, or where there is any inalienable estate or future contingent estate or interest which will or may be affected by such compromise, settlement or adjustment. . . .

32. Pub. Acts 1921, No. 249, p. 464.

An Act to provide for the compromise, settlement or adjustment of any contest of the probate of any instrument propounded for probate as the last will of a deceased person or of any controversy arising concerning the interpretation, effect or validity of any such instrument, or arising in the administration of an estate under a will or under a trust created by will, when there is or may be any person interested who is a minor or otherwise without legal capacity to act in person or whose present existence or whereabouts cannot be ascertained, or when there is any inalienable estate or interest or future contingent estate or interest which will or may be affected by such compromise, settlement or adjustment.

33. *In re Peck's Estate*, 323 Mich. 11, 34 N.W.2d 533 (1948); Appeal of Hannan, 227 Mich. 569, 199 N.W. 423 (1924).

34. *E.g., In re Kehlman Estate*, 359 Mich. 4, 101 N.W.2d 349 (1960); *Krause v. Hoffman*, 239 Mich. 348, 214 N.W. 146 (1927).

35. See *Metzner v. Newman*, 224 Mich. 324, 194 N.W. 1008 (1923).

being sufficiently protected if persons having the same interest who are before the court are "equally certain to bring forward the entire merits"<sup>36</sup> of the will contest or controversy that is sought to be compromised. However, a statutory provision insuring the representation of minors, incompetents, unborn and unascertained persons is desirable in light of the difficulties these interests present in property litigation.<sup>37</sup>

It was not until 1956 that the effect of the adjudicated compromise statute upon testamentary trusts was determined. Previously, the courts did approve some compromise agreements, made pursuant to the statute, which affected testamentary trusts.<sup>38</sup> On the other hand, there were also instances in which the courts would not approve compromise agreements which sought to modify or terminate a testamentary trust, at least if the trusts were spendthrift trusts.<sup>39</sup> In 1956 it was held that regardless of the presence or absence of trust provisions in an instrument submitted but not yet admitted to probate, the probate or chancery courts could "approve and effectuate a compromise of a good faith contest over the admission of such instrument to probate."<sup>40</sup> The court maintained that the statute provided for the compromise of "'any good faith contest' upon the admission to probate of 'any instrument' propounded as a last will" and did not contain any words purporting an exclusion of spendthrift trusts.<sup>41</sup> In distinguishing those cases which refused to apply the statute when a testamentary trust was involved, the court reasoned that a distinction existed between an instrument burdened with contest, one that had not passed the "ordeal of probate,"<sup>42</sup> and an instrument already admitted to probate.<sup>43</sup>

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36. *Detroit Trust Co. v. Neubauer*, 325 Mich. 319, 339, 38 N.W.2d 371, 380 (1949). *Accord* *Wolf v. Uhlemann*, 325 Ill. 165, 156 N.E. 334 (1927); *Wagner v. Honbaier*, 248 N.C. 363, 103 S.E.2d 474 (1958).

37. MICH. STAT. ANN. §27.3178 (116) (1943) provides for the appointment of a guardian ad litem for minors and incompetents, if not already represented by a guardian, and guardians ad litem to represent both persons whose whereabouts cannot be ascertained and any future contingent interest or estate that might be taken by any person not then in being, which may be limited or diminished by any compromise, settlement or adjustment.

38. *Detroit Trust Co. v. Neubauer*, 325 Mich. 319, 38 N.W.2d 371 (1949); *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W.2d 509 (1942); *In re Marxhausen's Estate*, 247 Mich. 192, 225 N.W. 632 (1929).

39. *Hay v. LeBus*, 317 Mich. 698, 27 N.W.2d 309 (1947); *Rose v. Southern Mich. Nat'l Bank*, 255 Mich. 275, 238 N.W. 234 (1931). (It was recognized in *Rose* that a court of equity had power by virtue of the adjudicated compromise of controversies statute to modify or extinguish a trust under circumstances but this trust, a spendthrift trust, belonged to that class of trusts which could not be terminated until its objects and purposes had been accomplished.)

40. *In re Dutton Estate*, 347 Mich. 186, 190, 79 N.W.2d 608, 610 (1956).

41. *In re Dutton Estate*, 347 Mich. 186, 79 N.W.2d 608 (1956).

42. *Allison v. Smith*, 16 Mich. 405, 428 (1868).

43. *In re Dutton Estate*, 347 Mich. 186, 79 N.W.2d 608 (1956). It is not readily apparent how *Rose v. Southern Mich. Nat'l Bank* can be so distinguished. The compromise agreement was executed only after a prolonged will contest, an appeal taken



Therefore, the adjudicated compromise statute is applicable only to testamentary trusts when there is a contest concerning the admission to probate of the will and not to any controversy concerning the trust after the will has been probated, in spite of the wording of the statute which could be construed to apply a contrary result.<sup>44</sup>

This distinction seems incongruous. The reasons for the enforcement of compromise agreements generally are the avoidance of litigation and the maintenance of family harmony. If the avoidance of an expensive will contest which all parties desire to compromise is regarded as a compelling circumstance justifying enforcement of a compromise agreement,<sup>45</sup> why are not the avoidance of litigation and the maintenance of family harmony likewise considered valid grounds justifying enforcement of a compromise agreement when controversy arises concerning the determination of rights under a testamentary trust which has been approved by a probate court? One possible reason for this distinction is the implication from those cases refusing to approve the compromise agreements affecting testamentary trusts that to so approve an agreement would be to defeat testamentary intent—that is, to impose a limitation upon the right to dispose of property by will. However, this is being done anyway by the approval of compromise agreements, although it is not recognized.

*Effect of the Statute Upon Common Law Rationale.* While there is some conflict of authority, it appears Michigan has adopted the rationale of the traditional common law position that rights involved in a compromise agreement are the contractual rights of beneficiaries. Compromise agreements, whether or not effectuated pursuant to the adjudicated compromise statute, are not considered to alter the fact that the property immediately passes by will to the beneficiaries when the testator dies.<sup>46</sup> Further, a comparison of the parties required to execute a compromise agreement prior to and subsequent to the enactment of the adjudicated compromise statute supports the conclusion that the statute

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from a directed verdict sustaining the will and a bill of exceptions settled and signed. Had the will passed the "ordeal of probate?"

44. MICH. STAT. ANN. § 27.2178 (115) (1943) provides for:

the compromise, settlement or adjustment of any good faith contest of the admission to probate of any instrument propounded as the last will and testament of any decedent, or of any good faith controversy (a) as to the construction, validity or effect of any such instrument or any provision thereof, whether such controversy shall arise before or after such instrument has been admitted to probate . . . or (c) otherwise arising out of the administration of the estate of any decedent under such will, or of any trust created thereby . . . including any distribution under such will or trust. . . .

45. *In re Dutton Estate*, 347 Mich. 186, 79 N.W.2d 608 (1956).

