ASSEMBLY BILL 280

LRB-572
EP:kc:2

March 1, 1967 - Introduced by COMMITTEE ON JUDICIARY, by request of Board of Governors of State Bar of Wisconsin. Referred to Committee on Judiciary.

AN ACT to repeal 74.62 (2), 230.47, 230.48, chapters 233, 237 and 238, 287.43, 287.44, 296.41, chapters 310, 311, 312 (except 312.03, 312.08, 312.11 and 312.13), 313, 314, 315, 316 (except 316.45, 316.46, 316.48, 316.49 and 316.50), 317 (except 317.06), 318, 321 and 324 (except 324.35, 324.351 and 324.356); to renumber and amend 296.42, 312.03, 312.08, 312.11, 312.13, 316.45, 316.46, 316.48, 316.49, 316.50, 317.06, 324.35, 324.351 and 324.356; to amend 48.92 (1), 49.08 (2), 72.05 (1), 253.10 (1), 268.026, 287.19 and 323.32 and 323.34, as renumbered; and to create 48.92 (3), 72.05 (4) and TITLE XLII (chapter 851 to 853, 856 to 863, 867, 868, 878 and 879) of the statutes, relating to the Wisconsin probate code.

Analysis by the Legislative Reference Bureau

This proposal revises the Wisconsin probate code. The proposed new probate code was developed by 2 committees appointed by the directors of the real property, probate and trust law sections of the state bar.

In explanation of the proposal, the committees wrote:

"Because numerous changes have been made in the substantive chapters (c. 852 on Intestate Succession replacing present c. 237, c. 853 on Wills replacing present c. 238, and c. 861 on Family Rights replacing present c. 233), a summary of the main changes has been given at the beginning of those particular chapters for the convenience of the Bar. These changes do not constitute radical departures from present concepts; the basic approach has been to build on and modernize our present laws whenever possible.

The attempt in the revision of the procedure statutes has not been to change the basic probate procedure in Wisconsin, but rather has been to clarify and reorganize the sections of the statutes to make them easier to locate and use and to make them more clearly support present practice. The sections have been relocated in chapters organized on the basis of subject matter, overlapping sections have been consolidated and archaic language has been largely eliminated. No change has been so great as to make any of the present uniform forms unusable; however, the requirement for some forms has been eliminated.

The following 3 policy changes have been incorporated in the proposed statutes:

1. For the purposes of probate, both real and personal property are handled in the same way that personal property has always been handled in Wisconsin.

2. Persons interested in the estate are to be kept informed of the proceeding as it progresses, and the burden of providing and distributing this information is placed on the personal representative and his attorney.

3. Greater power is given to and at the same time greater responsibility and accountability are placed on the personal representative. Provisions are included which it is hoped will facilitate and require prompt and effective work by all personal representatives."

The new probate code is explained in detail in the notes provided by the state bar of Wisconsin. These notes are of 3 types:

"Summary of Chapter" notes appear at the beginning of each chapter.

"Comment" notes follow many sections and apply directly to the particular section after which they appear.

"Cross Reference" notes call attention to other sections involved in the procedure set out in a particular section.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 48.92 (1) of the statutes is amended to read:

48.92 (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the adopted person and the adoptive parents. ~~The adopted person shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the adopted person in accordance with said statutes.~~

SECTION 2. 48.92 (3) of the statutes is created to read:

48.92 (3) Rights of inheritance by, from and through an adopted child are governed by s. 851.51.

SECTION 3. 49.08 (2) of the statutes is amended to read:

49.08 (2) If upon the death of any person any property prior to death was held in joint tenancy, ~~then ss. 230.47 (1m) and (3) and 230.48 (1m) and (3) shall apply and~~ the liability and recovery shall be the same as provided in sub. (1) except that it shall only be for relief furnished under ss. 49.01 to 49.17 and the judge so finds, and if there is no personal property or the personal property is insufficient to pay the debt and obligation and real property remains, the court shall enter judgment which shall constitute a prior lien for the unsatisfied amount as hereafter provided and remain a prior lien until satisfied or until the death of the surviving joint tenant at which time recovery may be had. The authorities or board shall file a copy of the judgment with a description of the property in the office of the register of deeds of every county in which real property of the joint tenant is located. This subsection is authority only to counties having a population of 500,000 or more for relief furnished by such counties and shall apply only to persons resident of such counties at the time of death.

SECTION 4. 72.05 (1) of the statutes is amended to read:

72.05 (1) All taxes imposed by ss. 72.01 to 72.24 shall be due and payable at the time of decedent's death, except as hereinafter provided; and except as provided in sub. (4) every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is transferred and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment. Whenever the department of taxation is satisfied that the collection of the tax will not thereby be jeopardized, it ~~shall have the power to~~ may release the lien hereby imposed with respect to all or any part of the property transferred upon the advance payment of a fee of $2. The release of the lien of the tax, duly executed by the department of

taxation, may be recorded in the office of the register of deeds of the county in which the property described therein is situated; and the register of deeds will be entitled to the same fee as is provided for the recording of the satisfaction of a mortgage.

SECTION 5. 72.05 (4) of the statutes is created to read:

72.05 (4) Sale. When any property is sold from an estate by a personal representative the lien described in sub. (1) is transferred to the proceeds of the sale and the property passes from the estate free of any such lien, and the person to whom the property is transferred has no liability for such tax.

SECTION 6. 74.62 (2) of the statutes is repealed.

SECTION 7. 230.47 and 230.48 of the statutes are repealed.

SECTION 8. Chapter 233 of the statutes is repealed.

SECTION 9. Chapters 237 and 238 of the statutes are repealed.

SECTION 10. 253.10 (1) of the statutes is amended to read:

253.10 (1) The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration on the estates of all persons deceased who ~~were~~ at the time of their ~~decease inhabitants of or residents in the same county and of all who shall die without the state having any estate within such county to be administered~~ decease were domiciled in the county and of all persons deceased who at the time of their decease were not domiciled in this state but who had an estate within the county to be administered or probated, and to any other cases authorized by law; to the appointment of guardians to minors and otheres in the cases prescribed by law; to all matters relating to the settlement of the estates of such deceased persons and of such minors and others under guardianship; to all cases of constructions of wills admitted to probate in such court; and to all cases of trusts and trust powers created by will admitted to probate in such court, including administration under ch. 323 of trusts created in accordance with s. 231.49 (1); and to

hearing objections to the granting of licenses to marry, to ordering the refusal of such licenses, and to the granting of stays upon the issuances thereof.

CROSS REFERENCE: For additional provisions relating to probate jurisdiction see s. 856.01.

SECTION 11. 268.026 of the statutes is amended to read:

268.026 In an action, in a court of record, for damages founded upon contract or upon a judgment, when it appears that the defendant is interested, as heir, legatee or devisee, in the estate of a decedent and that the defendant's property liable to execution is probably insufficient to satisfy the plaintiff's claim for damages, the defendant may be enjoined by the court, pending the action, from assigning or otherwise disposing of his interest in such estate; and a receiver therefor may be appointed. The judgment may compel the defendant to transfer sufficient of his interest to satisfy the judgment or may adjudge such transfer. The remedy given by this section is in addition to that given by ~~section 318.08 and by~~ proceedings supplementary to execution under ch. 273. If a receiver is appointed, he shall give prompt notice thereof to the administrator or executor.

SECTION 12. 287.19 of the statutes is amended to read:

287.19 If an action mentioned in s. 287.18 ~~be~~ is brought the plaintiff must show that he has been or will be unable, with due diligence, to collect his debt or some part thereof by proceedings in the county court or from the personal representatives of the decedent ~~and that he brings his action pursuant to sections 313.22 to 313.25;~~ and in such event, and except as limited by s. 859.23, the plaintiff may recover the value of all the assets received by all the defendants if necessary to satisfy his demand, and the amount of the recovery shall be apportioned among the defendants in proportion to the value of the property received by each of them; and the costs of the action shall be apportioned in like manner; but no allowance or deduction shall be made from such amount on account of other heirs or legatees or devisees to

whom assets have also been delivered or paid. The judgment shall express the amount recovered against each defendant for damages and costs.

SECTION 13. 287.43 and 287.44 of the statutes are repealed.

SECTION 14. 296.41 of the statutes is repealed.

SECTION 15. 296.42 of the statutes is renumbered 296.37 and amended to read:

296.37 Before making an application to the court for changing or establishing a name ~~or establishing an heirship~~ the applicant must cause a notice thereof to be published, as a class 3 notice, under ch. 985, stating therein the nature of the application, the time and place when and where the same will be made.

SECTION 16. Chapters 310, 311 and 312 (except 312.03, 312.08, 312.11 and 312.13) of the statutes are repealed.

SECTION 17. 312.03, 312.08, 312.11 and 312.13 of the statutes are renumbered 323.21, 323.23, 323.25 and 323.27 and amended to read:

323.21 (1) Every ~~executor, administrator,~~ trustee and guardian, shall verify by his oath every inventory required of him and such verification shall be to the effect that the inventory is true of all property which belongs to his decedent's or to the trust estate or his ward, which has come to his possession or knowledge, and that upon diligent inquiry he has not been able to discover any property belonging to such estates or ward which is not included therein. The court, at the request of any party interested, or on its own motion, may examine him on oath in relation thereto, or in relation to any supposed omission therefrom.

(2) If any ~~executor, administrator,~~ trustee or guardian~~, shall neglect~~ neglects to file his inventory or account when required by law, the county judge shall call his attention to his neglect. If he ~~shall~~ still ~~neglect~~ neglects his duty in the premises, the court shall order him to file his inventory, and the costs of such citation may be adjudged against him.

323.23 The county court, upon the application of any ~~executor,~~

~~administrator,~~ trustee or guardian appointed by it may order any person who has been intrusted by him with any part of the estate of a decedent or the trust estate to appear before such court, and may require such person to render a full account, on oath, of any property or papers belonging to such estate which ~~shall~~ have come to his possession and of his proceedings thereon. If he refuses to appear and render such account the court may proceed against him as for contempt.

323.25 Whenever the county court ~~shall have~~ has reason to believe that any ~~executor, administrator,~~ trustee or guardian within its jurisdiction has filed a false inventory, or claims as his own property, or permits others to claim and retain property belonging to the estate which he represents, or is guilty of waste or mismanagement of the estate, or is unfit for the proper performance of his duties, the court shall appoint a guardian ad litem for any minor or incompetent person interested and shall order such ~~executor, administrator,~~ trustee or guardian to file his account. If upon the examination of such account the court ~~shall deem~~ deems it necessary to proceed farther, a time and place for the adjustment and settlement of said account shall be fixed by the court, and at least 10 days' notice thereof shall be given to such guardian ad litem, if any is appointed, and to all persons interested. If, upon the adjustment of said account, the court ~~shall be~~ is of the opinion that the interests of the estate, and of the persons interested require it, such ~~executor, administrator,~~ trustee or guardian may be removed and another appointed.

323.27 RESALE BY TRUSTEE WITHOUT LICENSE. Whenever any ~~executor, administrator or~~ testamentary trustee has purchased real estate at judicial sale, under a judgment in an action in which he is plaintiff, or has redeemed real estate from a foreclosure or judicial sale, he may sell and convey the same without license, upon such terms as he deems best; and the proceeds arising from such sale shall be held by him the same as he would have held the money due upon the debt by virtue of which he purchased or held the money with which he redeemed such real estate.

SECTION 18. Chapters 313, 314, 315 and 316 (except 316.45, 316.46, 316.48, 316.49 and 316.50) of the statutes are repealed.

SECTION 19. 316.45, 316.46, 316.48, 316.49 and 316.50 of the statutes are renumbered 296.50, 296.52, 296.54, 296.56 and 296.58 and are amended to read:

296.50 ~~No action for the recovery of any estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate unless it be commenced within five years next after the sale; and~~ No action for the recovery of any estate sold by a guardian shall be maintained by the ward or by any person claiming under him unless it ~~be~~ is commenced within 5 years next after the termination of the guardianship, excepting only that minors and others under legal disability to sue at the time when the cause of action ~~shall accrue~~ accrues may commence their action at any time within 5 years next after the removal of the disability.

296.52 A sale of real estate by ~~an executor, administrator or~~ a guardian shall not be avoided on account of any irregularity in the proceedings~~; provided, it shall appear~~ if it appears that he was licensed to make the sale by the county court having jurisdiction; that he gave a bond

which was approved by the county court before the sale if a bond was required; that he gave the notice of the time and place of sale as prescribed by law; that the premises were sold accordingly and the sale confirmed by the court, and that they are held by one who purchased them in good faith.

296.54 If there ~~shall be~~ is any neglect or misconduct in the proceedings of the ~~executor, administrator or~~ guardian in relation to such sale, by which any person interested in the estate ~~shall suffer~~ suffers damages, such aggrieved party may recover the same in an action on the bond of such ~~executor, administrator or~~ guardian or otherwise, as the case ~~may require~~ requires .

296.56 The validity of a sale made by ~~an executor, administrator or~~ a guardian shall not be questioned by any person claiming under any title that is not derived from or through the deceased persons or the ward, on account of any irregularity in the proceedings~~; provided, it shall appear~~ if it appears that the ~~executor, administrator or~~ guardian was licensed to make the sale by a court having jurisdiction and that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises.

296.58 Any ~~executor, administrator or~~ guardian who ~~shall~~ fraudulently ~~sell~~ sells any real estate of his ~~testator, intestate or~~ ward, contrary to the provisions of law, shall be liable in double the value of the land sold as damages, to be recovered in an action by any person having an inheritance therein.

SECTION 20. Chapters 317 (except 317.06) and 318 of the statutes are repealed.

SECTION 21. 317.06 of the statutes is renumbered 323.30 and amended to read:

323.30 (1) Every trustee of a testamentary trust for charitable purposes shall, prior to March of each year, account to the court having jurisdiction thereof for the preceding calendar year and shall further

account ~~from time to time~~ as required by the court; and he may be examined by the court upon any matter relating to his account and his conduct of such trust.

(2) The court shall promptly examine such account, and if it ~~be~~ is not satisfactory it shall be examined on notice and the court shall make such order as ~~may be~~ is necessary to carry out the provisions of the trust.

(3) The court may remove the trustee for failure to comply with this section~~,~~ or with the order of the court~~,~~ and appoint another trustee as provided by law or the terms of the will creating such trust.

(4) No action of the court upon such account shall be final except it be upon notice mailed to the attorney general and published under s. ~~324.20~~ 879.05 (4).

CROSS REFERENCE: Enforcement of public charitable trust by attorney general, see 231.34. Time limit on mailing notice to attorney general, see 879.05 (2).

SECTION 22. Chapter 321 of the statutes is repealed.

SECTION 23. Chapter 324 (except 324.35, 324.351 and 324.356) of the statutes is repealed.

SECTION 24. 324.35, 324.351 and 324.356 of the statutes are renumbered 323.32, 323.34 and 323.36, and 323.32 and 323.34, as renumbered, are amended to read:

323.32 If ~~an executor, administrator,~~ a guardian or trustee resides out of this state, or neglects to render his account within the time provided by law or the order of the court, or neglects to settle the estate according to law, or to perform any judgment or order of the court, or absconds, or becomes insane or otherwise incapable or unsuitable to discharge the trust, the county court may remove him and appoint his successor; but no order of removal shall be made until the person affected has been notified, as provided by s. ~~310.21~~ 879.67, or, if a resident,

such notice as the court deems reasonable to show cause at a specified time why he should not be removed.

323.34 If any ~~executor, administrator,~~ guardian or trustee ~~shall fail~~ fails to file his account as required by law or ordered by the court, the court may, upon its own motion or upon the petition of any party interested, issue a citation directed to the sheriff ordering and directing the ~~executor, administrator,~~ guardian or trustee to show cause before the court why he should not immediately make and file his reports or accounts. Should any ~~executor, administrator,~~ guardian or trustee fail, neglect~~,~~ or refuse to make and file any report or account after having been cited by the court so to do, of if he fails to appear in court as directed by a citation issued under direction and by authority of the court, the court may, upon its own motion or upon the petition of any interested party, issue a warrant directed to the sheriff ordering that the ~~executor, administrator,~~ guardian or trustee be brought before the court to show cause why he should not be punished for contempt for such failure, refusal~~,~~ or neglect. If the court finds that such failure, refusal or neglect is wilful or inexcusable, the ~~executor, administrator,~~ guardian or trustee may be ~~punished for contempt by a fine~~ fined not to exceed $50 or ~~by imprisonment~~ imprisoned not to exceed 10 days~~,~~ or both.

SECTION 25. TITLE XLII (Chapters 851 to 853, 856 to 863, 867, 878 and 879) of the statutes is created to read:

TITLE XLII.

PROBATE CODE.

Chapter

851. Definitions and general provisions.

852. Intestate succession.

853. Wills.

856. Opening estates.

857. Powers and duties of personal representatives.

858. Inventory.
859. Claims.
860. Sale, mortgage and lease of property.
861. Family rights.
862. Accounts.
863. Closing estates.
867. Summary procedures.
868. Ancillary procedures.
878. Probate court bonds.
879. Notice, appearance, appeal and miscellaneous procedure.

CHAPTER 851.

DEFINITIONS AND GENERAL PROVISIONS

851.001 Effective date, probate code.
851.01 Administration.
851.03 Beneficiary.
851.05 Decedent.
851.07 Distributee.
851.09 Heir.
851.11 Intestate succession.
851.13 Issue.
851.15 Mortgage.
851.17 Net estate.
851.19 Person.
851.21 Person interested.
851.23 Personal representative.
851.25 Probate court.
851.27 Property.
851.29 Sale.
851.51 Status of adopted children for purposes of inheritance, wills and class gifts.