46. *In re Cress' Estate*, 335 Mich. 551, 56 N.W.2d 380 (1953).

enacted the common law rationale. Pre-statute decisions required that compromise agreements be consummated by persons interested in the estate and not affect the rights of persons not parties to the agreement.<sup>47</sup> The statute has adopted essentially the same position in that it requires that any agreement sought to be approved by the court be executed by all competent persons, except those whose whereabouts cannot be ascertained, "having estates, interests, or claims which will or may be limited or diminished in either extent or value by such compromise, settlement or adjustment if consummated."<sup>48</sup> Both requirements contemplate that the parties to the agreement are contracting with reference to property they have received by will.

Moreover, an executor or petitioner with the will annexed is not required to execute the agreement when it is submitted to the court.<sup>49</sup> It is only after the agreement is approved that the court authorizes the execution by these fiduciaries of a compromise, settlement or adjustment.<sup>50</sup> In a proper case a court can compel an executor or trustee to execute a compromise agreement.<sup>51</sup> If the statute were regarded as a limitation upon the right to dispose of property by will, a representative of an estate would be a necessary party, as the property was to be distributed in a manner different from that provided by the testator.

The requirement that an executor, administrator with the will annexed or a trustee execute the agreement, even against his wishes, may be a recognition that the estate has an interest in an adjudicated compromise, even though this interest is not considered in contract actions enforcing compromise agreements. There is further evidence that since the enactment, compromise agreements may be considered a limitation upon the right to dispose of property by will. In interpreting the statute one judge stated that it was not intended to nullify the right to dispose of property by will except in the absence of compelling circumstances to the contrary.<sup>52</sup> This is a recognition that a will is altered by a judicially approved compromise agreement.

*Summary.* The Michigan adjudicated compromise statute providing for the settlement of contests concerning wills or rights thereunder does not appear to change the common law position on compromise agreements. The obvious purpose of the statute is to facilitate settlement agreements

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47. See, *e.g.*, *Sellers v. Perry*, 191 Mich. 619, 158 N.W. 144 (1916); *Conklin v. Conklin*, 165 Mich. 571, 131 N.W. 154 (1911).

48. MICH. STAT. ANN. § 27.3178 (116) (1943).

49. *Rose v. Southern Mich. Nat'l Bank*, 255 Mich. 275, 238 N.W. 284 (1931).

50. MICH. STAT. ANN. § 27.3178 (116) (1943).

51. *Rose v. Southern Mich. Nat'l Bank*, 255 Mich. 275, 238 N.W. 284 (1931).

52. *Hay v. LeBus*, 317 Mich. 698, 27 N.W.2d 309 (1947).

when certain special interests are present, although it is not clear whether a statute is necessary for that purpose. Michigan does not regard the right to dispose of property by will as being limited and therefore enforces compromise agreements using the contract rationale.

### *New York*

*Common Law; Rationale.* New York recognized and enforced agreements which compromised will contests and controversies on the basis of contract law before the agreements received statutory authorization.<sup>53</sup>

*Effect of the Statute Upon Common Law.* The New York legislature, when it enacted the adjudicated compromise statute,<sup>54</sup> may have felt that legislation was necessary merely to facilitate compromise agreements when unascertained or unborn persons or persons without legal capacity were or might be affected. In fact the title to the enactment is, "Compromise of controversies arising between claimants to property or estates where the interests of infants, incompetents or persons unknown or not in being are or may be affected."<sup>55</sup> One court maintained that the statute, as indicated by the title as well as its context, was to be applied only when such interests were involved,<sup>56</sup> whereas another court stated that the statute concerned itself primarily with those interests.<sup>57</sup> Still another court which sought to apply the statute maintained that, although the title appeared to limit its application to the special interests, the statute's provisions were to be complied with if judicial approval of the compromise was desired, even when the special interests were not in-

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53. See, e.g., *Schoonmaker v. Gray*, 208 N.Y. 209, 101 N.E. 886 (1913); *Minehan v. Hill*, 144 App. Div. 854, 129 N.Y. Supp. 873 (1911); *Seaman v. Seaman*, 12 Wend. 381 (N.Y. S.C. 1834).

54. N.Y. DECED. EST. LAW § 19 provides that:

(a) The Supreme Court or the surrogate's court having jurisdiction of the estate or property involved may authorize executors, administrators and trustees to adjust by compromise any controversy that may arise between different claimants to the estate or property in their hands. . . . (b) The Supreme Court or the surrogate's court having jurisdiction of the estate or property involved may likewise authorize the person or persons named as executors in one or more instruments purporting to be the last will and testament of a person deceased, or the petitioners for administration with such will annexed, to adjust by compromise any controversy that may arise between the persons claiming as devisees or legatees . . . and the persons entitled to or claiming the estate of the deceased under the statutes regulating the descent and distribution of intestate estates. . . .

55. N.Y. DECED. EST. LAW. § 19.

56. In the *Matter of White*, 182 Misc. 223, 46 N.Y.S.2d 917 (Surr. Ct. 1943), *aff'd*, 268 App. Div. 759, 49 N.Y.S.2d 275 (1944), *appeal denied*, 268 App. Div. 759, 51 N.Y.S.2d 83 (1944), *appeal dismissed*, 293 N.Y. 767, 57 N.E.2d 845 (1944).

57. In the *Matter of Estate of Sidman*, 154 Misc. 675, 278 N.Y. Supp. 43 (Surr. Ct. 1935).

volved.<sup>58</sup>

Consequently, it appears that the adjudicated compromise statute may be applicable to any controversy between claimants to the property or estate or a decedent. The statutory procedure enabling the parties involved to have a court order or decree approving the agreement, instead of necessitating an action for a breach of contract, may be of sufficient advantage so that the statute will be invoked by persons *sui juris*, even when no persons or interests specifically protected are or may be affected.

New York adopts the position that when a compromise agreement proposes to affect an established testamentary trust, the agreement will be given no effect as to the trust.<sup>59</sup> However, if there is a contest or controversy concerning the admission of the will to probate, a compromise agreement may be approved which modifies or terminates a testamentary trust.<sup>60</sup> Since, as will be discussed, New York recognizes a limitation upon the right to dispose of property by will for real and substantial reasons, it is not apparent why litigation concerning a testamentary trust already established would not be embraced within such a limitation. Furthermore, such a compromise could conceivably be effectuated pursuant to the section of the adjudicated compromise statute that permits a trustee to adjust by compromise "any controversy that may arise between claimants to the property in . . . [his] hands"<sup>61</sup> if the proper court has jurisdiction of the estate or property. However, the statutory restraints placed upon the alienation of trust income<sup>62</sup> are sufficient to

58. In the Matter of Will of Yates, 26 Misc.2d 462, 202 N.Y.S.2d 950 (Surr. Ct. 1960).

59. See, *e.g.*, In the Matter of Estate of Caswell, 185 Misc. 599, 56 N.Y.S.2d 507 (Surr. Ct. 1944), *aff'd*, 269 App. Div. 809, 56 N.Y.S.2d 407 (1945). The court did not approve the agreement which terminated the testamentary trust maintaining that any agreement was violative of the statutory prohibition against the alienation of trust income. It was stated in dictum that New York permitted the modification or termination of a testamentary trust by an agreement which compromised a controversy concerning the admission of the will to probate. This restriction seems somewhat unwarranted in light of N.Y. DECED. EST. LAW § 19(a) which permits "executors, administrators and trustees to adjust by compromise any controversy that may arise between different claimants to the estate or property in their hands."