851.55 Uniform simultaneous death act.

851.61 Decedent devolution of United States obligations in beneficiary form.

851.001. EFFECTIVE DATE, PROBATE CODE. Chapters 851 (except s. 851.51), 856, 857, 858, 859, 860, 862, 863 (except s. 863.13), 867, 868, 878 and 879 are effective as of July 1, 1968. Chapters 852 and 861 and ss. 851.51 and 863.13 are effective as to any person dying on or after July 1, 1968. Chapter 853 is effective as to the will of any testator dying on or after July 1, 1968, except that it is inapplicable to a will executed prior to the publication of the chapter if it is proved the testator lacked testamentary capacity at the time of such enactment, unless the testator subsequently regained capacity to make a valid will and had such capacity for a period of 6 months; a will so excepted is governed by the statutes applicable at the time the testator executed his will.

851.01 ADMINISTRATION. "Administration" as used in title XLII means any proceeding relating to a decedent's estate whether testate or intestate.

851.03 BENEFICIARY. "Beneficiary" as used in title XLII means any person nominated in a will to receive an interest in property other than in a fiduciary capacity.

851.05 DECEDENT. "Decedent" as used in title XLII means the deceased person whose estate is subject to administration.

851.07 DISTRIBUTEE. "Distributee" as used in title XLII means any person to whom property of a decedent is distributed other than in payment of a claim, or who is entitled to property of a decedent under his will or under the statutes of intestate succession.

851.09 HEIR. "Heir" as used in title XLII means any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent. The state is an heir of the decedent and a person interested as provided in s. 45.37 (10)

and (11) when the decedent was a member of the Grand Army home for veterans at the time of his death.

851.11 INTESTATE SUCCESSION "Intestate succession" as used in title XLII means succession to title to property of a decedent by reason of the provisions of ch. 852, without regard to whether such property descends or is distributed.

851.13 ISSUE. "Issue" as used in title XLII means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy such relation by reason of adoption as provided in s. 851.51 and illegitimate persons and their lineal descendants to the extent provided by s. 852.05.

851.15 MORTGAGE. "Mortgage" as used in title XLII means any agreement or arrangement in which property is used as security.

851.17 NET ESTATE. "Net estate" as used in title XLII means all property subject to administration less the property selected by the surviving spouse under s. 861.33, the allowances made by the court under ss. 861.31, 861.35 and 861.41 except as such allowances are charged by the court against the intestate share of the recipient, administration expenses, the amount of claims paid and federal and state estate taxes payable out of such property (but not inheritance taxes).

851.19 PERSON. "Person" as used in title XLII includes natural persons, corporations and other organizations.

851.21 PERSON INTERESTED. (1) Who are "persons interested". The following are "persons interested" as used in title XLII:

(a) An heir of the decedent.

(b) A beneficiary named in any document offered for probate as the will of the decedent (including a person named or acting as a trustee of any trust, inter vivos or testamentary, named as a beneficiary).

(c) A beneficiary of a trust created under any document offered for probate as the will of the decedent.

(d) A person named as personal representative in any document offered for probate as the will of the decedent.

(e) Such additional persons as the court may by order include as "interested persons".

(2) Who cease to be "persons interested". The following cease to be "persons interested" as used in title XLII:

(a) An heir of the decedent who is not a beneficiary under the will of the decedent, upon admission of such will to probate.

(b) A beneficiary named in a document or documents offered for probate as the will of the decedent who is not an heir of the decedent, upon denial of probate to such document or documents.

(c) A person named as personal representative or testamentary trustee in the will of the decedent, upon his failure to be so appointed, the denial of letters by the court, or upon his discharge.

(d) A beneficiary under the will of a decedent, upon full distribution to such beneficiary.

851.23 PERSONAL REPRESENTATIVE. "Personal representative" as used in title XLII means any person to whom letters to administer a decedent's estate have been granted by the court, but does not include a special administrator.

851.25 PROBATE COURT. "Probate court" as used in title XLII means the probate branch or branches of the county court or the county court exercising its probate jurisdiction under s. 253.10.

851.27 PROPERTY. "Property" as used in title XLII means any interest, legal or equitable, in real or personal property, without distinction as to kind.

851.29 SALE. "Sale" as used in title XLII includes an option or agreement to transfer whether the consideration is cash or credit. It includes exchange, partition and settlement of title disputes. The intent in this definition is to extend and not to limit the meaning of "sale".

851.51 STATUS OF ADOPTED PERSONS FOR PURPOSES OF INHERITANCE, WILLS AND CLASS GIFTS. (1) Inheritance rights between adopted person and adoptive relatives. A legally adopted person is treated as a natural child of his adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute conferring rights upon children, issue or relatives in connection with the law of intestate succession or wills.

(2) Inheritance rights between adopted person and natural relatives. A legally adopted person ceases to be treated as a child of his natural parents for the same purposes, except as hereafter provided:

(a) If a natural parent marries or remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of such natural parent for all such purposes;

(b) If a natural parent of a legitimate child dies and the other natural parent remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the deceased natural parent for purposes of inheritance through such parent and for purposes of any statute conferring rights upon children, issue or relatives of such parent under the law of intestate succession or wills.

(3) Construction of class gift as including adopted persons. A gift of property by will, deed or other instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees or the like is to be construed to include a person duly adopted by a person whose natural child would be a member of the class or issue of such adopted person, if (a) the instrument does not expressly exclude adopted persons, (b) the conditions for membership in the class are otherwise satisfied, and (c) the adopted person was a minor at the time of adoption, or was adopted after having been raised as a member of the household by the adoptive parent from the child's 15th birthday or before. Unless the instrument expressly

provides otherwise such a gift is to be construed to exclude a natural child and his issue otherwise within the class if such a child has been duly adopted and would cease to be a child of his natural parents under sub. (2) for purposes of inheritance from the testator. This subsection applies only to a will, deed or other instrument which becomes effective on or after July 1, 1968; a will, deed or other instrument effective prior to that date is governed by the corresponding rule applicable at the time the instrument becomes effective.

COMMENT: This section governs the effect of adoption on inheritance and related matters. It makes certain changes in existing law: (1) it expressly provides for the effect of adoption on inheritance and wills as part of the probate statutes, rather than relying on 48.92 in the Children's Code; (2) it closes a gap in the law, under which a collateral relative may apparently not inherit through the adoptive parents; (3) it permits an adopted child to inherit from natural relatives in one special situation, as where a father dies and the wife remarries and the child is adopted by the stepfather (the changed law would enable the child to inherit from the natural paternal grandparents); and (4) it codifies the law regarding inclusion of adopted persons in class gifts under a will or other dispositive instrument.

The section adopts the basic principles underlying Wisconsin statutes, 237.04 and 48.92. However, it is an improvement upon those statutes, eliminating certain gaps in the law. Sections 237.04 and 48.92 have been criticized because they removed the inheritance subject-matter from its logical place and included it in a comprehensive Children's Code and also because they failed to provide expressly for inheritance by adoptive relatives other than adoptive parents. In fact the present statute suffers from attempting to combine both a general conceptual approach in 48.92 (1) and (2) and a specific but only partly inclusive approach in subsection (1) of that section. In this respect it is not as complete as the prior adoption statutes.

The first subsection deals with the status of an adopted person for purposes of inheritance by such person from his adoptive relatives, by adoptive relatives from the adopted person and by persons claiming through the adopted person (such as his children). It also broadens the coverage to secure to the adopted child and others claiming through him full rights under any other statutes such as the anti-lapse statute (853.27 replacing 238.13). In this respect it codifies the present case law illustrated by such cases as Sandon v. Sandon, 123 Wis. 603, 101 N.W. 1089 (1905) (pretermitted heir statute) and Estate of Holcombe, 259 Wis. 642, 49 N.W. 2d 914 (1951) (anti-lapse statute).

Sub. (2) generally terminates the relationship between an adopted

person and his natural parents for the same purposes. The closing of adoption records in order to protect the child makes it desirable as a practical matter to limit inheritance in the statutory manner, to avoid complications of title in tracing natural relatives. This statute would preserve rights in 2 limited situations, only one of which is covered by the present law: where a natural parent marries or remarries and the child is adopted by the stepfather or stepmother. In the other situation, covered by sub. (2) (b), where a parent dies and the other natural parent remarries, and the child is adopted by the stepfather or stepmother, the present law would prevent the child from inheriting from his natural grandparents through the deceased parent. In such a situation, preserving inheritance rights by the adopted child is not likely to present any difficulties either in proving heirship or in embarrassment to the adoptive parents.

The Code is accompanied by an amendment to 48.92 eliminating the last sentence of sub. (1) and providing for cross-reference to this Code.

Sub. (3) is new. It does not, however, involve any substantial change in existing law. The Wisconsin Supreme Court has reached the same result as a matter of judicial construction in Estate of Adler, 30 Wis.2d 250, 140 N.W.2d 219 (1966). The statute gives definitive shape to the construction. It also prevents a deliberate adoption of an adult to qualify the latter as a member of a class. In some states it has been possible to adopt one's own wife in order to make the latter a child within a class gift; the statute avoids such an absurd result.

851.55 UNIFORM SIMULTANEOUS DEATH ACT. (1) Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this section.

(2) If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the 2 have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that 2 or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived

the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

(3) Where there is no sufficient evidence that 2 joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than 2 joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(4) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

(5) This section shall not apply to the distribution of the property of a person who has died before June 26, 1941.

(6) This section shall not apply in the case of wills, living trusts, deeds or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this section, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

(7) This section shall be so construed as to make uniform the law in those states which enact it.

(8) This section may be cited as the "Uniform Simultaneous Death Act."

COMMENT: This is the Uniform Simultaneous Death Act as adopted in Wisconsin; it is the same as 237.10.

851.61 DECEDENT DEVOLUTION OF UNITED STATES OBLIGATIONS IN BENEFICIARY FORM. Where any resident of this state dies

possessed of any bonds or certificates of indebtedness of the United States of America which are registered in his name, payable on death to another, the unqualified ownership thereof and of the proceeds which may be derived therefrom shall, on the death of the original owner, belong to such named alternate payee, any law of this state to the contrary notwithstanding.

COMMENT: This is 237.11 unchanged.

CHAPTER 852

INTESTATE SUCCESSION

852.01 Basic rules for intestate succession.
852.03 Related rules.
852.05 Status of illegitimate persons for purpose of intestate succession.
852.09 Assignment of home as part of share of surviving spouse.
852.11 Advancement in intestate estate.
852.13 Right to renounce intestate share.

SUMMARY OF CHAPTER: (1) This chapter replaces chapter 237 on descent and 318.01 on distribution, with a single law governing the transfer of both real and personal property. Although the general pattern of 237.01 is retained, some changes are involved. This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Accordingly, unless there is issue by a prior marriage, the surviving spouse will receive the first $25,000 plus a share of any excess; this is an expansion of the concept in existing 318.01. This provision also saves the cost of guardianship if minor children are involved, unless the estate exceeds $25,000 after allowances.

(2) With greater mobility of population, ties with remote relatives are weakened. Inheritance by collateral relatives is therefore limited to those claiming through the grandparents. This limitation serves to simplify proof of heirship and also prevent will contests by remote relatives.

(3) This chapter requires that an heir survive the intestate decedent by 72 hours in order to take. This prevents double probate in the common accident situation and in some cases serves to keep the property in the family. The provision is in line with the common practice of testators

to require beneficiaries to survive a stated period to take, and is patterned on a proposal under study by the National Conference of Commissioners on Uniform State Laws.

(4) Instead of the existing law which gives the homestead to the surviving spouse for life or until remarriage, the surviving spouse has a right to the home in fee by applying the value of the home against the spouse's share in the total estate. The spouse thus has a marketable interest, and the real property is not tied up. On the other hand, the spouse does not get a greater share of the estate by reason of the presence or absence of a home.

852.01 BASIC RULES FOR INTESTATE SUCCESSION. (1) Who are heirs. The net estate of a decedent which he has not disposed of by will, whether he dies without a will or with a will which does not completely dispose of his estate, passes to his surviving heirs as follows:

(a) To the spouse:

1. If there are no surviving issue of the decedent, the entire estate;

2. If there are surviving issue all of whom are issue of the surviving spouse also, the first $25,000 (reduced, in case of partial intestacy, by any amount given the spouse by the will) plus one-half of the balance if there is only one surviving child and no surviving issue of a deceased child, or if only the issue of one deceased child survives, but one-third of the balance in other cases; property distributed to satisfy the dollar amount under this provision is valued at current fair market value at time of distribution;

3. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the estate if there is only one surviving child and no issue of a deceased child, or if only the issue of one deceased child survives, and one-third of the estate in other cases.

(b) To the issue, the share of the estate not passing to the spouse under the preceding provisions, or the entire estate if there is no surviving spouse; if the issue are all in the same degree of kinship to the decedent they take equally, but if they are of unequal degree then those of more remote degrees take by representation.

(c) If there is no surviving spouse or issue, to the parents or parent.

(d) If there is no surviving spouse, issue or parent, to the brothers and sisters and the issue of any deceased brother or sister by representation.

(e) If there is no surviving spouse, issue, parent or brother or sister, to the issue of brothers and sisters; if such issue are all in the same degree of kinship to the decedent they take equally, but if they are of unequal degree then those of more remote degrees take by representation.

(f) If there is no surviving spouse, issue, parent or issue of a parent, to the grandparents or grandparent.

(g) If there is no surviving spouse, issue, parent, issue of a parent, or grandparent, to the issue of the grandparents in the nearest degree of kinship to the decedent equally and without representation.

(2) Requirement that heir survive decedent for 72 hours. If any person who would otherwise be an heir under sub. (1) dies within 72 hours of the time of death of the decedent, the net estate not disposed of by will passes under this section as if the dying person had predeceased the decedent. In any case where the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by at least 72 hours, it is presumed that such person died within 72 hours of the decedent's death. In computing time for purposes of this subsection, local standard time at the place of death of the decedent is used.

(3) Escheat. If there are no heirs of the decedent under subs. (1) and (2), the net estate escheats to the state to be added to the capital of the school fund.

COMMENT: This section replaces the following Wisconsin statutes on descent and distribution: 237.01, 237.02, 318.01, and 233.01 and 233.23 insofar as applicable to the intestate situation. In general this section

follows the existing pattern. However, it makes four significant changes amplified below: (1) it increases the share of the surviving spouse if there is no issue by a prior marriage, in order to simplify settlement of small intestate estates; (2) it eliminates present obsolete distinctions dependent upon the type of property owned by the decedent, in the interests of fairness and uniformity; (3) it limits inheritance by remote collateral relatives, to facilitate handling of estates by eliminating need to trace remote relatives, to prevent inheritance by virtual strangers, and to cut down on will contests; and (4) it requires that an heir survive the decedent by 72 hours in order to inherit in line with provisions often found in wills, in order to avoid litigation in the common accident situation and to prevent double probate on the same property.

Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes, merely by executing a will. But the fact remains that many people, the majority in fact, do not make wills and that human inertia is such that the situation is not likely to change greatly. Most people rely on the "will" made for them by law — the law of intestate succession. Hence any law of this kind must attempt to anticipate the wishes of the people who die having made no testamentary disposition. Any such statute suffers because it is difficult to anticipate human desires which are unexpressed (by definition) and which are bound to vary with many facts and circumstances which cannot be incorporated into a statute without making it unduly complex. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for the man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be subjected to criticism because it does not satisfactorily meet some unusual situation. There is no such person as the "average" intestate. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should therefore be designed with the moderate and small estate in mind. Secondly, existing statutes were drawn over a century ago when the family was more interdependent and attitudes toward ownership by a widow were different from modern views. Modern wills give a better clue to the proper pattern of descent than do the present statutes. Nevertheless, existing statutes are a convenient starting point if only because they are familiar, have been accepted by people for years, and therefore affect attitudes.

This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior

centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

Sub. (1) (a) increases the amount passing to the widow where there is surviving issue of the same marriage, by giving the widow the first $25,000 out of the net estate. This is based on several grounds: (1) where the estate is small and the children are minors, it is desirable to give the entire estate to the widow, with the minor children protected by the substantial allowances which the court can make for them under 861.35 if this appears necessary for any reason; (2) where the estate is small, most testators wish prior provision to be made for the widow ahead of grown children; (3) with the elimination of the homestead right as such, the young widow needs a more substantial share in the balance of the estate. This $25,000 feature is not available if there are issue by a prior marriage, just as 318.01 (1) is presently qualified in the same manner. Providing the spouse with the first $25,000 presents an administration problem. As of what date is the property assigned to this share to be valued, date of death or date of distribution? If the property in the estate fluctuates between date of death and date of distribution, this will make a difference. The statutory language requires that the property be allocated at its value at time of distribution, in order to satisfy the share. But note that 852.09 (1) specifically treats inventory value as prima facie evidence of the value of the home. This approach protects the surviving spouse particularly against deflation in values, and the spouse at the same time benefits in case of inflation by the fractional share. It should be noted that this same problem is inherent in 318.01 (1) (b) and does not create difficulty.

The Wisconsin statute on descent (237.01) does not treat the surviving spouse as an heir to nonhomestead realty if there are issue of the decedent. However, the dower section (233.01) and the curtesy section (233.23) in effect provide an intestate share for the spouse in such a situation. Since dower is reduced to an elective share in this revision, and real and personal property are treated alike, provision of an intestate share in both kinds of property for the spouse is a formal rather than substantive change.

Sub. (1) (a) 3 provides a more limited interest for the spouse if the decedent is survived by both the spouse and issue by a prior marriage. This follows the pattern in 318.01 and is a recognition of the need for greater protection for the children in this situation. The surviving spouse has no duty of support unless he or she had formally adopted the children. In this situation the surviving spouse is given only a fractional interest in the estate and not the first $25,000. It should also be noted that the provision for the first $25,000 does not extend to an election against a will, in which case the elective share statute gives only a fractional interest.