60. See, *e.g.*, Fisher v. Fisher, 253 N.Y. 260, 170 N.E. 912 (1930); In the Matter of Estate of O'Keefe, 167 Misc. 148, 3 N.Y.S.2d 739 (Surr. Ct. 1938). "Only after the probate of the will and the setting up of trusts did the statutes against alienation of income become applicable under the public policy of our state requiring that the rule of in destructibility of trusts be rigidly enforced." *Id.* at 150, 3 N.Y.S.2d at 741.

61. N.Y. DECED. EST. LAW § 19(a).

62. N.Y. REAL PROP. LAW § 103 provides, "The right of a beneficiary of an express trust to receive rents and profits of real estate and apply them to the use of any person, cannot be transferred by assignment or otherwise, but the right and interest of the beneficiaries of any other trust in real property . . . may be transferred." N.Y. PERS. PROP. LAW § 15 provides, "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property . . . may be enforced."

protect the intentions of a testator, unless there is a contest concerning the admission of the will to probate.

*Effect of the Statute Upon Common Law Rationale.* New York appears to have placed its adjudicated compromise statute in the proper perspective. The pre-statute compromise agreements, being enforced on the basis of contract law, did not refer to the limiting effect of compromise agreements upon the right to dispose of property by will, thereby implying that the courts regarded the property passing by the will immediately at the time of the testator's death with any change in the ultimate disposition of the estate being the result of concessions made by the beneficiaries with reference to their own property. On the other hand, the statute's purpose and effect have been interpreted as actually defeating testamentary intent, but only for "real and substantial reasons."<sup>63</sup> That testamentary intent is not completely disregarded is evidenced by the fact that the court in which a compromise agreement is sought to be approved determines the following: (1) if the proposed agreement to which all the parties who are *sui juris* have already agreed is fair to the decedent in view of the surrounding circumstances, as well as (2) if it protects the interests of infants, incompetents or persons unknown or not in being who are or may be affected.<sup>64</sup> Nevertheless, the

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63. In the Matter of Estate of Wadsworth, 142 Misc. 717, 723-24, 256 N.Y. Supp. 348, 354 (Surr. Ct.) *aff'd*, 236 App. Div. 712, 258 N.Y. Supp. 982 (1932):

I do not believe that it is the intent or purpose of the statute that a decedent's disposition of his or her property made in an instrument purporting to be his or her last will and testament should be regarded as of little consequence or that it should be lightly considered and easily set aside. The intent and purpose of the statute, it seems to me, is not primarily to defeat the expressed direction of a decedent as to the disposition to be made of his property because his relatives are dissatisfied with the disposition thereof made by him, but rather to provide a means of compromising and settling real and bona fide difficulties and differences and disputes and controversies existing or arising between different interests concerning which bona fide and extended litigation is pending or threatened. The statute is founded on common sense and, in support of public policy, favors the avoidance of litigation, but does not, I believe, favor the defeat of a testator's disposition of his property and his interest in relation thereto except for real and substantial reasons. If it were otherwise the making of a will would be an empty useless formality. No testator could have any assurance that he would have anything whatever to say as to what should be done with his property or to whom it should go. All wills would then in the last analysis be subject to reduction to the common formula—I leave all of my property to such disposition as my distributees shall see fit to make of it—subject only to the approval of the surrogate. The desires and intents of the distributees would then be substituted for the desire and intent of the testator and would be controlling, subject always to the approval of the surrogate. The intent of the testator would become of little or no importance. This statute it seems to me has no such intent or purpose.

64. In the Matter of Estate of Jefferies, 155 Misc. 464, 279 N.Y. Supp. 924 (Surr. Ct. 1935), *aff'd*, 247 App. Div. 747, 287 N.Y. Supp. 151 (1936).

presence or threat of litigation is regarded as a sufficient justification to alter a testamentary disposition.

Recognizing that a compromise agreement limits the right to dispose of property by will implies that since enactment of the statute the New York courts, in approving a compromise agreement, do not regard a will as taking effect immediately upon the testator's death. An adjudicated compromise is not considered solely as an agreement by persons contracting with respect to their own property. The legislature has required that a proposed compromise agreement be executed by representatives of the estate,<sup>65</sup> as well as by representatives for those persons specifically protected,<sup>66</sup> those claiming as beneficiaries and those claiming the estate as intestate unless their interests will be unaffected by a proposed compromise agreement.<sup>67</sup>

*Summary.* The enactment of the adjudicated compromise statute did not provide for the effectuation of compromise agreements that were not recognized or enforced prior to their statutory authorization. However, the statute does facilitate compromise agreements, especially where special interests are involved. As opposed to the traditional common law position, New York, since enactment of the statute, regards a compromise agreement as a limitation upon the right to dispose of property by will.

### *Wisconsin*

*Common Law; Rationale.* Although in the overwhelming majority of the states the right to make a will is regarded as one created by statute and subject to the control of the legislature,<sup>68</sup> Wisconsin considers it a natural, inherent right protected by the constitution and affirmed by statute.<sup>69</sup> The right to make a will, it is reasoned, is incidental to the right to acquire property and includes the right to have the provisions of the will effectuated.<sup>70</sup> Consequently, the sole jurisdiction of the court as to an instrument purporting to be a last will and testament is to determine if it is the will of the decedent, and, if it is, to enforce the intention of the testator if it can be ascertained, provided such direction does not contravene a statute or public policy.<sup>71</sup>

Until the enactment of the adjudicated compromise statute in 1951, the Wisconsin courts were firmly opposed to the recognition or enforce-

65. N.Y. DECED. EST. LAW § 19(a); N.Y. DECED. EST. LAW § 19(b).

66. N.Y. DECED. EST. LAW § 19(c); N.Y. DECED. EST. LAW § 19(d).

67. N.Y. DECED. EST. LAW § 19(b).

68. PAGE, WILLS § 3.1 (Bowe-Parker rev. 1960).

69. *E.g.*, Will of Rice, 150 Wis. 401, 136 N.W. 956, 137 N.W. 778 (1912); *Nunne-macher v. State*, 129 Wis. 190, 108 N.W. 627 (1906).

70. Will of Rice, 150 Wis., 401, 136 N.W. 956, 137 N.W. 778 (1912).

71. *Ibid.*

ment of agreements compromising will contests and controversies.<sup>72</sup> Even though the provisions of an agreement contemplated that the estate was to be administered and distributed by the terms of the will and that the agreement was to be effective only after these procedures, compromise agreements were not enforceable as the ultimate result was to limit the right to dispose of property by will.<sup>73</sup> Moreover, it was maintained that proceedings to establish a will were proceedings in rem to which all the persons in the world were, in effect, parties.<sup>74</sup> Besides the heirs or legatees, the determination of whether an instrument was the will of a decedent was regarded as possibly affecting the rights and interests of others which could not be determined until the will was established as the will of the decedent.<sup>75</sup>

*Effect of the Statute Upon Common Law and Common Law Rationale.* In 1951, Wisconsin enacted a statute providing for an adjudicated compromise of controversies concerning decedents' estates which, with minor exceptions, is identical to the New York statute.<sup>76</sup> However, in upholding the constitutionality of this enactment,<sup>77</sup> about which there had been some doubt,<sup>78</sup> the Wisconsin Supreme Court did not adopt the interpretation given to the New York adjudicated compromise statute. New York recognized that the right to dispose of property by will might be limited for real and substantial reasons. On the other hand, Wisconsin enacted the common law position, as did Michigan, that compromise

72. See *Taylor v. Hoyt*, 207 Wis. 520, 242 N.W. 141 (1932); *Graef v. Kanouse*, 205 Wis. 597, 238 N.W. 377 (1931); *Will of Rice*, 150 N.W. 40, 136 N.W. 956, 137 N.W. 778 (1912); *Will of Dardis*, 135 Wis. 457, 115 N.W. 332 (1908). *But see Estate of North*, 242 Wis. 72, 7 N.W.2d 705 (1942) (the life beneficiary of a trust agreed not to contest the probate of a will and to release all interest as an heir or a testamentary beneficiary under a will to three of the remaindermen who agreed to pay money and assign their interests to the life beneficiary. It was recognized that a beneficiary of a trust whose rights are vested can convey his vested interest. The court did not consider the contention that it was only an offer not to contest the will and consequently an attempt to evade a testamentary disposition.)

73. *Taylor v. Hoyt*, 207 Wis. 520, 242 N.W. 141 (1932); *Graef v. Kanouse*, 205 Wis. 597, 238 N.W. 377 (1931).

74. *Will of Rice*, 150 Wis. 401, 136 N.W. 956, 137 N.W. 778 (1912); *Will of Dardis*, 135 Wis. 457, 115 N.W. 332 (1908).

75. *Will of Dardis*, 135 Wis. 457, 115 N.W. 332 (1908).

76. WIS. STAT. ANN. § 318.31 (1958) provides:

(1) The court may authorize executors, administrators and trustees to adjust by compromise any controversy that may arise between different claimants to the estate or property in their hands. . . . (2) The court may likewise authorize the person or persons named as executors in one or more instruments purporting to be the last will and testament of a person deceased or the petitioners for administration with such will or wills annexed, to adjust by compromise any controversy that may arise between persons claiming as devisees or legatees . . . and the persons entitled to or claiming the estate of the deceased under the statutes regulating the descent and distribution of intestate estates. . . .

77. *Estate of Jorgensen*, 267 Wis. 1, 64 N.W.2d 430 (1954).

78. Note, 1954 Wis. L. REV. 342.

agreements are to be regarded as contracts by persons who have already received property by will and not as a limitation upon the right to dispose of property by will. Interpreting the statute, the court stated:

Reading said section as authorizing the admission of a will to probate, not as executed by the testator, but as judicially amended, would require us to hold the statute unconstitutional, because such a construction would be against the fundamental constitutional right to dispose of property by will . . . and no one—the beneficiaries, the heirs, the courts, or the legislature, or all of them together—can rewrite a will so as to effect a distribution other than that provided by the testator. . . .

That section does nothing more than provide the mechanics whereby a compromise agreement under a will, which agreement would have been invalid before the enactment of that section, can be made in open court and thus become a valid and enforceable agreement. It goes without saying that anyone acquiring property as a legatee under a will has, and had before the enactment of this statute, the right to assign the whole or any portion of his property. The point to be noted and the point in issue here is that the legatee must acquire such property before he can assign it.<sup>79</sup>

The previous hostility toward agreements compromising will contests on the ground that proceedings to establish a will might affect persons other than the heirs or legatees made it essential that an adjudicated compromise statute specify the parties required to execute a proposed agreement of compromise. If the controversy concerns the will of a decedent this includes persons claiming the estate as beneficiaries under the will and those claiming the estate as statutory distributees.<sup>80</sup> This requirement is not substantially a departure from the common law requirement in other states that a compromise agreement be executed by all interested parties, especially in view of the fact that the statute has been interpreted as only facilitating contracts. On the other hand, the requirement that the executor or executors if they have not renounced, or the petitioner or petitioners with the will annexed execute the agreement<sup>81</sup> is apparently a departure from the common law position and may be some recognition that parties to an agreement are not actually contracting with reference to their own property.

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79. Estate of Jorgensen, 267 Wis. 1, 7-8, 64 N.W.2d 430, 434 (1954).

80. WIS. STAT. ANN. § 318-31(2) (1958).

81. *Ibid.*



The Wisconsin position as to compromise agreements affecting testamentary trusts is not yet apparent. It is conceivable that the New York position will be followed on the theory that one state in adopting a statute of another state intends also to adopt the construction placed upon the statute. Furthermore, since Wisconsin does not have statutory restraints placed upon the alienation of trust income, compromise agreements affecting testamentary trusts may be enforceable under the section granting to a trustee the power "to adjust by compromise any controversy that may arise between different claimants to the estate or property in . . . [his] hands."<sup>82</sup> However, Wisconsin did not adopt the New York interpretation as to the effect of an adjudicated compromise upon the right to dispose of property by will. In view of the paramount importance given to testamentary intent by the Wisconsin courts, it is more plausible that the Michigan position concerning the effectuation of an adjudicated compromise affecting a testamentary trust will be adopted.

*Summary.* Presently, the Wisconsin courts can still recognize the inherent, constitutional right to make a will and at the same time approve compromise agreements which evade a valid testamentary disposition. The rationale is that the property is considered as passing by the will and any rights acquired by the compromise agreement are contractual so that testamentary intent is effectuated. Nevertheless, the right to dispose of property by will is limited if at the same time the will is admitted to probate it is recognized that the estate is to be administered according to the terms of the agreement. Earlier Wisconsin decisions had rejected this rationale. Perhaps Wisconsin has recognized that under certain circumstances, it is justifiable to impose through compromise agreements a limitation upon the right to dispose of property by will. But why does not Wisconsin, like New York, admit that the intentions of the testator may be altered for real and substantial reasons, instead of insisting that the wishes of the testator have been enforced?

### *Massachusetts*

*Common Law; Rationale.* Compromise agreements concerning a decedent's will were enforceable and supported by public policy in Massachusetts prior to the enactment of the original compromise of wills statute.<sup>83</sup> It was and still is recognized that persons who are *svi juris*

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82. WIS. STAT. ANN. § 318-31(1) (1958).