Sub. (1) (b) is the same as 237.01 (1), and sub. (1) (c) is the same as 237.01 (2). Likewise subsection (1) (d) is the same as 237.01 (3). However, sub. (1) (e) makes a slight change in existing law. Where decedent is survived by nieces and nephews all of the brothers and sisters being dead, 237.01 (4) has been held to govern rather than 237.01 (3). Schneider v. Payne, 205 Wis. 235, 237 N.W. 103 (1931). This result is not obvious on the face of the existing statute. Sub. (1) (e) provides the same equal distribution where only nephews and nieces survive. Suppose, however, that one niece predeceases the intestate and leaves surviving issue; under the existing statute such issue would not share because they are not of equal degree and there is no representation under 237.01 (4). Estate of Szaczywka, 270 Wis. 238, 70 N.W.2d 600 (1955). Sub. (1) (e) allows representation on the theory that issue of brothers and sisters should be given the same pattern of distribution as issue of the decedent.

Sub. (1) (f) is new. It is, however, only declaratory of existing Wisconsin law, since a grandparent is the nearest in degree if decedent left no surviving spouse, parents, issue, brothers or sisters, or issue of brothers and sisters. See Estate of Kirkendall, 43 Wis. 167 (1877) where a grandparent inherited ahead of aunts and uncles.

Sub. (1) (g) limits inheritance to relatives claiming through the intestate's grandparents. More remote relatives are excluded. In recent years there has been a trend toward limiting inheritance by remote relatives, under the intestacy laws. New York, by Chapter 712 effective Sept. 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparents. The same limitation was proposed in the Model Probate Code in 1946 and adopted in slightly different form in Pennsylvania in 1947 and in Indiana in 1953. See Report No. 1.1B of the New York Commission on Estates.

This section contains no provision comparable to 237.01 (5) and (6). These subsections deal with a very specialized problem and were intended to preserve ancient notions of ancestral property and inheritance by the whole blood relatives. The precise purpose of sub. (5) and (6) of the existing statute appears vague in modern times. As a restriction on inheritance by brothers and sisters of the half blood, it is consistent with 237.03; but 852.01 eliminates any such restriction on inheritance by the

half blood. As a restriction on inheritance by the surviving parent, it may have had greater utility in an era of high infant mortality; but the requirement that the child die under age seems meaningless otherwise. As an ancestral property notion, it seems ineffective; if there is an only child, the surviving parent would take and the property passes outside of the ancestral line. If the early interpretation of the existing statute as a redistribution of the deceased parent's estate is a clue, this may have been a crude substitute for a will clause requiring survival for a limited time (like the clause requiring any beneficiary to survive the final decree of distribution). Probably the purpose of the existing statute was to prevent an increase in the share passing to the widow. If the deceased child is a minor, probably the other children will be minors also and the widow will be charged with their support anyway. Concern that the widow not receive too large a share of an estate is not a modern public policy. If the husband wishes to prevent this, or to avoid the possibility of double taxation and double administration expense, he can do so by a carefully drawn trust instrument providing for the children until majority.

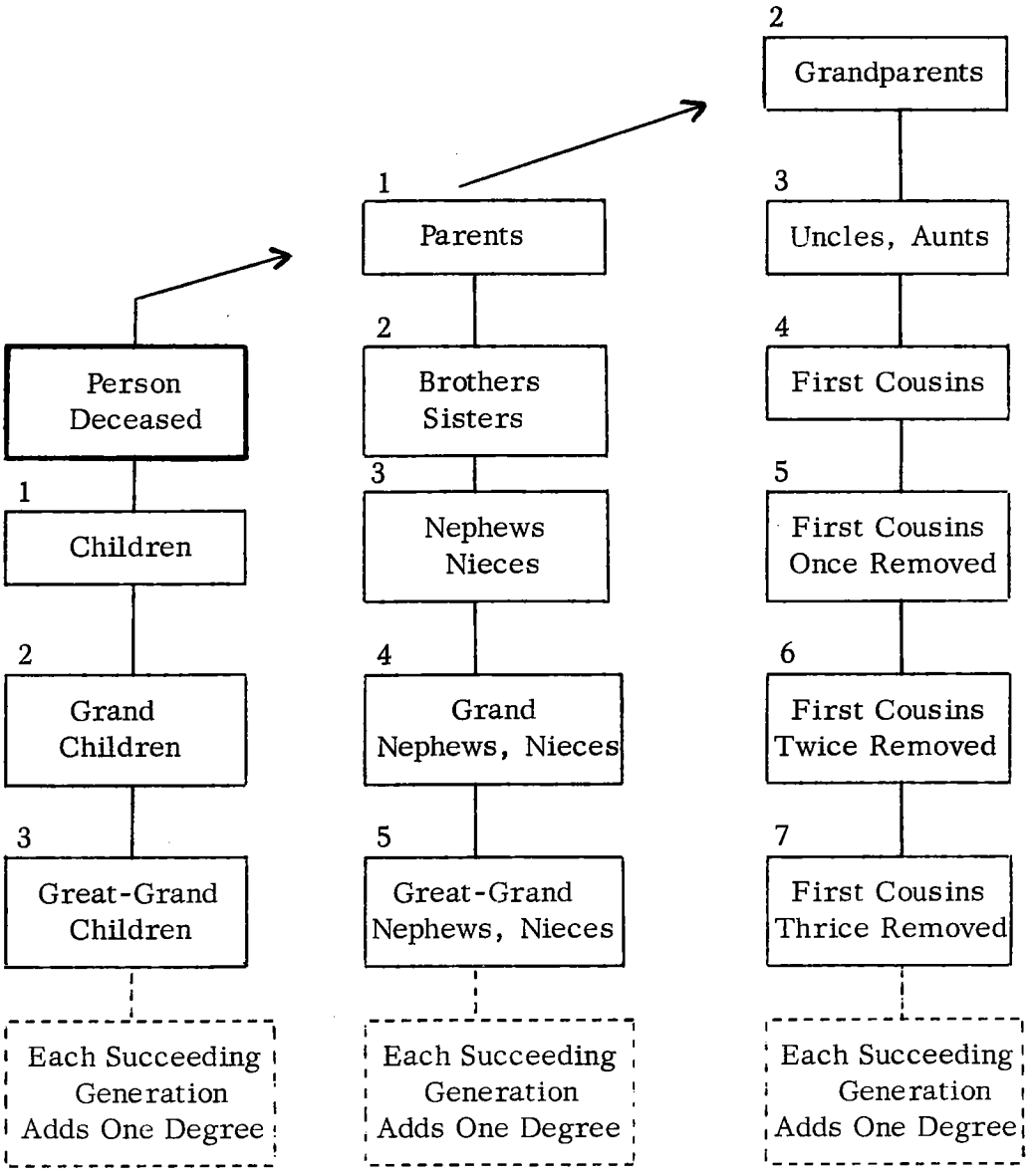
Sub. (2) is new. It is an extension of the purposes behind the Uniform Simultaneous Death Act. When two related persons die within a short time, there is often litigation to determine the sequence of deaths for purpose of inheritance. The frequency of automobile fatalities or airline crashes involving a married couple or parents and children makes the problem serious. The Uniform Act is only a partial solution. It does not prevent litigation because the act is inapplicable if the sequence of deaths can be established by evidence. Moreover, the modern will usually contains a clause requiring beneficiaries to survive the testator for a stated period (six months is common); these clauses eliminate the need for a second administration of the same property and assure that the property will pass to the decedent's relatives. This subsection achieves the same objectives for a person dying intestate. For example, husband and wife are killed in an automobile accident, the wife surviving for several hours. All or a substantial interest in the husband's estate would normally pass to the wife by intestacy. Without sub. (2), the same property would be subject to a second administration as the estate of the wife. If there were no children, the same property in the wife's estate would then go to her family. Sub. (2) prevents these results; the property would go not to the wife's estate but to the next in line of the heirs of the husband (his children, or if none, his parents, brothers and sisters, etc.).

Sub. (3) provides for escheat if the decedent leaves no surviving relatives within the preceding subsections; it makes no change in the present rule of 237.01 (7) and 238.136.

852.03 RELATED RULES. (1) Meaning of representation. When representation is called for by s. 852.01 (1) (b), (d) or (e), succession is accomplished as follows: the estate is divided into as many shares as

there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner until each part passes to a surviving heir.

(2) Computing degrees of kinship. The degree of kinship is computed according to the rules of the civil law, as follows:



(3) Relatives of the half blood. Relatives of the half blood take the same share as if they had been of the whole blood.

(4) Posthumous heirs. A person may be an heir under s. 852.01 even though born after the death of the decedent if such person was conceived before decedent's death.

COMMENT: This section involves several minor changes in the Wisconsin law, in order to modernize it.

Sub. (1) defines "representation" in greater detail than 237.07. When read in conjunction with 237.01 (1), this definition has been interpreted variously when applied to an unusual case like Maud v. Catherwood, 67 Cal.App.2d 636, 155 P.2d 111 (1945), noted 33 Cal.L.Rev. 324 (1945). There decedent's children all predeceased him. He was survived by several grandchildren and by 2 great-grandchildren whose parents also predeceased decedent. If the pattern of stirpital distribution were determined at the level of the living grandchildren, each of the great-grandchildren and each of the four surviving grandchildren would take one-sixth; but because the court determined representation at the level of the children, one great grandchild took one-fourth, one grandchild took a fourth, 3 grandchildren took one-eighth, and the other great-grandchild took an eighth. The California statutes were similar to 237.01 and 237.07. See also Note (1942) 140 A.L.R. 1141. The proposed definition is based on the Model Probate Code, s. 22 (c) and prevents such anomalous result. Since the point has never been decided in Wisconsin, this section would also eliminate litigation.

Sub. (2) is the same as the first sentence of 237.03 but a chart of relationship has been added for convenience.

Sub. (3) eliminates one of the last remnants of the ancient concept of "ancestral" property. The modern tendency has been in the direction of eliminating all distinctions between relatives of the half blood and of the whole blood. At a time when an adopted person has been accorded full rights, although sharing no blood relation with the intestate, it seems anomalous to limit inheritance by persons related through only one ancestor. Relationship is more a matter of interdependence and sharing than of blood. Thus if a husband has a child A by a first marriage, then remarries and with his second wife adopts a child B and later a child C is born to the couple, property inherited by C from the mother cannot on the death of C be inherited by A (who is of the half blood) but can be inherited by B (adopted but no blood relation). Moreover, if the property had originally been placed by A's father in joint tenancy with his 2nd wife and passed to her on his death and from her to C, a literal reading of the present statute would treat this as "ancestral" property of the 2nd wife rather than the husband. Our court very early rejected the application of the ancestral limitation in this section to personal property other than

heirlooms, because of the difficulty of tracing. Estate of Kirkendall, 43 Wis. 167 (1877).

Sub. (4) is the same in substance as the second part of 237.07. However, the present wording is improved by making the birth relate to the death of the intestate rather than "parents". Thus a niece or nephew born after the death of decedent might share in the estate of an intestate by representation of a deceased brother or sister.

852.05 STATUS OF ILLEGITIMATE PERSON FOR PURPOSES OF INTESTATE SUCCESSION. (1) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (a) his mother, and (b) his father if the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him.

(2) Property of an illegitimate person passes in accordance with s. 852.01 except that the father or his kindred can inherit only if the father has been adjudicated to be such under ss. 52.21 to 52.45.

(3) This section does not apply to a child legitimated by the subsequent marriage of his parents under s. 245.25, and status of an illegitimate child who is legally adopted is governed by s. 851.51.

COMMENT: The problem of illegitimate children is growing in incidence. Various related statutes minimize the scope of illegitimacy. Thus children born during the marriage are presumed to be legitimate — 328.39; an illegitimate child becomes legitimate upon the subsequent marriage of the parents — 245.25; and a child born to a married couple is legitimate even though the marriage is subsequently declared void — 245.25. Moreover, most illegitimate children become adopted, and their status becomes that of children of the adoptive parents. Nevertheless, it is important to modernize our statutes on inheritance by, from and through illegitimate persons. Although illegitimacy is still against public policy, any change in the inheritance laws will not promote illegitimacy but merely protect the innocent child.

The existing rules of inheritance under 237.05 and 237.06 are as follows:

(1) The child can inherit from his mother, but not from her kindred.

(2) The child can inherit from the father only if paternity is established by written and witnessed acknowledgment by the father, an adjudication of paternity, or admission in open court; he can not inherit from paternal collateral relatives.

(3) Property of the illegitimate child is inherited by his mother and her relatives only. Although 237.05 contains no express exception, it seems clear that if the illegitimate child were to leave a surviving spouse or children, they should inherit under 237.01; other courts have so construed similar legislation. Pulliam v. Churchman, 108 Okla.290, 236 P. 875 (1925).

The existing statutes were drafted with the young child in mind. This undoubtedly accounts for the failure to consider inheritance by a surviving spouse of the illegitimate person. It also accounts for failure to consider rights of issue of the illegitimate to inherit from the mother and from the acknowledged father of the illegitimate. All that 237.06 does is to make the illegitimate child an heir; it says nothing about his issue taking as heirs representing him. Probably the court would construe 237.06 as equivalent to legitimation so far as inheritance by issue of the illegitimate person from the parents might be involved.

The ancient stigma attaching to illegitimacy bars inheritance from collateral relatives, either through the mother or through the father. If we bear in mind that the intestate succession can be avoided by a will, along with the changing social attitude toward the illegitimate child, the right of the illegitimate child to inherit from collateral relatives ought to be expanded. It is not uncommon for maternal grandparents to raise an illegitimate child without adoption. Accordingly, this section allows inheritance through the mother in any case and through the father in situations where the father has been established as such in the manner provided in sub. (1). The language in sub. (1) dealing with methods of proof of paternity is based on 237.06 but no longer requires a witness to a written acknowledgment signed by the father. That language has been given a liberal interpretation by the Supreme Court, a continuation of which should be assured by use of the same language in this section.

Sub. (2) broadens the scope of inheritance from the illegitimate child. As previously noted, 237.05 is too limited and may, if unaltered, create interpretation problems for the courts. This section makes applicable the normal rules of inheritance from an illegitimate child with the single exception that the father or his kindred can inherit only if the father has been formally adjudicated as such. While logic might seem to require that the father and his kindred should inherit in the other situations where the illegitimate may inherit from the father and his kindred under sub. (1), this might open the door to fraud; hence the limitation.

As already noted, the incidence of this section will in fact be fairly small. Most illegitimate children are either legitimated by marriage of the parents or adopted by new parents. Sub. (3) makes clear that normal rules govern such cases.

The Committee carefully weighed the possibility that this section might encourage false claims, but decided this was not likely enough to justify unfair treatment in valid cases. Where substantial wealth is

involved, a will or trust document is almost always executed. The objection that inclusion of illegitimate children may complicate proof of heirship and giving notice was also considered by the committee. This objection was also considered minimal; the possible presence of an illegitimate child is already a risk in case of the estate of the father or mother under existing law.

852.09 ASSIGNMENT OF HOME AS PART OF SHARE OF SURVIVING SPOUSE. (1) If the intestate estate includes an interest in a home, the interest of the decedent shall be assigned to the surviving spouse as part of his or her share under s. 852.01 unless the surviving spouse files with the court at or before the hearing on the final account a written request that the home not be so assigned. The interest of the decedent in the home is valued with all liens deducted. Inventory value is prima facie the value of the interest in the home. If such value exceeds the share of the surviving spouse under s. 852.01, the court may either (a) assign the interest in the home to the surviving spouse subject to a lien in favor of the other heirs for their respective interests in such excess, or (b) assign the interest in the home to the surviving spouse upon payment by the latter to the personal representative of the amount by which the value of the interest exceeds such share of the spouse.

(2) Home means any dwelling in the estate of the decedent which at the time of his death the surviving spouse occupies or intends to occupy; if there are several such dwellings, any one may be selected by the surviving spouse. It includes but is not limited to any of the following: a house, a mobile home, a duplex or multiple apartment building one unit of which is occupied by the surviving spouse, or a building used in part for a dwelling and in part for commercial or business purposes. The home includes all of the surrounding land, unless the court in its discretion sets off part of the land as severable from the remaining land; the court may set off for the home so much of the land as is necessary for a dwelling, on petition of the surviving spouse or of any interested

person that part of the land is not necessary for dwelling purposes and that it would be inappropriate to assign all of the surrounding land as the home; in determining whether to allow a division of the land and in determining how much land should be set off, the court shall take into account the use and marketability of the parcels set off as the home and the remaining land; the court shall deny a petition for division unless division is clearly appropriate under the circumstances and can be made without prejudice to the rights of all persons interested in the estate.

COMMENT: This section is new. The surviving spouse receives the homestead under 237.02 for life or until remarriage, if there is surviving issue. This is unsatisfactory because the surviving widow often finds the house too large for her needs and it cannot be sold without the consent of the remaindermen. Moreover, the existing law is inequitable because the "homestead" may vary from an inexpensive home to a large hotel or a valuable combination residence-commercial property. This section would leave the choice to the widow or widower. If the property is unusually valuable, this is deducted from the share passing to the surviving spouse, so that nothing is gained at the expense of the children. Moreover, the homestead is taken in fee, rather than in terms of a limited and unmarketable life estate. This allows subsequent sale or mortgage as might be desirable in the future as circumstances change.

If decedent is survived by a spouse and no issue, there is no need for application of this section, because the surviving spouse takes the entire estate, including the homestead, under 852.01 (1) (a) (i). Since the share of the surviving spouse in other cases has been increased under 852.01, that share will normally be adequate to include the value of the home. However, there may be situations in which the value of the home exceeds the spouse's share. The last sentence of sub. (1) empowers the court with discretion to adopt either of two methods for dealing with the situation; the court has to weigh both the interest of the surviving spouse and protection of the issue.

This section places the burden on the spouse of rejecting the home; otherwise it will be assigned as part of the share. The Committee felt that normally the spouse will want the home and that, if the home subsequently proves undesirable, it can be sold by the spouse.

This section is open to the criticism that it is dependent upon accurate appraisal. The Committee believed that in this State, where inheritance taxes are also dependent upon appraisal, the probate courts can be relied upon to maintain a fair and accurate system of appraisal. Any heir who feels that the value placed on the home is unfairly low and thus favors the surviving spouse can raise the objection in the probate proceedings prior

to the final account.

Sub. (2) is designed to get away from existing difficulties involved in the definition of "Homestead." Since the intent of the statute is to provide a home for the surviving spouse, the latter should have the choice. Because the value will be charged against the share of the surviving spouse anyway, it is no longer necessary to be concerned about kinds of properties and commercial uses. In dealing with area problems, the preference in modern times ought to be in favor of keeping the land in a single unit rather than dividing it, as is necessary under existing law in the case of a farm part of which is a homestead. If the surviving spouse does not have a large enough share to take the entire farm as a unit, the court may divide the land but the burden is on the proponent to demonstrate that such a division is fair to all the heirs.

The section applies to any "interest" the decedent has in the home, whether outright ownership, an equity under a land contract, a lease, a unit in a condominium, a cooperative apartment, etc.

This section does not affect the problem of exemption from claims of creditors (the existing concept of "exempt homestead"); if the estate is insolvent, exemption from creditors is governed by 861.41.

852.11 ADVANCEMENT IN INTESTATE ESTATE. (1) When gift is an advance. A gift by the decedent during his lifetime to an heir is an advance against his intestate share, to be taken into account by the court in the final judgment, only if there is either a writing by the decedent clearly stating that the gift is an advance (whether or not such writing is contemporaneous with the gift) or the heir states by writing or in court that the gift was an advance.

(2) Death of advancee before decedent. If a gift is made during lifetime to a prospective heir and such gift would have been an advance under sub. (1) but for the death of the prospective heir prior to the decedent or within the time limited by s. 852.01 (2), the amount of the advance shall be taken into account in computing the share or shares of the issue of the prospective heir to whom the gift was made, whether or not the issue take by representation.

(3) Valuation. If any gift is an advance, its value shall be determined as of the time when the heir comes into possession or enjoyment of the property advanced, or the time of death of the decedent if that occurs first.

COMMENT: This section replaces 318.24 – 318.29. It makes little change in existing law. Sub. (1) corresponds to 318.27. It is based on the premise that gifts during lifetime, typically by a parent to a child, are not intended as advances but as separate gifts. If an advance is intended, it must be established by written proof. One minor change in the law is that of allowing the decedent to charge the gift in writing after the gift is made; the existing statute has been interpreted to allow a writing by the decedent only if contemporaneous with the gift, so that an entry in personal records at a time subsequent to the gift is not sufficient. Of course the heir can acknowledge the advance at any time and may under this section do so by oral statement in court. The statute does not apply to a loan to an heir, which may be proven without a writing in some situations.

Distinctions in the existing statute based on the kind of property advanced, real or personal, are immaterial under this section which treats real and personal property alike.

Sub. (2) is substantially the same as 318.28 but makes clear that the advance is charged to children of a deceased child to whom advances have been made even though the distribution is to all grandchildren other than by representation (where all children predecease the decedent, grandchildren do not take by representation).

Sub. (3) corresponds to the last sentence of 318.27 on value, but with a minor change.

Because the probate branch of the county court has complete jurisdiction in Wisconsin over settlement of an estate, 318.29 has been omitted as superfluous. Likewise 318.25 states such an obvious proposition of the law of advancement that it has not been embodied in this section. Omission of these sections is not intended to change the law in any respect.

Technically the property advanced is not part of the estate for purposes of administration. It is merely considered for purposes of computing the shares of the heirs as though it were part of the estate, to be deducted from the share of the heir to whom the advance was made. Hence 318.24 has been omitted. The treatment of the advance is implicit in the wording of the new sub. (1).

852.13 RIGHT TO RENOUNCE INTESTATE SHARE. Any person to whom property would otherwise pass under s. 852.01 may renounce all or part of such property by filing a signed declaration of such renunciation with the court and serving a copy on the personal representative within 180 days from granting of letters to the personal representative; but the court may grant additional time for cause shown by order entered within or after such 180 day period. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced

property or part passes as if such person had predeceased the decedent. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the court a copy of the assignment or contract and serves a copy on the personal representative.

COMMENT: This section replaces 237.01 (8) and makes no change in substance. A slight change in procedure is made, however. The 180 day period in the existing statute dates from "receiving notice of the death of the intestate"; since there is no official notice sent to heirs, this introduces some uncertainty in the law. This section dates the 180 day period from the granting of letters. It also allows the court to extend the time for cause shown; this is limited to a reasonable time. The heir who renounces must not only file with the court but also serve a copy on the personal representative.

The last sentence is new. It is intended to deal with the problem raised in the recent case Estate of Wettig, 29 Wis.2d 239, 138 N.W.2d 206 (1965).

CHAPTER 853.

WILLS.

853.01 Capacity to make or revoke a will.
853.03 Execution of wills.
853.05 Execution of wills outside the state or by nonresidents within this state.
853.07 Witnesses.
853.09 Deposit of will in county court during testator's lifetime.
853.11 Revocation.
853.13 When will is contractual.
853.15 Equitable election if will attempts to dispose of property belonging to beneficiary.
853.17 Effect of will provision changing beneficiary of life insurance or annuity.

853.19 Advancement in testate estate.

853.21 Renunciation of gift under will.

853.23 Renunciation of power of appointment or appointed property.

853.25 Unintentional failure to provide for issue of testator.

853.27 Rights of issue of beneficiary dying before testator (lapse).

853.29 After-acquired property.

853.31 Presumption that will passes all of testator's interest in property.

853.33 Gift of securities construed as specific.

853.35 Non-ademption of specific gifts in certain cases.

SUMMARY OF CHAPTER: (1) No major changes in execution of wills are contemplated. However, oral (nuncupative) wills are no longer valid.

(2) In line with the trend in other states a uniform minimum age of 18 years is provided.

(3) The law of revocation is codified (except for dependent relative revocation). Two minor changes are involved: a subsequent marriage generally revokes a will, and revival of a revoked will is permitted under special circumstances.

(4) The existing statutes providing for a child born after execution of the will or omitted by mistake are modified to give the court discretion as to the kind and amount of share the child should receive; and it is no longer necessary to mention the child in the will in order to prevent an objection to probate.

(5) The provisions on equitable election dealing with a will which mistakenly disposes of nonprobate property (such as joint tenancy assets) are clarified.

(6) The burden of establishing that any will is made under a contract not to revoke is extended to joint wills.

(7) A totally new provision ameliorates the effect of ademption by extinction if specifically devised or bequeathed property is sold, condemned or destroyed by fire or changed by corporate action.

(8) The administrative features of deposit of a will during testator's lifetime are changed, with provision for discretionary microfilming of deposited wills and destruction of originals after 25 years.

853.01 CAPACITY TO MAKE OR REVOKE A WILL. Any person of sound mind 18 years of age or older may make and revoke a will.

COMMENT: This section replaces 238.01 and 238.05 and lowers the minimum age for testamentary capacity to 18 years, on a uniform basis. The existing age requirement is 21 with exceptions for a married woman

of 18 or older and for any minor who is in the military and naval forces.

The reasons for recommending a uniform lower age are as follows: (1) Minors today are increasingly owners of substantial amounts of property. In an era when accumulation of wealth was the major means of acquiring an estate, few, if any, men acquired an estate before they reached 21. Today the tax advantages of inter vivos gifts have induced parents and grandparents to make transfers, outright or in trust, for minors. Trusts created to comply with IRC s. 2503 (c) must either provide for payment to the minor's estate in event of death before 21 or give the minor a testamentary power of appointment (although under existing tax regulations it is not required that the minor be able to exercise the power under state law). (2) Marriage of minors is increasingly frequent. Patterns of marriage and raising a family have changed drastically. There is more need for a minor to be able to make a will to provide for a changing family situation. (3) Our present law contains inconsistencies which are neither logical nor sound. The exceptions for the married woman of 18 and for a minor in military service can, of course, be rationalized. The exception for the married minor woman, which is apparently unique to Wisconsin, enables her to avoid the intestate laws which would give the entire estate to her husband as heir if there are no children, or to create trusts for children if there are any. But the married man under 21 has just as much need for estate planning as his minor wife. The exception for young men in the military forces is an outgrowth of historic accident and has been attacked as historically unsound. 21 Mod.L.Rev. 423 (1958). Wisconsin is one of only six states which lower the age for soldiers and sailors. Although the special exception for persons in military service can be justified on grounds of the increased peril, more minors are killed in automobile accidents than in the performance of military duties. (4) Minors can avoid existing limitations by resorting to legal devices which bypass probate: insurance, joint bank accounts, government bonds with beneficiary designations, etc. (5) With modern public education, a young person of 18 ought to have sufficient judgment to make a testamentary disposition.

Eighteen states have already recognized these changed conditions and set the age of 18 as the minimum age requirement. This also is the age adopted in the Model Probate Code.

That the capacity to revoke a will is the same as the capacity to make a will is implicit in our existing statute and is the basis for the last sentence of 238.14 ("The power to make a will implies the power to revoke the same.") which was added in 1878 to eliminate any possible argument that a married minor woman could make a will but not revoke it.

853.03 EXECUTION OF WILLS. Every will in order to be validly executed must be in writing executed with the following formalities:

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

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

COMMENT: This section makes no change in the Wisconsin law relating to attested wills, with the possible addition of the requirement that the proxy signature of another person for the testator be in the presence of the witnesses or be acknowledged in their presence, and a very minor change in the signature of the witnesses, who no longer are required to subscribe but merely to sign. The section abolishes the use of oral wills as a permissible method of testamentary disposition.

Wisconsin has fewer formalities for execution of wills than almost any other state. It is not necessary that the testator publish the will, i.e., declare the document to be his will in the presence of the witnesses: Allen v. Griffin, 69 Wis. 529, 35 N.W. 21 (1887); Estate of Tollefson, 198 Wis. 538, 224 N.W. 739 (1929); Estate of White, 273 Wis. 212, 77N.W. 2d 404 (1956). Nor is it necessary that the testator either sign in the presence of the witnesses or acknowledge the signature in their presence: Will of Wnuk, 256 Wis. 360, 41 N.W.2d 294 (1950); Estate of McCarthy, 265 Wis. 548, 61 N.W.2d 819 (1953), or that they even see the signature: Will of Johnson, 225 Wis. 140, 273 N.W. 512 (1937). In fact, it is difficult to determine what the witnesses are attesting in a case like Estate of White, above, where the testatrix did not sign in the presence of the witnesses, nor indicate to them that it was a will she wanted them to sign. Our court has held that "attested" as used in 238.06 is thus synonymous with "subscribed": see Estate of White, above, and Skinner v. Am. Bible Society, 92 Wis. 209, 65 N.W. 1037 (1896). This statute uses only the word "signed" in sub. (2). It is inconsistent to allow the testator to sign any place on the will but to require that the witnesses sign at the end. Normally, of course, they will subscribe or sign at the end of the will. In all cases where a formal attestation clause is part of the will document, the witnesses are attesting to all facts recited therein, including capacity of the testator as well as matters relating to execution.

Although normally, where the testator signs in his own handwriting, the signature need not be made or acknowledged in the presence of the witnesses, no Wisconsin case has held that a proxy signature may be made by another person for the testator outside the presence of the witnesses. Hence the requirement of sub. (1) (b) that such a signature be made or acknowledged in the presence of the witnesses may be the exist-

ing Wisconsin law. In any event, it seems like a reasonable safeguard for the proxy signature. Under this statute the person signing for the testator could be one of the two witnesses. The requirement of sub. (1) (b) is patterned after Penn. Stat. title 20, s. 180.2 (3). In most states such a separate requirement is unnecessary because every signature by the testator must be made or acknowledged in the presence of the witnesses.

A signature in which the testator participates, as by touching the pen guided by another, is a signature by him. Will of Wilcox, 215 Wis. 341, 254 N.W. 529 (1934). Hence such a signature would be within sub. (1) (a) and not a proxy signature within sub. (1) (b). Nor would the proposed statute change the existing law that a testator may sign a will by mark or by proxy signature even though he is able to write: Will of Mueller, 188 Wis. 183, 205 N.W. 814 (1925) (holding what is now 990.01 (38) inapplicable to signature for purposes of the wills statute, 238.06).

This section abolishes nuncupative (oral) wills entirely. Such wills are now permitted by 238.16 — 238.17 under very limited circumstances. Our existing statutes, except for the limitation in 238.16 (2) which was added in 1955, were copied from the 1838 — 39 Territorial Laws, which in turn were copied from the English Statute of Frauds (1677). In England oral wills were abolished by the Statute of Wills in 1837, except for soldiers and sailors. Although a number of the states still retain the old provisions regarding nuncupative wills, 8 states prohibit oral wills and 10 other states allow oral wills only in the case of soldiers and sailors.

The restrictions in the existing statutes are such that nuncupative wills have extremely limited effectiveness, anyway. Those restrictions, which originated in the 17th century, make little sense in a modern setting and are illogical in the distinctions drawn. The courts have demonstrated a hostile policy toward oral wills, and all of the appellate cases in Wisconsin have invalidated such wills on one ground or another.

The distinctions drawn under the existing statute cannot be defended on rational grounds. An oral will may dispose of a million dollars in stocks and bonds to a wife, but not transfer a vacant lot or the home to her. A testator may by oral will give his wife an unlimited amount of personal property but may give one of his children no more than $500. Where the testator takes sick at home and is moved to a hospital where he makes the oral will while dying, the will is ineffective; but if he takes sick away from home, the will is good.

The statutory permission for oral wills is a product of an age of illiteracy, when legal services were often not available and people who were not part of the landed aristocracy did little planning for death. Such wills are obsolete under present conditions. Abolition of the oral will should not result in unsettling expectations. Probably more people mistakenly believe that holographic wills are valid than believe oral wills are effective. In terms of fraud, there is just as much chance of fraud in the case of nuncupative wills as with holographic wills or written wills attested by one

witness, neither of which are valid in Wisconsin.

The special exception for soldiers' and sailors' wills is also obsolete. In the first place, the exception is seldom resorted to, and in the case of actual war conditions special statutes are enacted to ease formalities in the execution of wills (e.g., 235.255 (3) dispensing with witnesses, etc., for written wills of persons engaged in World War II). In the second place, the military services today provide legal services for both officers and enlisted men and urge them to execute wills. In the third place, the exception is hedged with strict requirements: the soldier must actually be engaged in military service during a state of war, and the sailor must be at sea. How these 17th century requirements fit personnel in supply positions, in the air defense, etc., can only lead to litigation.

It should be noted that abolition of nuncupative wills would not affect the validity of gifts causa mortis, which allow transfers of personal property in expectation of death when the gift is completed by delivery.

853.05 EXECUTION OF WILLS OUTSIDE THE STATE OR BY NON-RESIDENTS WITHIN THIS STATE. A will is validly executed if executed according to s. 853.03 or if executed in accordance with either of the following, provided that it is in writing: (a) the law of the place where the will is executed; or (b) the law of the place where the testator is domiciled at the time of execution of the will. Any such will has the same effect as if executed in this state in compliance with s. 853.03.

COMMENT: This section makes only minor changes in the Wisconsin law. It retains the existing choice of law provisions in general. It does, however, eliminate nuncupative wills; the existing exception for such wills was no doubt intended to preserve soldiers' and sailors' oral wills made outside the state. This exception has been dropped to accord with the recommendation that all nuncupative wills be treated as invalid.

The existing statute also contains a proviso that wills be in writing "subscribed" by the testator; since the only requirement of either 238.06 or 853.03 for wills executed within the state is that they be "signed" by the testator personally or by proxy, the requirement of subscription has been dropped. This section merely requires that the will be in writing and does not refer to signing by the testator, in order to allow the appropriate law to govern as to proxy signature if the testator does not personally sign. However, a nuncupative will reduced to writing by any person other than the testator would not meet the requirement of a writing.

Another possible choice of law would be testator's domicile at time of death, and some writers have advocated that it be an added choice. However, since a testator will rely at the time of execution on either

the law of the place of execution or the law of his domicile at that time, there appears to be no need to add this fourth choice.

1a 238.07 applies only to wills executed outside of Wisconsin. No such limitation is retained in this section. This is to permit a nonresident visiting in Wisconsin to execute a will in accordance with the law with which he is familiar. Normally this section will have its major incidence on wills executed in another state or country.

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

(2) No will is invalidated because signed by an interested witness; but, unless the will is also signed by 2 disinterested witnesses, any beneficial provisions of the will for a witness or his spouse are invalid to the extent that such provisions in the aggregate exceed in value what the witness or his spouse would have received had the testator died intestate. Valuation is to be made as of testator's death.