83. *Leach v. Forbes*, 77 Mass. (11 Gray) 506 (1958). The compromise of wills statute originally enacted in 1864 is now MASS. GEN. LAWS ANN. ch. 204 §§ 15-18 (1955). Section 15 provides:

The supreme judicial court or the probate court may authorize the persons named as executors in an instrument purporting to be the last will of a person

have full power to enter into contracts respecting property to which they are entitled under a will, provided no future contingent interests are affected, without the aid of statutes.<sup>84</sup> If a will contest is to be withdrawn in return for the payment of a certain sum or for a specific share of the estate, the agreement is enforceable at law for the recovery of the sum or by an action for specific performance.<sup>85</sup>

*Effect of the Statute Upon Common Law.* Since future contingent interests are often involved in compromise agreements, one of the main purposes of the statute is to provide a means by which in effectuating these agreements the interests may be bound.<sup>86</sup> The statute, applicable to all controversies concerning a decedent's will and not just the controversies where future contingent interests or persons not legally competent to act are or might be affected, may also have eliminated any uncertainty in carrying out an agreement consummated by persons legally competent to contract, even when these specially protected interests were not affected.<sup>87</sup> The adjudicated compromise does provide certain advantages not available to an agreement enforceable only as a contract. Once the award or compromise is approved by the court, it becomes a matter of record in that the decree admitting the will to probate generally contains a clause stating that the estate shall be administered according to the terms of the agreement.<sup>88</sup> This conclusively establishes the form and validity of the agreement. Furthermore, the decree admitting the will to probate stipulates that the agreement is to be carried out by the persons administering the will and not by the parties themselves.<sup>89</sup>

Since, as will be discussed, the statute is interpreted using the contract rationale, it naturally follows that the parties required to execute a compromise agreement for which judicial approval is sought are not essentially different from those who would be required parties to an

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deceased, or the petitioners for administration with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates. . . .

84. *E.g.*, *Manganiello v. Caggiano*, 338 Mass. 542, 156 N.E.2d 41 (1959); *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667 (1918).

85. *E.g.*, *Mulligan v. McDonagh*, 307 Mass. 464, 30 N.E.2d 385 (1940); *Renwick v. Macomber*, 225 Mass. 380, 114 N.E. 720 (1917).

86. See *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667 (1918).

87. See *Baxter v. Treasurer and Receiver General*, 209 Mass. 459, 95 N.E. 854 (1911).

88. *Mulligan v. McDonagh*, 307 Mass. 464, 30 N.E.2d 385 (1940); *Baxter v. Treasurer and Receiver General*, 209 Mass. 459, 95 N.E. 854 (1911).

89. *Ibid.*

agreement enforceable as a contract.<sup>90</sup> However, the provisions for the representation of minors and those under guardianship or conservatorship<sup>91</sup> and those providing for the protection of future contingent interests<sup>92</sup> may have made possible compromise agreements not enforceable prior to the enactment of the adjudicated compromise statute. Massachusetts also requires that a compromise agreement be executed by an executor or petitioner with the will annexed.<sup>93</sup> Since the practice of the court is to insert in the decree admitting the will to probate a clause providing that the estate is to be administered according to the terms of the agreement, this requirement is one of convenience rather than a recognition that a compromise agreement may affect the right to dispose of property by will.

It appears from the wording of the compromise of wills statute and from the cases applying the statute that there is no obstacle to the judicial approval of an agreement compromising a contest concerning the admission to probate of a will which provides for a testamentary trust.<sup>94</sup> Furthermore, if a controversy arises concerning a testamentary trust after the will has been admitted to probate and the trust established,

90. MASS. GEN. LAWS ANN. ch. 204 § 15 (1955) specifies that "the persons named as executors, or the petitioners for administration with the will annexed . . . those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties." See *Manganiello v. Caggiano*, 338 Mass. 542, 156 N.E.2d 41 (1959); *Mulligan v. McDonagh*, 307 Mass. 464, 30 N.E.2d 385 (1940); *Sherman v. Warren*, 211 Mass. 288, 97 N.E. 892 (1912).

91. MASS. GEN. LAWS ANN. ch. 204 § 18 (1955) provides for representation by the guardian of any person without legal capacity, or the appointment of a guardian ad litem, if these interests are necessary parties as required by MASS. GEN. LAWS ANN. ch. 204 § 15 and the guardian or guardian ad litem is authorized to "make and receive all proper conveyances and payments necessary to carry into effect any award or compromise sanctioned by the court."

92. MASS. GEN. LAWS ANN. ch. 204 § 16 (1955) provides that, "If the court finds that any future contingent interests which would be affected by the arbitration or compromise, it shall appoint some person to represent such interests in such controversy. . . ." MASS. GEN. LAWS ANN. ch. 204 § 17 (1955) provides that if an award or compromise is "found by the court to be just and reasonable in relation to the parties in being and in its effect upon any future contingent interests that might arise under such will . . ." it shall be "valid and binding upon such interests . . . as well as upon the interests of all persons in being. . . ." These provisions have provided an adequate defense to the argument that it is unconstitutional to deprive a person of his property without his consent in *Neafsey v. Chincholo*, 225 Mass. 12, 113 N.E. 651 (1916). *But see Copeland v. Wheelright*, 230 Mass. 131, 119 N.E. 667 (1918). A future contingent interest may be entirely extinguished by agreement when the interest may be "so remote, and its actual enjoyment so improbable that its retention would appear to be nothing more substantial than a film of mist." *Id.* at 137, 119 N.E. at 669.

93. MASS. GEN. LAWS ANN. ch. 204 § 15 (1955).

94. See MASS. GEN. LAWS ANN. ch. 204 § 15 (1955) which provides for the adjustment by arbitration or compromise of any controversy under a will; *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667 (1918); *Ellis v. Hunt*, 228 Mass. 39, 116 N.E. 956 (1917); *Lincoln v. Wood*, 128 Mass. 203 (1880).

Massachusetts has another statute by which an agreement compromising the controversy may receive judicial authorization.<sup>95</sup>

*Effect of the Statute Upon Common Law Rationale.* Even though the decree admitting the will to probate generally provides that the estate is to be administered according to the terms of the agreement, the compromise of wills statute is not regarded as a limitation upon the right to dispose of property by will.<sup>96</sup> The enactment is construed as providing a means by which real controversies between persons claiming the estate as beneficiaries and those claiming as statutory distributees may be settled by agreement, however complicated the controversy may be, subject to the supervisory powers of the court to see that the agreement is just and reasonable toward all interests whether in being or future and contingent.<sup>97</sup> The entire effect of the decree may be a modification of the will, but the Massachusetts courts consider that any such effect results from the concessions made by the legatees to the intestate successors or to themselves as to what disposition shall be made of interests granted to them by the will and does not result from any change in the provisions of the will.<sup>98</sup> The rights of the parties take effect by the agreement and the decree confirming it and not by the will.<sup>99</sup>

The recognition by Massachusetts that an adjudicated compromise is desirable even when testamentary trusts are established is not present in Michigan and New York, despite the purposes for which these statutes

95. MASS. GEN. LAWS ANN. ch. 204 § 14 (1955) provides that:

The supreme judicial court or the probate court may authorize an executor, administrator . . . or a trustee, to adjust by arbitration or compromise any controversy or question as to the administration or distribution of the estate in his possession . . . or as to any matter relating to said estate, or as to the construction of a will or trust created by a written instrument . . . or as to any controversy growing out of said will or instrument that may arise between him and any other person . . . interested under said will or instrument or in said estate, or between claimants to said estate. . . .