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

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

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

COMMENT: Sub. (1) makes no change in existing Wisconsin law. It merely states the obvious rules regarding competency. Sub. (2) adopts the general principle of 238.08 and 238.09 but makes some change in details of application. The language of this section is patterned on the Model Probate Code s. 46 (s. 3 of the Model Execution of Wills Act). The normal result of sub. (2) is to invalidate any excess of gifts under the will to a witness over the amount which the witness would have taken by intestacy. The alternative would be to invalidate the excess over "what the witness would have received had the will been disallowed". The Commit-

tee considered and rejected this alternative largely on the grounds of administrative convenience. It would make a difference only in the case where testator's last will, witnessed by a beneficiary and heir, revoked a prior will in which the witnessing heir was given less than the intestate share. This section eliminates difficulties of computation which arise where the witness is a residuary beneficiary under the prior will, as well as the need of establishing the prior will in order to determine its validity and what the witness would have received under it. 238.09 is ambiguous on this problem.

The provision of 238.09 that the beneficiary may recover his share of the devisees or legatees named in the will has been eliminated. The share saved to the witness or spouse is out of the provision made in the will itself for such witness or spouse, and there is no need to allow recovery out of the shares of other legatees or devisees. Under some circumstances 238.09 may result in real distortion of the testamentary scheme if the statute is literally applied.

Sub. (3) is new. It makes some change in the existing law.

Sub. (3) (a) merely codifies existing law. An executor may be a witness under both our existing statute and this section without being beneficially interested. Will of Lyon, 96 Wis. 339, 71 N.W. 362 (1897). The same would be true of a trustee, an attorney named in the will to handle the estate, or any other person whom the will directs the executor to employ. However, this ceases to be the case if the will expressly provides for special compensation greater than that usual for the particular services, as where the will names an executor and gives him a large legacy in payment for his services. The express provision of 238.08 that a mere charge on land for payment of debts does not prevent a creditor from being a witness has been eliminated as obsolete. This provision dates back to the old Statute of George II (1752) at a time when land was not subject to claims of creditors unless expressly charged by the will; land is today subject to creditors' claims, and omission of this provision is not intended to change the law in this regard.

Sub. (3) (b) in intended to take care of a special problem. It permits a person to act as witness where he would benefit under the anti-lapse statute or under an alternative gift by the will if another beneficiary predeceases the testator. The interest in such a case is so contingent that it ought not to disqualify.

853.09 DEPOSIT OF WILL IN COUNTY COURT DURING TESTATOR'S LIFETIME. (1) Deposit of will. Any testator may deposit his will with the register in probate of the county court of the county where testator resides. Such will shall be sealed in an envelope with the name of the testator, his address, and the date of deposit noted thereon; if the

will is deposited by a person other than the testator, such fact shall also be noted on the envelope. The size of the envelope may be regulated by the register in probate to provide uniformity and ease of filing.

(2) Duty of register in probate. The register in probate shall issue a receipt for the deposit of the will and shall maintain a registry of all wills so deposited. The original will, unless withdrawn under sub. (3) or opened in accordance with s. 856.03 after death of the testator, shall be kept on file for a period of 25 years from the date of deposit; thereafter the register may either retain the original will or open the envelope, copy or reproduce the will for confidential record storage purposes by microfilm or other method of comparable retrievability and destroy the original. Such a reproduction, satisfactorily identified, shall be admissible in court for probate or any other purpose to the same extent and with like effect as the original document. Wills deposited with the county judge under former s. 238.15 (Stats 1965) shall be transferred to the register in probate and become subject to this section.

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

COMMENT: This section permits deposit of a will by the testator during his lifetime and continues existing law with only minor changes. Deposit will be with the register in probate rather than the county judge, since the function is administrative in nature. In order to facilitate record storage, the register may regulate size of the envelope and has discretionary power after 25 years to microfilm or otherwise reproduce the will and destroy the original. It is unlikely that any will on file for more than 25 years will ever be needed for probate. In counties where storage is not a problem, the register will undoubtedly retain original wills for a much longer period rather than go to the expense of microfilming. A slight change in the provision for withdrawal is reflected in the requirement for two witnesses rather than an oath subscribed by one where the testator has another person withdraw the will for him; the opportunity for fraud in such cases is minimized by the additional witness.

853.11 REVOCATION. (1) Subsequent writing or physical act. A will is revoked in whole or in part by:

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

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

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

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

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

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

(4) Other methods of revocation. A will is revoked only as provided in this section.

(5) Dependent relative revocation. This section is not intended to change in any manner the doctrine of dependent relative revocation, except as modified by sub. (6).

(6) Revival. When a will, codicil or part thereof has been revoked by a subsequent will, codicil or other instrument under sub. (1) (a), the later revocation of the revoking instrument by act under sub. (1) (b) revives the prior will or codicil or part thereof: (a) if there is clear and convincing evidence that the testator intended to revive the prior will,

codicil or part; or (b) if the revoking instrument is a codicil which revoked only a part of the will by inconsistency and not expressly, and the evidence is insufficient to prove that the testator intended no revival. Proof of testator's statements at or after the act of revocation is admissible to establish intent. No will, codicil or part can be revived under this subsection unless the original will or codicil is produced in court.

COMMENT: A will can be revoked by a subsequent writing, by a physical act to the document itself, or by certain subsequent changes in circumstances from which revocation is implied. This section includes all of these methods and in addition deals with revival of a revoked will. This section makes minor changes in existing law and codifies other aspects; it is more comprehensive than 238.14.

Sub. (1) is comparable to the first sentence of 238.14 and makes no change in existing law regarding revocation by subsequent writing or by physical act. A subsequent instrument operates as a revocation only to the extent that it expressly revokes the will or a part thereof or to the extent that it is inconsistent with the will. This leaves to the court problems of interpretation where the subsequent instrument is not carefully drafted, but no statute can aid in such a problem, which has to be decided by the court in each individual case in the light of the wording of the instrument and all the circumstances.

What physical acts demonstrate the intent to revoke, and how much of the will is revoked by such acts, is similarly a problem for the courts. Compare Will of Byrne, 223 Wis. 503, 271 N.W. 48 (1937) with Estate of Holcombe, 259 Wis. 642, 49 N.W.2d. 914 (1951).

Undoubtedly there are other actions of a testator which clearly indicate his intent to revoke a will, but which fall short of doing so under both 238.14 and this section. Thus, In re Ladd, 60 Wis. 187, 18 N.W. 734 (1884) held that a will was not revoked where the testatrix wrote "I revoke this will" with her name and the date on the back of the will; had she written this across the face of the will it would have been a cancellation within the statute and hence sufficient to revoke. But there are even more "hard" cases where documents intended as wills fall short because not properly executed. This section on revocation therefore retains existing minimal formalities.

Although witnesses might be required for the destruction of a will, the popular notion that a testator may revoke simply by destroying the will itself is too widespread to permit a change in the law. This section does not change existing law in this regard. That a will in the possession of the testator is missing at his death gives rise to a presumption of revocation, but this presumption is easily overcome by evidence that he referred to his will as still in force, that others who would benefit by

loss of the will had access, or the like. In re Steinke's Will, 95 Wis. 121, 70 N.W. 61 (1897); Gavitt v. Moulton, 119 Wis. 35, 96 N.W. 395 (1903); Wendt v. Ziegenhagen, 148 Wis. 382, 134 N.W. 905 (1912); Will of Donigian, 265 Wis. 147, 60 N.W.2d 732 (1953).

When the statute refers to revocation by physical act to the "will or part", this includes an act done to a duplicate original, but not to a conformed or unconformed copy. Will of Donigian, cited above; Will of Wehr, 247 Wis. 98, 18 N.W.2d 709 (1945).

Under our existing statute, the Supreme Court has held that the testator may not "ratify" loss or destruction of a will under circumstances which do not comply with the statutory requirements. Estate of Murphy, 217 Wis. 472, 259 N.W. 430 (1935).

While sub. (1) might have codified all of these matters into statutory form, the Committee decided that there was no need to do so in such detail.

Sub. (2) and (3) deal with revocation by operation of law and introduce a change in existing law. The only provision in our existing statutes is found in 238.14, and reads: "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." The Wisconsin Supreme Court has hinted that the court has power to determine revocation based on this section in situations not recognized at common law. Will of Wehr, 247 Wis. 98, 18 N.W.2d 709 (1945); Estate of Wilkins, 192 Wis. 111, 211 N.W. 652 (1927). Nevertheless, aside from divorce, the only change in the testator's circumstances now recognized as automatically revoking a will is a combination of marriage and birth or adoption of a child. Glascott v.Bragg, 111 Wis. 605, 87 N.W. 853 (1901). Marriage alone is not enough. Will of Lyon, 96 Wis. 339, 71 N.W. 362 (1897); Will of Wehr, cited above. Nor is birth of issue alone enough. Will of Read, 180 Wis. 497, 193 N.W. 382 (1923). Change in the amount or nature of a testator's estate may give rise to problems of abatement or ademption by extinction, but such changes are not within this doctrine of revocation by change in circumstances. One early Wisconsin case on revocation by operation of law is anomalous and has been distinguished in later Wisconsin cases. This is Parsons v. Balson, 129 Wis. 311, 109 N.W. 136 (1906) which held a will revoked where it was accidentally destroyed by fire and the testator, with full knowledge of its loss, later adopted a child and failed to make a new will. It is probable this case would either be disapproved or limited to its precise facts.

Sub. (2) changes the Wisconsin rule to provide that marriage alone operates to revoke a will. It is designed primarily to deal with the common case of first marriage. Often young unmarried men, particularly those entering the armed services, make wills in favor of one or both of their parents. When such young men subsequently marry, they believe that such a will is no longer in force. Actually, the wife in that case is

under existing law limited to her elective share, one-third of the estate. It is believed that this runs counter to the wishes of most husbands. The second marriage situation, with a will drafted in favor of children by a prior marriage, is met by allowing the will to anticipate this problem and expressly provide against revocation and by an express exception for a will which provides for issue by a prior marriage; marriage contracts are also common in that situation, and can under the terms of sub. (2) prevent operation of this section. The English Statute of Wills, enacted in 1837, provided that a will made by a man or woman would be revoked by his or her subsequent marriage. Twenty-four states have somewhat varying provisions for revocation by subsequent marriage. Sub. (2) attempts to embody the best features from those statutes. Sub. (2) applies to either a man or a woman as testator and by its terms is limited to the situation where the spouse survives. Thus if a man made a will in favor of charity, subsequently married, had no children, and was predeceased by his wife, the will would still be valid.

There is no need to retain the existing rule that marriage plus birth of issue revokes a will. Where there is marriage and the spouse survives, the will is revoked; if the spouse does not survive, so that sub. (2) is no longer applicable, the issue can take the entire estate under the pretermitted heir statute anyway.

The existing law whereby marriage plus birth of issue automatically revokes a will operates without regard to the testator's intent and may work a hardship in some cases. For example, a man acquires the family business from his parents with the understanding that he will take care of an invalid sister for life. In contemplation of marriage, he makes a will providing for his intended wife and for any children born of the marriage, with the balance left in trust for the invalid sister. Under existing law this will is revoked by marriage plus birth of a child. Under this section, it will remain in force. Sub. (2) would be inapplicable because the will makes a provision for the spouse (and also indicates that it was drafted in contemplation of the marriage). 853.25 on Pretermitted Children is inapplicable for similar reasons.

Sub. (3) is merely declaratory of the rule laid down in Will of Battis, 143 Wis. 234, 126 N.W. 9 (1910); and Estate of Kort, 260 Wis. 621, 51 N.W.2d 501 (1952). Although those cases deal with divorce, the same reasoning would apply to a judgment of annulment under ch. 247.

Except in the two situations specified in subs. (2) and (3) the doctrine of revocation by operation of law is abandoned. This is the result of sub. (4).

Sub. (5) merely preserves the doctrine of dependent relative revocation. This doctrine is left to the courts for application and development, as it has been under the existing statute.

Sub. (6) changes existing Wisconsin law regarding revival of a revoked will, codicil or part thereof. Under existing law if a testator executes will No. 1, subsequently executes will No. 2 which expressly re-

vokes will No. 1, and later destroys will No. 2 with the intent that will No. 1 be effective, the probate court is not permitted to probate will No. 1 however clear the evidence may be that testator wanted his first will as the effective document. Noon's Will, 115 Wis. 299, 91 N.W. 670 (1902); Estate of Laege, 180 Wis. 32, 192 N.W. 373 (1923); Estate of Eberhardt, 1 Wis.2d 439, 85 N.W.2d 483 (1957). Nevertheless the court can admit proof of testator's intent for the purpose of determining whether revocation of will No. 2 was dependent or conditional upon revival of the first will; in a proper case the court can then allow probate of the second will on the basis of the doctrine of dependent relative revocation. Estate of Callahan, 251 Wis. 247, 29 N.W.2d 352 (1947); Estate of Alburn, 18 Wis.2d 340, 118 N.W.2d 919 (1962). Since the principle reason for denying revival of the first will is to avoid the dangers of oral proof of intent, and the very same evidence is now admitted to determine whether the second will (the one document testator intends to revoke and has often destroyed) should be allowed for probate, it seems logical to allow proof of the testator's intent to revive the first document.

Sub. (6) allows revival under certain restricted conditions. The party urging revival must usually prove the intent to revive by "clear and convincing" evidence. Only in one narrow situation is revival presumed, and that is where the second document was a codicil which did not expressly revoke the first will but revoked a part only by inconsistency; in such a case revival will be allowed unless there is sufficient proof that the testator intended not to revive the affected part of the prior will. This statute also makes proof of the testator's statements at or after the act of revocation admissible; this would not, it should be noted, affect other rules of evidence dealing with competency of particular witnesses, which may bar a particular witness from testifying to such statements. Finally the will or codicil which allegedly has been revived must be produced in the original and not proved by a copy. If the testator destroys his second will or a codicil with the intent that the first will be revived, revival would be allowed only where his first will was intact in its original form.

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

(2) This section applies to a joint will (except if one of the testators has died prior to July 1, 1968) as well as to any other will; there is no presumption that the testators of such a joint will have contracted not to

revoke it.

COMMENT: This section is intended to clarify the nature of 238.19 and also to remove any inference that joint wills are made pursuant to a contract not to revoke such wills. In the latter respect this changes existing law as expressed in the exception in 238.19 and the cases stemming from Doyle v. Fischer, 183 Wis. 599, 198 N.W. 763 (1924) (joint will construed as strong evidence of underlying contract). In the recent case Estate of Hoeppner, 32 Wis. 2d 339, 145 N.W.2d 754 (1966) the Supreme Court felt bound to follow the precedent, but Justice Gordon (concurring) urged corrective legislation.

238.19 was enacted in 1957 as the result of concern by some attorneys that the marital deduction under the federal estate tax law might be lost when a husband and his wife executed separate wills at the same time. The concern was that the Internal Revenue Service might contend that such wills were executed pursuant to contract or agreement that the surviving spouse would not change her will, hence that she took subject to a trust, and the husband's bequest to her was a terminable interest which did not meet the requirements of IRC 2040. It now appears that, even if there were an express agreement, the marital deduction would be allowed; but it may be necessary to litigate the issue in the federal courts. Estate of Emmet Awtry v. Comm'r, 221 F.2d 749 (8th Cir. 1955); Newman v. United States, 176 F. Supp. 364 (S.D.Ill.1959); Schildmeier v. United States, 171 F. Supp. 328 (S.D.Ind.1959). The tax matter is, however, still not completely free from doubt. See Note 55 N.W.L. Rev. 727 (1961). The existing statute is ambiguous. Does it create a presumption, or is it a requirement (similar to the Statute of Frauds) that the contract must be referred to on the face of the will to be enforceable? Suppose, for example, that a husband and wife execute separate wills containing no mention of a contract but they also execute a written contract whereby each promises not to revoke his or her will without the consent of the other. If 238.19 is merely a rule of construction (as is indicated by the word "construed"), the contract can be proved by the written agreement. But if so, an oral contract could also be proved by extrinsic evidence in a proper case. Under this interpretation, 238.19 merely removes any inference that there is a contract arising from similarity of terms of two wills executed at the same time. This section has been reworded to make it clear that no substantive requirement is involved, but merely an evidentiary requirement.

The existing judicial rule, indirectly indorsed by the provisions of 238.19 which except joint wills, making it easier to infer a contractual arrangement where there is a joint will should be changed. In the first place, joint wills are sometimes used without any intent to make a binding promise not to revoke such wills; and in any event the existing rule tends to invite litigation in joint will cases. This section, requiring clear and convincing evidence "apart from the will", destroys any inference that joint wills are pursuant to contract, any more than any other

wills. But persons are free to make a contract not to revoke joint wills, just as they can contract not to revoke mutual wills or ordinary wills.

853.15 EQUITABLE ELECTION IF WILL ATTEMPTS TO DISPOSE OF PROPERTY BELONGING TO BENEFICIARY. (1) Necessity for election. If a will gives a bequest or devise to one beneficiary and also clearly purports to give to another beneficiary a property interest which does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation or otherwise, the first beneficiary must elect either to take under the will and transfer his property interest in accordance with the will, or to retain his property interest and not take under the will. If he elects not to take under the will, the bequest or devise given him under the will is to be assigned by the court to the other beneficiary in lieu of the property interest which does not pass under the will. But this section does not require an election in any case where the property interest belongs to the first beneficiary by reason of transfer or beneficiary designation made by the decedent after the execution of the will; the section does not apply to the elective right of the surviving spouse under s. 861.05.

(2) Procedure for election. If an election is required under sub. (1), the following provisions apply:

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

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

is deemed to have elected not to take under the will.

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

COMMENT: This section replaces 238.02 (2) and deals with the doctrine of equitable election laid down in Will of Schaech, 252 Wis. 299, 31 N.W. 2d 614 (1947). The problem commonly arises if a testator mistakenly attempts to dispose by will of assets which belong to a beneficiary by survivorship in joint tenancy or beneficiary designation on life insurance or government bonds. The doctrine allows a testator to make a testamentary gift to one beneficiary on condition that he give up the assets which he would otherwise have outside the will and which the testator wills to another beneficiary. Each case involves two issues: (1) when does the will require an election, and (2) what conduct on the part of the beneficiary constitutes an election on his part to take under the will and give up his other interests acquired outside the will.

Sub. (1) embodies the rule laid down in Will of Parker, 273 Wis. 29, 76 N.W.2d 712 (1955). Where a beneficiary owns property or has rights aside from the will (for example, as the named beneficiary under a life insurance policy on the life of the testator or as surviving joint tenant), it is presumed that the testator did not wish to affect those rights by his will; a will should require an election only if it "clearly" attempts to dispose of the property.

Sub. (2) changes existing law on the 2nd issue. 238.02 (2) provides that "acceptance of a bequest or devise" does not constitute an election unless the will "so provides in express terms". Apparently this means that the beneficiary can take under the will and also retain rights outside the will unless the will expressly provides that acceptance of the bequest or devise is an election. Since the doctrine of election is primarily designed to relieve against mistake, this requirement in the existing statute seems to nullify the entire doctrine. See Estate of Riley, 6 Wis.2d 29, 94 N.W. 2d 233 (1959). Where the will is clearly intended to call for a choice by the beneficiary as a condition to taking under the will, acceptance of the devise or bequest under the will is the clearest possible indication of choice. Sub. (2) provides a procedure whereby the election can be required and determined. Part of the existing law is retained in the provision that participation in administration of the estate is not an election. Thus a beneficiary could petition for probate of the will and be appointed executor of the will and still have a free choice when the court requires a written election to be filed.

853.17 EFFECT OF WILL PROVISION CHANGING BENEFICIARY OF LIFE INSURANCE OR ANNUITY. (1) Any provision in a will which

purports to name a different beneficiary of a life insurance or annuity contract than the beneficiary properly designated in accordance with the contract with the issuing company, or its bylaws, is ineffective to change the contract beneficiary unless the contract or the company's bylaws authorizes such a change by will.

(2) This section does not prevent the court from requiring the contract beneficiary to elect under s. 853.15 in order to take property under the will; nor does it apply to naming a testamentary trustee as designated by a life insurance policy under s. 231.49.

COMMENT: This section is new and changes the Wisconsin law to achieve uniformity. If a life insurance policy is payable to a named beneficiary who survives the testator, in almost all states a provision in the insured's will changing the beneficiary is ineffective. Largely due to an early court misunderstanding regarding the nature of life insurance, Wisconsin permits a change of the life insurance beneficiary by a provision in the will in limited situations. Estate of Breitung, 78 Wis. 33, 46 N.W. 891, 47 N.W. 17 (1890). The rule does not apply if the insurance is payable to a married woman or if the insurance is mutual benefit and the society has a rule prohibiting change by will. Christman v. Christman, 163 Wis. 433, 157 N.W. 1009 (1916); Thomas v. Covert, 126 Wis. 593, 105 N.W. 922 (1906). Most insurance companies provide an exclusive method by which the insured can change the beneficiary with specified formalities.

In the interests of bringing Wisconsin into line with the majority of states and of eliminating now obsolete distinctions, this section changes the Wisconsin rule. It has no application if at the death of the testator there is no surviving beneficiary properly designated in accordance with the insurance contract or the company's bylaws; in that case the proceeds become payable to the personal representative and a provision in the will naming a beneficiary becomes an effective testamentary disposition of the proceeds.

853.19 ADVANCEMENT IN TESTATE ESTATE. (1) When gift during life is deducted from will. If a testator by his will makes a provision for a beneficiary and later makes a gift during lifetime to such beneficiary, the gift is not to be deducted from the provision in the will as an advance unless the testator by his will provides for deduction of such a gift, or the testator by writing clearly states that the gift is an advance

(whether or not such writing is contemporaneous with the gift), or the beneficiary states by writing or in court that the gift was an advance.

(2) Advance when gift lapses. If the provision in the will fails because of the death of the beneficiary, and issue of such beneficiary take by the terms of a substitutional gift in the will or by reason of s. 853.27, the provision in the will to which the issue become entitled shall be reduced by the amount of the advance unless the contrary intent is apparent from the will or the writing by the testator evidencing the advance.

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

COMMENT: This section is new. There is no statute dealing with the effectiveness of inter vivos gifts to a beneficiary under the will if the testator intends those gifts to be deducted from the bequest or legacy in the will. At common law, which would prevail, the court would deal with the problem as one of "ademption by satisfaction" and would allow proof, including testimony as to oral statements, to establish whether the gift is to be deducted or to be in addition to the will provision. The court is aided by "presumptions"; thus, if the gift is to a child or a member of the family, it is presumed to be in satisfaction of the will; if it is to a stranger, the presumption is that it is in addition to the will. Such presumptions are illogical today. Moreover, Wisconsin court rules are inconsistent with the existing statutory rule on advancements in the intestate estate (where written proof is required). To bring the testate situation into line with the intestate, this section parallels 852.11.

This section does not change the normal rules on ademption by extinction. If testator devises his farm to son John, and during lifetime deeds the farm to John, the devise is adeemed by reason of the fact that the farm is no longer an asset of the estate at testator's death.

Because of tax advantages many wealthy testators engage in lifetime gift programs to deplete their probate estates. While this may require periodic review of their wills, these gifts are usually not regarded as advances. This statute carries out that intent.

853.21 RENUNCIATION OF GIFT UNDER WILL. Any person to whom property is given by the terms of a will may renounce all of such property, or any part of such property unless the will expressly pro-

hibits partial renunciation, by filing a signed declaration of such renunciation with the probate court and serving a copy on the personal representative within 180 days from admission of the will to probate; but the court may grant additional time for cause shown, by order entered within or after such 180 day period. Property includes rights of a beneficiary of a trust under the will, including right to receive discretionary or contingent distributions; and any provision in the will attempting to restrict alienablility of the interest of a beneficiary, whether under a trust or otherwise, does not restrict the power to renounce such interest under this section. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced property or part passes as if such person had predeceased the testator unless the will provides otherwise. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the probate court a copy of the assignment or contract and serves a copy on the personal representative.

COMMENT: This section is new and parallels the provisions for renunciation of an intestate share in 852.13. It makes three changes in existing Wisconsin law: (1) it provides a procedure for renunciation, which is left to the discretion of the county court with no statutory guidance under existing law; (2) it modifies the common law rule on partial renunciation, which grew out of a now obsolete background and unnecessarily restricts partial renunciation; and (3) it changes the rule on effect of renunciation in 238.135.

The procedure for renunciation is the same as that provided in 852.13 and sets standards for renunciaition within a reasonable time. Partial renunciation is permitted unless the testator's will expressly provides otherwise; this is undoubtedly the intent in modern times.

The most significant change is in the effect of renunciation. Normally the rule in 238.135 is sound and would prevail under this section as a matter of regular rules of construction. However, if the testator has provided a substitutionary gift or if the anti-lapse statute is applicable this provision would achieve a different result. Thus if testator left a gift to his son, the son could renounce so that the property would pass

to his children. This accords with the rule adopted for renunciation of an intestate share. It may handicap post-mortem estate planning in a few situations, as where the son in our prior illustration wished to renounce so that the gift would be added to a residuary gift for charity. If the testator wishes to anticipate renunciation, he can under this section provide for its effect by the terms of his will.

853.23 RENUNCIATION OF POWER OF APPOINTMENT OR APPOINTED PROPERTY. (1) If a will purports to create any power of appointment, as defined in s. 232.01 (1), the donee may renounce the power entirely, or partially renounce to the same extent that he may partially release the power under s. 232.09 (1) (b), by filing a renunciation in the manner and time provided in s. 853.21. To the extent that he renounces, such power is deemed not to have been created in the donee at any time.

(2) Any person to whom property is appointed by will may renounce all or, unless the will expressly provides otherwise, any part of such property by filing a renunciation as provided in s. 853.21 within 180 days from admission to probate of the will making the appointment. The renounced property or part passes: (a) if the donee has made an alternate appointment to take effect in event of renunciation, to such alternate appointee; (b) if no alternate appointment is made and the power is a general power as defined in s. 232.01 (4), in the same manner as if the donee owned the appointed property; (c) if no alternate appointment is made and the power is not general, as if no appointment had been made to the renouncing person.

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

COMMENT: This section is new. It is necessary because of settled property notions that a power of appointment is not technically an interest in property; nor is property appointed by a testator under a power considered as property passing under the testator's will within the meaning of the preceding section.

If a will purports to create a power of appointment in X, sub. (1) permits him to renounce the power. There are some limitations inherent

in this rule. A power in X to appoint the property among charity is not a power of appointment as defined in 232.01 (1) because it is exercisable in a fiduciary capacity; hence it is not releasable nor can it be renounced under this section.

Sub. (2) permits renunciation of an appointment. Thus if X has a power of appointment by will, and his will appoints in favor of Y, Y can renounce by complying with the procedure of the preceding section. The consequences of such renunciation are set forth in the statute, and depend on the nature of the power itself and the presence or absence of an alternate appointment.

853.25 UNINTENTIONAL FAILURE TO PROVIDE FOR ISSUE OF TESTATOR. (1) Children born or adopted after making of the will. If a testator fails to provide in his will for any child born or adopted after the making of the will, such child is entitled to receive a share in the estate of the testator equal in value to the share which the child would have received if the testator had died intestate, unless the testator left all or substantially all of his estate to the mother of the child, the testator eliminated all of his children known to him to be living at the time of execution of the will from any share under the will, the testator provided for the subsequently born or adopted child by a transfer or transfers outside the will and the intent that such transfer or transfers be in lieu of a testamentary gift is either shown by statements of the testator or inferred from the amount of the transfer and other circumstances, or in any other case it appears from the will or evidence outside the will that such omission was intentional. If a child entitled to a share under this section dies before the testator, and such child leaves issue who survive the testator, the issue who represent such child are entitled to his share.

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

accident.

(3) Time for presenting demand for relief. A demand for relief under this section must be presented to the court in writing not later than (a) 6 months after allowance of the will, or (b) the final judgment, whichever first occurs.

(4) From what estate share is to be taken. Except as sub. (5) provides otherwise, the court shall in its final judgment assign the share provided by this section:

(a) from any intestate property first;

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

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

COMMENT: This section builds on the principles embodied in 238.10 and 238.11, the so-called "pretermitted heir" statutes. It eliminates ambiguity existing in such statutes by providing for special cases which

now have to be left to court interpretation. It also makes minor changes in existing law, notably in eliminating a share for the afterborn child where it is obvious that the testator would not have made any such provision had he thought about the problem and also in preventing inequality between existing children and the omitted child by changing the fixed nature of the share of the latter.

Sub. (1) provides for the afterborn child. The share provided by this subsection is subject to adjustment under sub. (5). No share is available in certain situations where the testator would not have wanted a share, since the purpose of this whole section is to cure an apparent oversight by the testator and is based on the theory that the testator would want some provision for each child. No share is available where the testator has left all or substantially all of his estate to the mother of the child. Thus if a testator leaves all of his estate to his wife, a child born of such marriage (or adopted) would take no share; the mother would normally support the child anyway, and the testator could have changed his will had he intended a share for the child. Similarly if the testator has one or more children and makes no provision for them, it is highly probable that he would have made no provision for a subsequently born child; usually this is a case where the estate is left to the wife anyway, as in Will of Read, 180 Wis. 497, 193 N.W. 382 (1923). Another situation where the testator would not want a subsequent child to take a share is that in which he makes up for the omission by a non-testamentary transfer, such as a living trust or life insurance. Although the existing statute provides for a share for the omitted child unless the testator's intent to provide no share is apparent from the will, sub. (1) allows evidence outside the will (extrinsic evidence) to show that the omission was intentional. Compare the use of such evidence in Bresee v. Stiles, 22 Wis. 120 (1867); In re Donge's Will, 103 Wis. 497, 79 N.W. 786 (1899) and Sandon v. Sandon, 123 Wis. 603, 101 N.W. 1089 (1905). However, neither the reference to evidence outside the will nor the express provision for use of statements of the testator is intended to make admissible evidence which would be barred by other rules of evidence such as the deadman statute. Note that sub. (1) expressly includes a child adopted after the making of the will, according with the interpretation of the existing statute in the Sandon case, previously cited. It is obvious that a child born posthumously is of necessity within the phrase "child born . . . after the making of the will"; see Verrinder v. Winter, 98 Wis. 287, 73 N.W. 1007 (1898). The final sentence of sub. (1) expressed the interpretation given by the New York court to its pretermitted heir statute in Matter of Horst, 264 N.Y. 236, 190 N.E. 475 (1934); such a situation is likely to be rare.

Sub. (2) deals with the rare problem of living descendants omitted by mistake. In order to bolster wills against false claims of mistake, the subsection places a heavy burden of proof on the child or issue of a deceased child who attempts to claim under the statute. By its very

nature, mistake must be established by extrinsic evidence. The last sentence makes it clear that it is unnecessary to mention a child or issue in the will in order to preclude a claim of mistake; sometimes it is embarrassing to expressly disinherit a child.

Sub. (3) has no counterpart in the existing statutes. Language in Will of Kurth, 241 Wis. 426, 6 N.W.2d 233 (1942) and in the earlier case of Newman v. Waterman, 63 Wis. 612, 23 N.W. 696 (1885) indicated that the time to present a claim as an omitted heir was "at the time of probate"; this may limit the claim to the proceedings on proof and allowance of the will, or it may merely mean that the claim must be made prior to the final decree and not in a collateral proceedings. This statute places a definite time limit. It is believed that the 6 months period is ample time within which to present such a claim and that the interests of certainty make it undesirable to allow for an extension. Where the estate is settled and a final decree entered earlier than 6 months after the allowance of the will, the claim would also be barred; otherwise it might be necessary to hold every estate open for the full 6 months period as a precautionary measure.

Sub. (4) merely restates existing Wisconsin law embodied in 238.12. The problem of disruption of a testamentary scheme, whether by unanticipated debts or taxes or by the elective share of the widow or the share of the pretermitted heir, is a most difficult one. The court has to have freedom to do the best job it can to salvage the testamentary scheme. This ought not to be done automatically on the basis of rules about kinds of provisions in the will (whether realty is preferred over personalty, whether the gift is specific, general, demonstrative, or residuary) but should be done intelligently in light of the relationship of the beneficiaries under the will to the testator and what the testator would probably have wanted. 238.12 and sub. (4) give the county court the discretion to do such an intelligent salvage operation, with the presumption in favor of pro rata apportionment. While it may be argued that the choice of the kinds of gifts (specific, general or residuary) is made by the draftsman in light of knowledge of the established rules of abatement, this argument is, in fact, artificial in cases like these. The careful draftsman would never have permitted the pretermitted heir statute to apply in the first place. Moreover, it is often clear that the residuary beneficiary is the person whom the testator wants to favor most (as where it is the surviving spouse).

Sub. (5) is new. It vests limited discretion in the county court. It is based on the sound premise that any statute providing for an omitted heir necessarily requires a rewriting of the testator's will. Rather than to provide a fixed share in all cases, as the existing statute does, even when it is obvious that the testator would have wanted a different provision for the omitted heir, this subsection permits the court to approximate the testator's intent had he foreseen this contingency. Examples of the

situations to which this subsection would apply are: a will establishing a sprinkling trust for testator's existing children and omitting any reference to afterborn children because testator anticipated no additional children at his age but later adopted one (the court properly would modify the trust to include the afterborn child rather than assigning a fixed share); a will establishing a trust of the entire estate to pay income to the widow for life, with principal to go at her death to his named children, and again a child is born or adopted later (since outright assignment of a share would unduly disrupt the testator's scheme, the omitted child should be assigned a remainder interest under the trust similar to that for the other children).

853.27 RIGHTS OF ISSUE OF BENEFICIARY DYING BEFORE TESTATOR (LAPSE). (1) Unless a contrary intent is indicated by the will, if provision in the will is made for any relative of the testator and such relative dies before the testator and leaves issue who survive the testator, then such issue as represent the deceased relative are substituted for him under the will and take the same interest as he would have taken had he survived the testator.

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

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

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

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

COMMENT: This section provides against "lapse" where the beneficiary under a will predeceases the testator. It is designed to carry out the normal intent of a testator who provides in his will for a child or other relative, and the child dies before the testator and leaves issue who survive the testator. Thus, it testator leaves a bequest for a son, it is assumed that had the testator thought about the possibility of the son dying before him, the testator would want the son's children to take his place under the will.

The section governs only if there is no expression of contrary intent in the will. Normally this will take the form of a gift over in event of the death of the named beneficiary. However, it may simply be in the form

of a condition that the beneficiary take "if he survives me." 238.13 reads: "unless a different disposition shall be made or directed by the will." However, even though no different disposition is made, a gift expressly conditional on survival does not take effect under an anti-lapse statute. While similar language has been thus interpreted in other states, the proposed language ("Unless a contrary intent is indicated by the will") is clearer. Cf. Estate of Stewart, 270 Wis. 610, 72 N.W.2d 334 (1955).

This section applies only to gifts to relatives as does the present statute. It is not limited to heirs under s. 852.01 but may include more remote relatives. It would exclude relatives by marriage; see Cleaver v. Cleaver, 39 Wis. 96 (1875); Estate of Dodge, 1 Wis.2d 399, 84 N.W.2d 66 (1956). This section includes an adopted person who enjoys any degree of relation by virtue of the adoption, by the provision of 851.51; 238.13 has been similarly interpreted.