This statute could conceivably be applied to effectuate the compromise of a will contest or controversy, but the presence of MASS. GEN. LAWS ANN. ch. 204 § 15-18 (1955) makes this unnecessary. For compromise agreements effectuated pursuant to MASS. GEN. LAWS ANN. ch. 204 § 14 (1955) see, *e.g.*, *Willcutt v. Prescott*, 340 Mass. 532, 165 N.E.2d 105 (1960); *Clarke v. Cordis*, 86 Mass. (4 Allen) 466 (1862). This statute also has provisions requiring the requisite parties to execute the agreement and insuring the protection of minors, persons without legal capacity or under guardianship, or any future contingent interests who may be affected, by the appointment of persons to represent such persons or interests.

96. See, *e.g.*, *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667 (1918); *Ellis v. Hunt*, 228 Mass. 39, 116 N.E. 956 (1917).

97. *Copeland v. Wheelwright*, 230 Mass. 131, 119 N.E. 667 (1918); *Ellis v. Hunt*, 228 Mass. 39, 116 N.E. 956 (1917).

98. *Ellis v. Hunt*, 228 Mass. 39, 116 N.E. 956 (1917); *Baxter v. Treasurer and Receiver General*, 209 Mass. 459, 95 N.E. 854 (1911).

99. *E.g.*, *Mulligan v. McDonagh*, 307 Mass. 464, 30 N.E.2d 385 (1940); *Neafsey v. Chinholo*, 225 Mass. 12, 113 N.E. 651 (1916); *Brandeis v. Atkins*, 204 Mass. 471, 90 N.E. 861 (1910).

were enacted, apparently on the ground that to approve such an agreement would be to defeat testamentary intent. It is not clear whether this Massachusetts statute is regarded as imposing a limitation upon the right to dispose of property by will. Since the statute providing for the approval of agreements affecting established testamentary trusts is substantially similar to the compromise of wills statute which has been interpreted as not limiting the right to dispose of property by will, the former statute may likewise be regarded as only facilitating contracts between claimants to a decedent's estate and not affecting the right to dispose of property by will.

*Summary.* Massachusetts, like most states providing for an adjudicated compromise of will contests and controversies, adopted legislation to facilitate compromise agreements between beneficiaries under a will and the intestate successors, but especially so when future contingent interests or persons without legal competence to act were or might be affected. If these latter interests are not to be affected, a compromise agreement may be effectuated and enforced without the aid of the adjudicated compromise statute. Consequently, the contract analysis is adhered to by the Massachusetts courts, so that with or without the aid of statutes a compromise agreement is not considered a limitation upon the right to dispose of property by will.

### *Pennsylvania*

*Common Law; Rationale.* Prior to the enactment of the 1917 Fiduciaries Act<sup>100</sup> providing for the compromise of controversies relating to a decedent's estate, Pennsylvania recognized and enforced agreements compromising will contests and controversies.<sup>101</sup> The avoidance of litigation or the settlement of a family controversy were regarded as a sufficient consideration to enable agreements consummated by persons *sui juris* in the absence of fraud to be enforced as contracts.

*Effect of the Statute Upon Common Law.* The 1917 statute provided that any question or dispute concerning the validity or construction of any will or testament or the disposition of a decedent's estate could be compromised or settled. The Fiduciaries Act of 1949 enacted substantially the same provisions<sup>102</sup> but contained also a separate section by which

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100. Pa. Pub. Law 1917 No. 193, § 40, at 508.

101. See, *e.g.*, *Bartholomew's Estate*, 155 Pa. 283, 26 Atl. 214 (1893); *Appeal of Wilen* 105 Pa. 121 (1884); *Phillips v. Phillips*, 8 Watts 195 (Pa. 1839).

102. PA. STAT. ANN. tit. 20 § 320.513 (1950).

Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any will, or the distribution of all or any part of any decedent's estate, or any other contro-

questions or disputes concerning trust estates could be compromised or settled.<sup>103</sup>

The fact that the present adjudicated compromise statutes contain no provisions specifying the parties required to execute a compromise agreement,<sup>104</sup> coupled with the fact that compromise agreements are enforced or recognized without the aid of statutes,<sup>105</sup> supports the inference that Pennsylvania enacted the common law position as to compromise agreements. The courts probably consider, as was done in the absence of statute, that the parties were contracting with their own property. Notwithstanding the lack of specific provisions in the compromise of controversies statutes providing for the representation of minors or incompetents and for the protection of the unascertained or future contingent interests, it appears that where these interests or persons are or may be affected by a compromise agreement, their interests have been represented or protected.<sup>106</sup> Moreover, Pennsylvania has a court rule by which a court may appoint a guardian ad litem to represent minors or incompetents, or a trustee ad litem to represent an absentee, a presumed decedent or unborn or unascertained person not already represented by a fiduciary unless the court considers that these interests are adequately represented.<sup>107</sup> The rule thus insures that any judgment may be made effective and conclusive upon all present and future contingent interests.

very affecting any estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made. 103. PA. STAT. ANN. tit. 20 § 320.945 (1950).

Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against a trust, or to compromise or settle any question or dispute concerning the validity or construction of any will or trust instrument, or the distribution of all or any part of any trust, or any controversy affecting any trust, the court on petition of the trustee or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.

104. The 1917 enactment, Pa. Pub. Law 1917 No. 193, § 40, at 508 provided that there should be due notice to all interested parties. PA. STAT. ANN. tit. §§ 320.513, 320.945 specify "after such notice as the court shall direct."

105. See, e.g., *Way Estate*, 379 Pa. 421, 109 A.2d 164 (1954); *Fry v. Stetson*, 370 Pa. 132, 87 A.2d 305 (1952); *In the Matter of Estate of Kramer*, 57 Daugh. 335 (Dauphin County Pa. Ct. 1946); *Wallace's Estate*, 76 Pitts. Rep. 112 (Allegheny County Pa. Ct. 1928).