Sub. (2) provides definite answers to certain situations as to which 238.13 is indefinite. Thus it is made clear that the statute applies where the relative is dead at the time the will is executed (a "void" gift rather than a case of "lapse") if the gift is to an individual. It is also uncertain whether class gifts are included within the existing statute, although this seems to have been generally assumed in two cases: Estate of Phillips, 236 Wis. 268, 294 N.W. 824 (1940) (holding statute inapplicable where gift was to "my nephews and nieces" and issue of nephews and nieces who died before execution of the will claimed under the statute); Estate of Stewart, 270 Wis. 610, 72 N.W.2d 334 (1955) (statute again held inapplicable where gift was in trust for "all of my children living at the time of my death" on grounds that will made "a different disposition" in favor of the living children). Finally, there are no Wisconsin cases bearing on the application of the anti-lapse statute to the exercise of a power of appointment where the appointee predeceases the donee of the power; it is arguable that an appointment is not a "devise or legacy" and hence not within such a statute. See V Am. Law of Property s. 23.47 and Restatement, Property (1940) s. 350. Sub. (2) (c) includes both general and special powers of appointment except where the special power of appointment could not have been exercised in favor of the persons taking under this section.

This section substitutes "such issue as represent the deceased beneficiary." Normally this would be the children. However, issue of several generations might be involved, and representation or per stirpital distribution would then be necessary. Thus where a gift is made to a brother, who predeceases testator, the normal rules of representation would apply to determine whether any of the brother's grandchildren would share the gift with his children.

The Committee considered the desirability of codifying the law regarding disposition of a lapsed gift not saved by the statute, patterned on Model Probate Code s. 57 (a). However, it was decided not to include

any provision on this subject. The interrelation of clauses in a modern will is often complex, so that effect of failure of one clause or gift upon the whole is better left to the courts to work out in light of the whole testamentary scheme in the individual case. Since it is clear under modern law (and 853.29) that a will can pass after acquired real estate, there is no need for a special provision that a lapsed devise passes under the residue in a proper case, rather than under the intestate law.

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

COMMENT: This section builds on 238.03 but modernizes the statutory language so that a will is presumed to pass all after-acquired property, whether real or personal. This is the existing rule as to personalty, but changes the form of the rule as to realty.

The law of wills is a product of history, and the development of wills of land and testaments of personalty under different court systems has left an unfortunate imprint on many aspects of the law today. Although the concept of the will as an ambulatory document speaking and taking effect as of the date of the testator's death developed fully as to personalty, the will of real property (after the Statute of Wills in 1540) was thought of as a revocable present conveyance to take effect at death. See 1 Page (Bowe-Parker ed.) ss. 16.12 — 16.13. This led to the rule that a will could not pass after-acquired realty even though the intent to do so was clearly expressed. Three types of statutes have been passed in this country to change this rule:

(1) Some states have statutes comparable to 238.03, providing that a will may pass after-acquired realty if the intent to do so is clearly expressed.

(2) Some states have statutes providing that the will passes after-acquired realty unless a contrary intent is expressed (thus reversing the presumption involved in the first type of statute).

(3) Some have even broader statutes which are based on the English Statute of Wills (1837) and provide that the will is to be construed as if it had been executed immediately before the testator's death unless a contrary intent appears in the will. It should be noted that this statute may do more than merely change the rule as to after-acquired property; it may affect the approach to other construction problems.

238.03 is the most limited of the three types of statutes. Although in its day it was intended as a "liberalizing" statute, it is now obsolete and restrictive. It has proved workable only because our Supreme Court has gone to considerable lengths to avoid literal application of the

statute. The most recent case is Estate of Zink, 15 Wis.2d 527, 113 N.W.2d 420 (1961) (holding that a residuary clause expresses the necessary intent to dispose of the testator's entire property, including after-acquired realty). See also Will of Smith, 176 Wis. 494, 186 N.W. 180 (1922); Estate of Buser, 8 Wis.2d 40, 98 N.W.2d 425 (1950). Nevertheless, the existing statutory language ought to be changed, not only to reflect the liberal judicial interpretation but also to prevent hardship in some cases beyond the scope of such interpretation.

This section adopts an intermediate approach. As to inclusion of after-acquired property it essentially adopts a time-of-death construction. However, the Committee did not feel it necessary to propose a broad statute favoring the time-of-death construction in all other types of situations. In situations not covered by the statute the court is thus free to explore the intent of the testator in the individual case, under normal rules of construction, and to adopt whatever presumption the court feels more desirable for the particular kind of problem, although the principle that "a will speaks as of the testator's death" will usually prevail. This section follows the policy of uniform treatment for real and personal property and accords with the oft-repeated rule that a testator intends to dispose of all his property (the presumption against intestacy).

853.31 PRESUMPTION THAT WILL PASSES ALL OF TESTATOR'S INTEREST IN PROPERTY. Any gift of property by will is presumed to pass all the estate or interest which the testator could lawfully will in such property unless it clearly appears by the will, interpreted in light of the surrounding circumstances, that the testator intended to pass a less estate or interest.

COMMENT: This section makes no substantial change in the existing law.

At common law a devise in a will was interpreted to pass only a life estate unless the intent to pass a fee was expressed, although it was not necessary that the devise contain words of inheritance to pass a fee, as was the rule for deeds. It was to change this common law rule of construction that 238.02 (1) was enacted. Our court has properly interpreted the wording of our existing statute ("unless it shall clearly appear by the will") as not being a limitation on the power of the court to consider surrounding circumstances in construing a devise to pass either a fee or a life estate. Dew v. Kuehn, 64 Wis. 293, 25 N.W. 212 (1885) (tracing history of the common law and statutory rules).

The common law rule was designed to protect the heir. Modern law on the other hand adopts a presumption against intestacy where a will has been properly executed. The presumption is, therefore, strong that the

devise passes all of the testator's real estate when the contest is between the devisee and the heir. When, however, the contest is between the devisee and another beneficiary under the will who claims that the devisee takes only a life interest and that there is a gift over to the other beneficiary, the presumption has less weight. See Will of Ritchie, 190 Wis. 116, 208 N.W. 880 (1926) (reversing lower court); Will of Richter, 215 Wis. 108, 254 N.W. 103 (1934) (finding only a life estate where there was gift over, with no mention of statute). This section is not intended to change this result.

This section includes personal as well as real property, although there never has been any doubt but that this is the rule as to personalty.

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

COMMENT: This section is new. If a testator disposes by gift in his will of a stated number of shares of securities, such as "100 shares of XYZ common stock" or "$5,000 of government bonds" and at the time of execution of the will he owns that number of shares or that amount of bonds, he presumably is thinking of the specific stock or bonds he then owns. However, under existing rules of construction the court will construe the gift as a general gift. If the testator sells the stock or cashes the bonds after his will is drawn, the personal representative is under a duty to purchase stock or bonds to satisfy the bequest. Conversely, if the stock is augmented by a stock dividend prior to testator's death, the named beneficiary receives only 100 shares of stock and not the dividend. This section changes the rule and requires the court to construe the gift as specific, i.e., referring to the property owned by the testator at the time the will is executed. Hence the beneficiary would under the next section (853.35) get the benefit of the stock dividend.

853.35 NONADEMPTION OF SPECIFIC GIFTS IN CERTAIN CASES. (1) Scope of section. It is the intent of this section to abolish the common law doctrine of ademption by extinction in the situations governed by this section; this section is inapplicable if the intent that the gift fail under the particular circumstances appear in the will, or if the testator during his lifetime gives property to the specific beneficiary with the intent of satisfying the specific gift. Whenever the subject of the specific gift is property only part of which is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property owned by the testator at the time of his death is not affected by this section; but this section applies to the part which would have been adeemed under the common law by the destruction, damage, sale or condemnation.

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

(3) Proceeds of sale. If property which is the subject of a specific gift is sold by the testator within 2 years of his death, the specific beneficiary has the right to: (a) any balance of the purchase price unpaid at the time of death (including any security interest in the property and interest accruing before death), if part of the estate, with the incidents of the specific gift; and (b) a general pecuniary legacy equivalent to the amount of the purchase price paid to the testator within one year of his death. Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on

the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on his death, is a sale by the testator for purposes of this section.

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

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

(6) Securities. If securities are specifically willed to a beneficiary, and subsequent to execution of the will other securities in the same or

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

(7) Reduction of recovery by reason of expenses and taxes. Throughout this section the amount the specific beneficiary receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.

COMMENT: This section is new and changes the law. At common law, if real or personal property were specifically given by will to a named person, and the property were destroyed or sold between the time of execution of the will and the testator's death, the devise or bequest failed; the reason was that there was no property in the estate to satisfy the specific gift. This doctrine, known as ademption by extinction, worked without regard to the testator's intent. It was ameliorated to some extent by various judicial approaches. Thus if testator devised "my residence" to his wife, and sold the residence he owned at the time the will was drafted and subsequently purchased another residence, the court would apply the time-of-death construction; by relating the phrase "my residence" to the residence testator owned at death, ademption was avoided. But if testator sold one residence and died pending negotiations to purchase another residence, the wife was out of luck. If the testator sold on a land contract, our Supreme Court has held that the devisee is entitled to the unpaid balance on the land contract. Estate of Atkinson, 19 Wis.2d 272, 120 N.W.2d 109 (1963). Apparently the result would be different if the testator had sold and taken a mortgage back, however. The same kind of problem arises if the house burns down before the testator's death. Is the devisee entitled to the fire insurance proceeds? In a somewhat analogous case our Supreme Court again prevented hardship by giving the insurance proceeds to the surviving joint tenant. Rock County Savings & Trust Co. v. London Assurance Co., 17 Wis.2d 618, 117 N.W.2d 676 (1962). The existing law not only involves uncertainty but requires costly litigation to reach a decision in each new case. This section is intended to settle the law.

The Committee decided that specific kinds of situations should be covered by the statute, rather than a broad statute abolishing the doctrine entirely. The resulting statute is only partly drawn from legislation in other states. The need for an antiademption statute was considered as great as the need for the anti-lapse statute which has been on the books for many years. The statute is intended to carry out the normal intent of the testator.

CHAPTER 856

OPENING ESTATES

856.01 Jurisdiction.
856.03 Wills in court for safekeeping.
856.05 Delivery of will to court.
856.07 Who may petition for administration.
856.09 Petition for administration, contents.
856.11 Notice of hearing on petition for administration.
856.13 Will must be proved.
856.15 Proof of will and proof of heirs where uncontested.
856.17 Lost will, how proved.
856.19 Order admitting will.
856.21 Persons entitled to domiciliary letters.
856.23 Persons who are disqualified.
856.25 Bond of personal representative.
856.27 Appointment of special administrator if appointment of personal representative is delayed.
856.29 Letters issued to trustee of testamentary trust.
856.31 Selection of attorney to represent estate.

SUMMARY OF CHAPTER: This chapter deals with procedure from the initial petition through the appointment and bonding of the personal representative. It replaces chs. 310 and 311.

856.01 JURISDICTION. The jurisdiction of a proceeding for administration of a decedent's estate is as follows:

(1) If the decedent was domiciled in this state, then in the county in this state where the decedent had his domicile at the time of his death.

(2) If the decedent had no domicile in this state, then in any county in this state where property of the decedent is located, and the probate court which first exercises jurisdiction under this subsection has exclusive jurisdiction.

CROSS REFERENCE: Section 253.10 contains additional provisions in regard to jurisdiction.

856.03 WILLS IN COURT FOR SAFEKEEPING. When a will has been filed with a probate court for safekeeping during the testator's lifetime, the court on learning of the death of the testator shall open the will and give notice of the court's possession to the executor, if any, named in the will, otherwise to some person interested in the provisions thereof. If probate jurisdiction belongs to any other court such will shall be delivered to such other court.

856.05 DELIVERY OF WILL TO COURT. (1) Duty and liability of person with custody. Every person, other than the executor, having the custody of any will shall, within 30 days after he has knowledge of the death of the testator, file it in the proper probate court or deliver it to the person named as executor therein. Every person named as executor shall, within 30 days after he has knowledge that he is named executor, and has knowledge of the death of the testator, file such will in the proper probate court, unless the will has been otherwise deposited with the court. Every person who neglects to perform any of the duties required in this subsection, without reasonable cause, is liable in a proceeding in probate court to every person interested in such will for all damages caused by such neglect.

(2) Duty of person with information. Any person having information which would reasonably lead him to believe in the existence of any will of a decedent of which he does not have custody and having information that no more recent will of the deceased has been filed with the probate court and that 30 days have elapsed after the death of the decedent, shall submit this information to the judge of the proper probate court within

30 days after he has such information.

(3) Penalty. Any person who with intent to injure or defraud any person interested therein suppresses or secretes any will of a person then deceased or any information as to the existence or location of any such will or having custody of any such will fails to file it in the probate court or to deliver it to the executor named therein shall be punished by the probate court by imprisonment in the county jail for not more than one year or by fine not to exceed $500 or both.

(4) Liability for neglect. If any person having the custody of any will after the death of the testator and after a petition for administration has been filed, neglects without reasonable cause to deliver the same to the proper probate court after he has been duly notified in writing by such court for that purpose, he may be committed to the jail of said county by warrant issued by such court and there kept in close confinement until he shall deliver the will as required.

COMMENT: A new provision is contained in (2) giving one who has information concerning an unfiled will a duty to give this information to the court. It is intended to enable a person in this position to act without being considered an intermeddler.

856.07 WHO MAY PETITION FOR ADMINISTRATION. (1) Generally. Petition for administration of the estate of a decedent may be made by any executor named in the will or by any person interested.

(2) After thirty days. If none of those named in sub. (1) has petitioned within 30 days after the death of the decedent, petition for administration may be made by the public administrator, any person who was guardian of the decedent at the time of the decedent's death, any creditor of the decedent, anyone who has a cause of action or who has a right of appeal which cannot be maintained without the appointment of a personal representative or anyone who has an interest in property which is or may be a part of the estate.

CROSS REFERENCE: Section 879.57 provides for petition by the public administrator when there appears to be no person in the

state to petition for administration.

856.09 PETITION FOR ADMINISTRATION, CONTENTS. The petition for administration shall comply with s. 879.01 and in addition shall state:

(1) The name, age, domicile, post office address and date of death of the decedent;

(2) That the decedent left property requiring administration;

(3) Whether the decedent left a will and the date of execution of the will, if any;

(4) The name and post office address of the person, if any, named as executor in the will;

(5) The name and post office address of the person, if any, named as testamentary trustee in the will;

(6) The name and post office address of the person for whom letters are asked and the facts which show his eligibility for appointment as personal representative.

CROSS REFERENCES: Section 863.23 provides that a petition for determination of heirship may be included in a petition for administration. Section 879.25 requires filing of an affidavit as to military service. Section 268.23, Uniform Absence as Evidence of Death and Absentee's Property Act, provides a procedure for determining the fact of death when evidence is not available.

856.11 NOTICE OF HEARING ON PETITION FOR ADMINISTRATION. When a petition for administration is filed the court shall set a time for proving the will, if any, for determination of heirship and for the appointment of a personal representative. Notice of hearing on the petition shall be given as provided in s. 879.03 with the additional requirement that when any person interested is represented by a guardian ad litem, notice shall be given to both the person interested and his guardian ad litem. A copy of the will which is being presented for proof shall accompany each notice that is mailed or served.

CROSS REFERENCE: Section 863.23 provides for determination of heirship and proof of heirship.

856.13 WILL MUST BE PROVED. No will shall pass any property unless it has been proved and admitted to probate.

856.15 PROOF OF WILL AND PROOF OF HEIRS WHERE UNCONTESTED. (1) Generally. The court may grant probate of an uncontested will on the execution in open court by one of the subscribing witnesses of a sworn statement that such will was executed as required by the statutes and that the testator was of sound mind, of full age and not acting under any restraint at the time of the execution thereof.

(2) Proof outside the county. Upon request of the petitioner or his attorney the judge of the probate court in which the estate is pending may by order direct that proof of heirs or proof of will, if uncontested, may be taken in open court by the probate judge of any county in this state, or by a judge having probate jurisdiction in any other state or territory of the United States, for use in the court in which the estate is pending.

(3) Removal of will for proof outside the county. If a will filed for probate is removed from the court in which the estate is pending so that it may be proved outside the county, it shall during its absence be replaced by a photographic copy or a certified copy thereof.

(4) Will and proof to be returned and filed. After a will is proved in a court other than the court in which the estate is pending, the will and the proof of will shall be sent to the court in which the estate is pending. If no contest develops at the time fixed for proving the will in the court in which the estate is pending, the will and proof of will shall be filed as though made in the court in which the estate is pending.

(5) When no competent subscribing witness in state. If no competent subscribing witness resides in this state at the time fixed for proving the will or if none of them, after reasonable diligence used can be found in this state, the court may admit the testimony of other witnesses

to prove the competency of the testator, the execution, proof of testator's handwriting and that of one of the subscribing witnesses.

CROSS REFERENCE: Section 863.23 contains the general provisions in regard to proof of heirship and determination of heirship.

856.17 LOST WILL, HOW PROVED. Whenever any will is lost, destroyed by accident or destroyed without the testator's consent the probate court has power to take proof of the execution and validity of such will and to establish the same. The petition for the probate of such will shall set forth the provisions thereof.

856.19 ORDER ADMITTING WILL. Every will, when admitted to probate as prescribed by statute, shall have that fact signified thereon by the court.

856.21 PERSONS ENTITLED TO DOMICILIARY LETTERS. Letters shall be granted to one or more of the persons hereinafter mentioned, who are not disqualified, in the following order:

(1) The executor named in the will, if any.

(2) Any person interested in the estate or his nominee within the discretion of the court.

(3) Any person whom the court may select.