106. See *Stoffel's Estate*, 295 Pa. 248, 145 Atl. 70 (1929); *In re Small's Estate*, 67 York 1 (York County Pa. Ct. 1953); *Rainbow Estate*, 93 Pitts. Rep. 461 (Allegheny County Pa. Ct. 1945). *But see* *Estate of Wanamaker*, 54 Montg. 197 (Montgomery County Pa. Ct. 1938) (it is not apparent if there was any representation for the contingent interests interested in the estate, although the court did construe the trust as not violating the rule against perpetuities).

107. PA. ORPHANS' CT. R. 4(a).

The Pennsylvania position in regard to the compromise of controversies concerning wills which provide for the establishment of trusts is not apparent. The 1949 enactment applicable to trust estates is clearly applicable to established testamentary trusts,<sup>108</sup> but it has not yet been determined if it can be extended to trusts provided for by wills concerning which a dispute has arisen as to their admission to probate. Cases decided pursuant to the original compromise of wills statute, together with cases decided without resort to any statutory provisions are not helpful, since they present opposing points of view as to whether an agreement compromising a contest concerning the admission to probate of a will can be effectuated where there is a trust provided for by the terms of the will.<sup>109</sup>

*Effect of the Statute Upon Common Law Rationale.* It appears from the few cases applying these statutes that Pennsylvania is in accord with Michigan, Wisconsin and Massachusetts that a compromise agreement does not limit the right to dispose of property by will. There is little distinction between the cases applying the adjudicated compromise statutes and the cases in which agreements are sought to be enforced or recognized as contracts.<sup>110</sup> There is no reference to the effect of an adjudicated compromise upon the right to dispose of property by will.<sup>111</sup> Where a compromise agreement was enforced as a contract, even though the adjudicated compromise statute was available to the parties, the court did not regard the agreement as a limitation upon the right to dispose of property by will.<sup>112</sup> It was held that the agreement did not affect the validity of the will, for when the agreement was consummated the rights

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108. PA. STAT. ANN. tit. 20 § 320.945 (1950); *Middleton Estate*, 1 Pa. D.&C.2d 162 (Bucks County Ct. 1954); *In re Small's Estate*, 67 York 1 (York County Pa. Ct. 1953).

109. *Compare* *Stoffel's Estate*, 295 Pa. 248, 145 Atl. 70 (1929) and *Estate of Wanamaker*, 54 Montg. 197 (Montgomery County Pa. Ct. 1938) *with* *Martin Estate*, 349 Pa. 255, 36 A.2d 786 (1944) and *Schwehm's Estate*, 264 Pa. 355, 107 Atl. 699 (1919).

110. *Compare* *Crawford's Estate*, 320 Pa. 444, 182 Atl. 252 (1936); *Stoffel's Estate*, 295 Pa. 248, 145 Atl. 70 (1929); *Middleton Estate*, 1 Pa. D.&C.2d 162 (Bucks County Ct. 1954); *Estate of Wanamaker*, 54 Montg. 197 (Montgomery County Pa. Ct. 1938) *with* *Bartholomew's Estate*, 155 Pa. 283, 26 Atl. 214 (1893); *Appeal of Wilen*, 105 Pa. 121 (1884); *Phillips v. Phillips*, 8 Watts 195 (Pa. 1839).

111. *But see* *In re Small's Estate*, 67 York 1 (York County Pa. Ct. 1953) construing PA. STAT. ANN. tit. 20 § 320.945 (1950) which is based upon the compromise of wills statute and its predecessor, the 1917 enactment. The court may have announced a position similar to that of N.Y. in that it stressed the importance of testamentary intent, but stated the statute "must be construed to mean it shall only apply when an actual question, dispute or controversy concerning the validity of the construction of a will or trust instrument is raised. This section of the statute was not intended as authority for the rewriting of a testator's will." *Id.* at 7.

112. *In the Matter of Estate of Kramer*, 57 Dauph. 335 (Dauphin Pa. County Ct. 1946).

of the parties had become fixed so that they were contracting with regard to their own property.

*Summary.* It appears that the adjudicated compromise statutes did little more in Pennsylvania than enact the prevailing common law that compromise agreements are enforceable as contracts. However, the common law may have been expanded as to the permissibility of compromise agreements affecting testamentary trusts once established. This would be similar to Massachusetts which also has a separate statute applicable to trusts, but different from Michigan which has no such statute and from New York which apparently has such a statute but does not apply it.

### *New Jersey*

*Common Law; Rationale.* Agreements compromising will contests and controversies were enforceable in New Jersey prior to the enactment of the original compromise of claims statute, on the basis of contract law.<sup>113</sup> The courts maintained that the avoidance of litigation or the compromise of a doubtful question was a sufficient consideration to support the agreement.

*Effect of the Statute Upon Common Law and Common Law Rationale.* New Jersey by statute permits a fiduciary to compromise certain enumerated claims, or to submit the compromise to the court for its approval.<sup>114</sup> These claims are substantially similar to those of the Model Probate Code and the Michigan adjudicated compromise statute.<sup>115</sup> The New Jersey statute, like that of Pennsylvania, has neither provisions stipulating which persons are required to execute a compromise agreement nor provisions for the representation of minors, incompetents, unascertained or future contingent interests, except that a minor or mental incompetent may make a claim through his guardian.<sup>116</sup> The absence of any such provisions together with the fact that compromise agreements

113. *E.g.*, *Grandin v. Grandin*, 49 N.J.L. 508, 9 Atl. 756 (1887); *Bell v. White*, 76 N.J. Eq. 49, 73 Atl. 861 (1909); *Rue v. Meirs*, 43 N.J. Eq. 377, 12 Atl. 369 (1887).

114. N.J. REV. STAT. ANN. § 3A:14-1 (1953).

115. N.J. REV. STAT. ANN. § 3A:14-2 (1953). These claims are:

- a. The probate of any writing purporting to be the decedent's will.
- b. The construction, validity or effect of any will of the decedent or any such writing, or of any trust.
- c. The rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir, next of kin or spouse,
- d. The rights or interests of any cestui que trust or ward,
- e. The administration of the estate of any decedent, any trust or guardianship,
- f. Any demand owing to or by the estate, trust, guardianship or ward, or
- g. Any other matter relative to the estate or trust or the death of a decedent, or the guardianship or ward.

116. N.J. REV. STAT. ANN. § 3A:14-2 (1953).



appear to be enforceable without the aid of any statutory provisions<sup>117</sup> indicates that New Jersey has enacted the common law position with regard to compromise agreements. Consequently, this statute would not be considered as a limitation upon the right to dispose of property by will, but simply as providing statutory recognition of contracts by persons who have acquired property by will.

### *Rhode Island*

The Rhode Island adjudicated compromise statute enables the state supreme court to authorize an executor or petitioner with the will annexed to compromise all controversies that may arise or exist as to an instrument purporting to be a decedent's last will before the instrument is admitted to probate.<sup>118</sup> It does not appear that there was litigation concerning compromise agreements before this statute. This statute, like most adjudicated compromise statutes, specifies those parties required to execute a compromise agreement,<sup>119</sup> provides for the representation of persons legally incompetent to act<sup>120</sup> and insures the protection of future contingent interests that will be affected by a compromise agreement.<sup>121</sup>

The Rhode Island adjudicated compromise statute and the cases applying it definitely establish that a compromise agreement does limit the right to dispose of property by will. It is not contended that an estate is distributed according to the provisions of the will with any ultimate deviation from the testator's directions resulting from concessions made by the legatees or devisees as to their own property. The statute specifically provides that when a compromise agreement is confirmed by the court, "the estate is to be administered and disposed of according to the provisions of the will as modified by the compromise."<sup>122</sup> This provision has been interpreted as incorporating an award or compromise into the will, so that any person receiving part of the estate by virtue of the compromise takes as a legatee, just as if such provisions were originally in the will.

### *Indiana*

In 1953, Indiana enacted sections 93-95 of the Model Probate

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117. See *DeCaro v. DeCaro*, 13 N.J. 36, 97 A.2d 658 (1953).  
118. R.I. GEN. LAWS ANN. § 33-7-12 (1956).  
119. R.I. GEN. LAWS ANN. § 33-7-13 (1956).  
120. R.I. GEN. LAWS ANN. § 33-7-14 (1956).  
121. R.I. GEN. LAWS ANN. § 33-7-15 (1956).  
122. R.I. GEN. LAWS ANN. § 33-7-17 (1956).  
123. *Chase Nat'l Bank v. Sayles*, 11 F.2d 948 (1st Cir. 1926); *Barber v. Westcott*, 21 R.I. 355, 43 Atl. 844 (1899).

Code.<sup>124</sup> There has been no litigation concerning this adjudicated compromise statute, but it appears that compromise agreements were recognized by the Indiana courts prior to the enactment.<sup>125</sup> One of the cases recognizing an agreement compromising a will contest held that the state inheritance tax should be assessed by virtue of the transfer of the property by will and not by the agreement.<sup>126</sup> The agreement was said not to affect the validity of the will, as those persons who acquired property by virtue of the agreement received this property not as legatees but as assignees of those to whom the property was devised by will. It is possible that this same interpretation will be given to a compromise agreement effectuated pursuant to the adjudicated compromise statute. If so, Indiana would be in accord with the majority of states having adjudicated compromise statutes that an adjudicated compromise is enforced upon a contract rationale and does not limit the right to dispose of property by will.

#### CONCLUSION

The states that have enacted adjudicated compromise statutes regard the avoidance of litigation and the maintenance of family harmony as a sufficient justification for the approval or authorization of an agreement compromising a will contest or controversy. It is primarily for these objectives that compromise agreements are enforceable as contracts in the absence of statute. Consequently, as at common law, many adjudicated compromises are not regarded as a limitation upon the right to dispose of property by will.

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124. IND. ANN. STAT. § 7-301 to -304 (Burns 1953). Section 7-301 provides:

The compromise of any contest or controversy as to

(a) Admission to probate of any instrument offered at the last will of any decedent,

(b) The construction, validity or effect of such instrument,

(c) The rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir,

(d) The rights or interests of any beneficiary of any testamentary trust, or

(e) The administration of the estate of any decedent or of any testamentary trust, whether or not there is or may be any person interested who is a minor or otherwise without legal capacity to act in person or whose present existence or whereabouts cannot be ascertained, or whether or not there is any inalienable estate or future contingent interest which may be affected by such compromise [compromise], shall, if made in accordance with the provisions of this code, be lawful and binding upon all the parties thereto, whether born or unborn, ascertained or unascertained, including such as are represented by trustees, guardians of estates and guardians ad litem; but no such compromise shall in any way impair the right of creditors or of taxing authorities.

125. See, *e.g.*, *Indiana Dep't of State Revenue v. Kitchin*, 119 Ind. App. 422, 86 N.E.2d 96 (1940); *Becker v. Becker*, 46 Ind. App. 93, 91 N.E. 966 (1910).

126. *Indiana Dep't of State Revenue v. Kitchin*, 119 Ind. App. 422, 86 N.E.2d 96 (1949).

In spite of what may be justifiable reasons for the recognition or enforcement of compromise agreements on the basis of contract law or by virtue of an adjudicated compromise statute, the courts are avoiding the basic issues, at least in regard to will contests. When agreements compromising a will contest are sought to be enforced or approved by courts, the courts do not ultimately determine the validity of the grounds for the contest; rather, they consider whether the agreements were made in good faith, whether there was a possibility that the issue could be decided either way and whether there was fraud surrounding the consummation of the agreement. In cases where the principal beneficiaries under the will receive a larger portion of the estate after a compromise agreement than if intestacy had resulted, they are benefited by the fact that the testator may have lacked testamentary capacity or failed to adhere to the requisite formalities. At times, the principal beneficiaries may have actually exerted an undue influence over the testator, but because of the fact that litigation on the subject could be decided either way, such persons may be permitted to benefit by their own wrongdoing. Similarly, since it is estimated that only 1% of wills contested are set aside,<sup>127</sup> is not the avaricious contestant who presents an issue of fact as to the testamentary capacity or the validity of the will and who receives a portion or larger share of the estate by virtue of a compromise agreement receiving something he ordinarily would not receive some 99% of the time?

There is more merit to the allowance of such agreements when construction of the will is necessary. Perhaps the heirs are in much better position to place a construction on the will that will achieve what the testator desired. Yet here again, the courts do not attempt to ascertain what the correct construction should be, but only consider whether a compromise agreement was fairly entered into and settled a dispute that could be decided either way by the courts. Furthermore, should the parties interested in an estate be permitted to construe as valid certain terms of a will which could be construed to violate a statutory prohibition?

Finally, why are not all of the adjudicated compromise statutes, as well as compromise agreements generally, recognized as a limitation upon the right to dispose of property by will? The reasons for authorizing or approving these limitations appear justifiable and are supported by public policy, as indicated by the favorability with which they are received by most courts. The right to make a will is generally recognized as one created by statute, subject to the control of the legislature, so that an adjudicated compromise which limits the right to dispose of property

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127. ATKINSON, WILLS 518 (2nd ed. 1953).

by will can be justified on this basis. In many instances the intentions of a testator can be frustrated. For example, the wishes of a testator as expressed by will are not followed when the rule against perpetuities is violated, when the testator has imposed unreasonable restraints upon the alienation of property, when a widow pursues her dower rights or statutory forced share against the will, when beneficiaries completely renounce their rights under a will and when a beneficiary receiving property under a will immediately distributes it in a manner which he considers more equitable than that stated in a will. Nevertheless, whether the rights acquired by virtue of a compromise agreement are regarded as entitling one to receive this property or interest as if one were a devisee or legatee, or whether a compromise agreement is regarded as not altering the fact that the property passes to the devisees and legatees at the moment of the testator's death with any rights acquired by virtue of this agreement as being contractual and not testamentary, the result is the same—the limitation or destruction of the right to dispose of property by will.