856.23. PERSONS WHO ARE DISQUALIFIED. No person including the executor named in the will is entitled to receive letters if he is under 21 years of age, of unsound mind, a corporation not authorized to act as a fiduciary in this state, a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court, or a person whom the court deems unsuitable for good cause shown. Nonresidency may be a sufficient cause for nonappointment or removal of a person in the court's discretion.

856.25 BOND OF PERSONAL REPRESENTATIVE. (1) Generally. No person shall act as personal representative, nor shall letters be

issued to him until he has given a bond in accordance with ch. 878, with one or more sureties, conditioned on the faithful performance of his duties, to the judge of the court, or until the court has ordered that he be appointed without being required to give bond. If the court does not require a personal representative to give bond prior to his letters being issued, the court may require him to give bond at any later time. The requirement of a bond and the amount of the bond, if any, is solely within the discretion of the court, except that no bond shall be required of any trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02.

(2) When two or more personal representatives. If 2 or more persons are appointed personal representatives, the judge may require no bond, may take a bond from each, take a joint bond from all or take a bond from some but not all.

(3) Share of estate can stand as excess surety. If any distributee, including one serving as personal representative, stipulates to a reduction of the bond and that his share of the estate stand as excess surety to the extent of the reduction, the judge may reduce the bond by an amount equal to the estimated share of such distributee.

(4) When will waives bond. A direction or request in a will that the personal representative serve without bond is not binding on the court.

(5) Section 895.345 not to apply. Section 895.345 does not apply to bonds of personal representatives.

COMMENT: This section gives the court complete discretion to determine whether a bond will be required and the amount of the bond if one is required.

856.27 APPOINTMENT OF SPECIAL ADMINISTRATOR IF APPOINTMENT OF PERSONAL REPRESENTATIVE IS DELAYED. If, because of an objection to the admission of a proposed will of a decedent or an

objection to the appointment of a proposed personal representative or for any other cause, no personal representative is appointed in an estate at the hearing on appointment, the court at such hearing shall appoint a special administrator to administer the estate until a personal representative is appointed.

COMMENT: This section is intended to expedite the administration of an estate when there is delay in the appointment of the personal representative.

856.29 LETTERS ISSUED TO TRUSTEE OF TESTAMENTARY TRUST. If the will of the decedent provides for a testamentary trust, letters of trust shall be issued to the trustee as soon as feasible after the admission of the will to probate. The trustee is a person interested in the estate. The trustee if required to give bond shall not be required to give bond until such time as assets are to be distributed to him as trustee.

COMMENT: A testamentary trust is directly affected by many proceedings in the administration of an estate such as a will construction or accounting.

856.31 SELECTION OF ATTORNEY TO REPRESENT ESTATE. Whenever a corporate fiduciary is granted letters to administer an estate, the person receiving the largest interest from the estate shall name the attorney who shall represent the estate in all proceedings of any kind or nature, unless good cause be shown before the court why this should not be done. In case several persons receive a similar interest and no person receives a larger interest, the attorney named by the majority shall represent the estate, and if such persons are equally divided in their selection, the personal representative shall select one of those named as attorney. In case of persons who are under guardianship, their court appointed guardian shall make the selection, except that in the case of minors having a natural guardian surviving,

their natural guardian shall make the selection. "Interest," as used in this section, means beneficial interest whether legal or equitable.

CHAPTER 857

POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

857.01 Title in personal representative.
857.03 Powers and duties of personal representative: in general.
857.05 Allowances to personal representative for expenses and services.
857.07 Allowances to personal representative for costs.
857.09 Procedure which may be followed when personal representative fails to perform.
857.10 Failure to comply with certain statutes.
857.11 Ordering personal representative to appear; costs.
857.13 Powers of surviving personal representative.
857.15 When personal representative removed, resigns.
857.17 Validity of acts of personal representative prior to removal.
857.19 When will proved after letters issued.
857.21 Appointment of successor personal representative.
857.23 Rights and powers of successor personal representative.
857.25 Continuation of business.
857.27 Personal representative or trustee may form corporation.
857.29 Personal representative may plat land.

SUMMARY OF CHAPTER: This chapter contains the sections pertaining to the personal representative which are presently scattered throughout the probate chapters.

857.01 TITLE IN PERSONAL REPRESENTATIVE. Upon his letters being issued by the court, the personal representative has title to all property of the decedent.

COMMENT: This section gives the personal representative title to both the real and personal property of the decedent and is consistent with the policy of treating real and personal property in the same way in all phases of probate procedure. Historically in Wisconsin a personal representative has had title to personal property

but not to real property, while a trustee has had title to both real and personal property.

857.03 POWERS AND DUTIES OF PERSONAL REPRESENTATIVE; IN GENERAL. The personal representative shall collect and possess all the decedent's estate; inventory all of the decedent's estate and all property subject to inheritance tax and have appraised such as is required by law; collect all income and rent from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance; contest all claims except claims which he believes are valid and which are not objected to by a person interested; pay and discharge out of such estate all expenses of administration, taxes, charges, claims allowed by the court, or such payment on claims as directed by the court; render accurate accounts; make distribution and do such other things as directed by the court or required by law.

CROSS REFERENCES: Chapter 287 deals generally with actions by and against personal representatives. Section 70.22 deals with assessment of personal property taxes on property in decedent's estates. Section 71.08 (6) requires the personal representative to file with the assessor of incomes such withholding tax returns (reports) for wages paid, sales tax returns and income tax returns as are due from the decedent and his estate.

857.05 ALLOWANCES TO PERSONAL REPRESENTATIVE FOR EXPENSES AND SERVICES. (1) Expenses. The personal representative shall be allowed all necessary expenses in the care, management and settlement of the estate.

(2) Services. The personal representative shall be allowed for his services commissions computed on the inventory value of the property for which the personal representative is accountable less any mortgages or liens plus increments in the estate proceedings as follows: For the first $50,000 at the rate of 3%; for all above the sum of $50,000 at the rate of 2%; and such further sums in cases of unusual difficulty or extraordinary services as the probate court judges reasonable. If a personal representative is derelict in his duty, his compensation for services may

be reduced or denied.

857.07 ALLOWANCES TO PERSONAL REPRESENTATIVE FOR COSTS. When costs are allowed against a personal representative in any action or proceeding the same shall be allowed him in his administration account unless it appears that the action or proceeding in which the costs were taxed was prosecuted or resisted without just cause on his part; and the court may determine, in rendering the judgment, whether the costs shall be paid out of the estate or by the personal representative. The court may allow as costs the sum paid by a personal representative on any bond or undertaking given by him in the case.

857.09 PROCEDURE WHICH MAY BE FOLLOWED WHEN PERSONAL REPRESENTATIVE FAILS TO PERFORM. When a personal representative fails to perform an act or file a document within the time required by statute or order of the probate court the judge may upon his own motion or upon the petition of any person interested order the personal representative for such estate and his attorney to show cause why the act has not been performed or the document has not been filed and shall mail a copy of such order to the sureties on the bond of the personal representative. If cause is not shown the judge shall determine who is at fault. If both are at fault, the judge shall dismiss both and forthwith appoint a personal representative and appoint an attorney acceptable to such personal representative to complete the administration of the estate. If only the personal representative is at fault, he shall be summarily dismissed and the judge shall forthwith appoint another personal representative to complete the administration and close the estate. If only the attorney is at fault, the judge shall dismiss him and instruct the personal representative to employ another attorney; if such personal representative fails to employ another attorney within 30 days, the judge shall appoint an attorney. No other procedure for substitution of attorney shall be required in such cases. The procedure set forth in this section

is not exclusive.

CROSS REFERENCE: This procedure is mandatory when the personal representative fails to comply with the requirements of ss. 862.17 and 863.35.

COMMENT: This procedure has been used for dormant estates since 1953 under 324.355. This section makes the procedure available in the discretion of the court whenever a personal representative fails to perform.

857.10 FAILURE TO COMPLY WITH CERTAIN STATUTES. Failure of the personal representative to comply with ss. 858.03, 859.29 or 862.09 is prima facie evidence of neglect of duty.

857.11 ORDERING PERSONAL REPRESENTATIVE TO APPEAR; COSTS. Whenever the court issues an order directed to the sheriff requiring the personal representative to appear before it, all costs incurred by the court in such proceeding may be charged to the personal representative personally and may be deducted from the fees which he may receive for his services as personal representative.

COMMENT: This section is new and makes a personal representative personally responsible for all costs incurred by the court as it forces the personal representative to perform his duties.

857.13 POWERS OF SURVIVING PERSONAL REPRESENTATIVE. Every power exercisable by co-personal representatives may be exercised by the survivor or survivors of them when one or more is dead or by the other or others when less than the number designated in the will are appointed by the court or when an appointment is terminated by order of the court or by resignation accepted by the court unless the power is given in the will and its terms provide otherwise as to the exercise of such power.

857.15 WHEN PERSONAL REPRESENTATIVE REMOVED, RESIGNS. The judge may accept the written resignation of any personal representative. When a personal representative becomes incompetent, disqualified,

unsuitable, incapable of discharging his duties or is a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court, the court shall remove him. When any personal representative has failed to perform any duty imposed by law or by any lawful order of the court or has ceased to be a resident of the state, the court may remove him. When grounds for removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed.

857.17 VALIDITY OF ACTS OF PERSONAL REPRESENTATIVE PRIOR TO REMOVAL. The resignation, removal or death of a personal representative after letters have been issued to him do not invalidate his official acts performed prior to his resignation, death or removal.

857.19 WHEN WILL PROVED AFTER LETTERS ISSUED. When after letters are issued to a personal representative by a probate court in the estate of a decedent, whether testate or intestate, a will of such decedent is proved and allowed by such court, the powers of such personal representative cease, and the court shall remove him. All acts of such personal representative before his removal are as valid as if such will had not been allowed.

857.21 APPOINTMENT OF SUCCESSOR PERSONAL REPRESENTATIVE. When a personal representative dies, is removed by the court, or resigns and such resignation is accepted by the court, the court may, and if he was the sole or last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

857.23 RIGHTS AND POWERS OF SUCCESSOR PERSONAL REPRESENTATIVE. When a successor personal representative is appointed, he has all the rights and powers of his predecessor or of the executor

designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the personal representative therein designated.

857.25 CONTINUATION OF BUSINESS. (1) Generally. Upon a proper showing, the court may by order authorize the personal representative to continue any business of the decedent, but such order may not be contrary to the provisions of the decedent's will. The order may be with or without notice. If notice is not given to all interested persons before the order is made, notice of the order shall be given within 5 days after the order. The order may provide:

(a) For the conduct of the business solely by the personal representative or jointly with one or more of the decedent's surviving partners or as a corporation to be formed by the personal representative;

(b) As between the estate and the personal representative, the extent of the liability of the estate and the extent of the liability of the personal representative for obligations incurred in the continuation of the business;

(c) As between distributees, the extent to which liabilities incurred in conduct of the business are to be chargeable solely to a part of the estate set aside for use in the business or to the estate as a whole; and

(d) As to the period of time for which the business may be conducted and such other conditions, restrictions, regulations, requirements and authorizations as the court may order.

(2) Rights of creditors. Nothing contained in this section affects the rights of creditors against the estate or the personal representative. Expenses incurred in the operation of a business, other than those incurred to wind up and dispose of a business, are not considered costs and expenses of administration for the purpose of determining priority of payment under s. 859.25 and are subordinate to all claims and allowances listed in s. 859.25.

857.27 PERSONAL REPRESENTATIVES OR TRUSTEES MAY FORM CORPORATION. The court may by order authorize the personal repre-

sentatives or trustees of the estate of a decedent or one or more of such personal representatives or trustees to organize a corporation for any of the purposes authorized by ch. 180 or 181 and to subscribe for shares of such corporation and convey estate property to such corporation in payment for the shares subscribed.

857.29 PERSONAL REPRESENTATIVE MAY PLAT LAND. The court may by order authorize the personal representative to plat land which is a part of the estate, either alone or together with other owners of such real estate. In such platting the personal representative must comply with the same statutes, ordinances, rules and regulations which apply to a person who is platting his own land.

CHAPTER 858.

INVENTORY.

858.01 Inventory must be filed by personal representative.
858.03 Persons interested to be informed of inventory.
858.05 Order to file inventory.
858.07 Contents of inventory.
858.09 Inventory, verification, examination in court.
858.11 Inventory of partnership property and liabilities by survivor.
858.13 When appraisal necessary.
858.15 When appraisal not necessary.
858.17 Supplemental inventory and appraisal.

SUMMARY OF CHAPTER: This chapter replaces chapter 312.

858.01 INVENTORY MUST BE FILED BY PERSONAL REPRESENTATIVE. Every personal representative, within a reasonable time but no later than 6 months after his appointment unless the court has by order extended or shortened the time, shall make and file with the court an inventory of all property owned by the decedent. The inventory shall also separately include all property which is required to be listed for inheritance tax purposes only. The inventory when filed shall show the

value of all property as of the date of the decedent's death. If a special administrator or personal representative has filed an inventory, no personal representative who is later appointed need file a further inventory unless additional property is found or the court orders otherwise.

CROSS REFERENCES: Section 72.01 describes property subject to inheritance tax.

858.03 PERSONS INTERESTED TO BE INFORMED OF INVENTORY. Not more than 5 days after filing any inventory with the court, the personal representative shall mail or deliver to all persons interested a statement indicating that such inventory has been filed; and shall mail or deliver to the surviving spouse and to all other persons interested, except those whose only interest is as beneficiary of a monetary bequest in a will, either a copy of such inventory or a statement indicating the inventory value of each item of property in which the person has an interest. If any person interested is represented by a guardian of the estate, guardian ad litem or attorney for persons in military service, a copy of the statement indicating that such inventory has been filed together with a copy of the inventory or statement of inventory value shall be mailed or delivered to the guardian of the estate, guardian ad litem or attorney for persons in military service as well as to the person interested. Failure of the personal representative to comply with the provisions of this section does not affect the jurisdiction of the court as to persons interested.

CROSS REFERENCE: Section 879.26 provides for waiver of this requirement.

COMMENT: This is one of the new requirements adopted for the purpose of keeping the persons interested in the estate periodically informed of the progress of the administration and aware of the facts which affect the share of the estate which they will receive.

858.05 ORDER TO FILE INVENTORY. If any personal representa-

tive neglects to file his inventory when required by law, the court shall call his attention to his neglect. If he still neglects to file, the court shall order him to file his inventory. If, without reasonable cause shown, he refuses or neglects to comply with such order for 20 days after service of said order upon him, he may be held in contempt of court.

858.07 CONTENTS OF INVENTORY. The personal representative shall include in the inventory all property subject to administration. For information purposes the personal representative shall also include all property over which the decedent had a power of appointment, life insurance payable to beneficiaries other than the estate, benefits payable on decedent's death under annuities or under a retirement plan, joint and life tenancies, gifts which may have been made in contemplation of death or taking effect upon death or made within 2 years prior to death and any other property which may be subject to inheritance tax as a result of the decedent's death. He shall include a statement of all encumbrances, liens and other charges on any item.

858.09 INVENTORY, VERIFICATION, EXAMINATION IN COURT. Every personal representative shall verify every inventory required of him. Such verification is to the effect that to the best of his knowledge the inventory includes all property of his decedent which is subject to administration and all property which may be subject to inheritance tax as a result of his decedent's death. The court, at the request of any person interested in the estate or the property listed or on its own motion, may examine the personal representative on oath in relation thereto or in relation to any proposed addition thereto or deletion therefrom.

858.11 INVENTORY OF PARTNERSHIP PROPERTY AND LIABILITIES BY SURVIVOR. The surviving partner of any deceased person whose estate is being administered shall, whenever required by order of the probate court, file with said court a verified inventory of the partner-

ship property and liabilities. If, after the service of such order upon him, he without reasonable cause shown refuses or neglects to comply with such order for 20 days after the day set for compliance, he may be held in contempt of court.

858.13 WHEN APPRAISAL NECESSARY. Except as provided in s. 858.15 all inventoried property shall be appraised by one or more disinterested persons appointed by the court. The appraisers shall appraise each such item in the inventory and certify to the value thereof. Where the estate is situated in 2 or more counties, appraisers may be appointed for each county.

858.15 WHEN APPRAISAL NOT NECESSARY. Assets, the value of which is readily ascertainable without the exercise of judgment on the part of an appraiser, shall not be appraised. The value of such assets shall be shown in the inventory and verified by the personal representative, and he shall provide such evidence of value as the court requires. Where evidence satisfactory to the court is produced to establish the value of any inventoried assets, no appraisal shall be required of such assets, unless a formal appraisal is requested by the public administrator.

COMMENT: This broadens the provisions of present 312.01 (3).

858.17 SUPPLEMENTAL INVENTORY AND APPRAISAL. If any property not included in the inventory comes to the knowledge of the personal representative, he shall either make and file a supplemental inventory thereof or include the same in his accounting. He shall cause such property to be appraised unless it is of the type described in s. 858.15.

CHAPTER 859.

CLAIMS.

859.01 Limitation on filing claims against decedent's estates.
859.03 Continuance of separate action.
859.05 Time to file.

859.07 Notice; publication.
859.09 Transfer of claims when administration fails.
859.13 Form and verification of claims.
859.15 Effect of statute of limitations.
859.17 Claims not due.
859.19 Secured claims.
859.21 Contingent claims.
859.23 Payment of contingent claims by distributees.
859.25 Priority of payment of claims and allowances.
859.27 Execution and levies prohibited.
859.29 Information to persons interested.
859.31 Compromise of claims.
859.33 Contest of claims; procedure.
859.35 Prompt judgment; hearing if claim filed one year.
859.37 Judgment on claims.
859.39 Delay of payment of claims when funds are insufficient.
859.40 Creditor's action for property not inventoried.
859.41 Creditor's action for property fraudulently sold by decedent.
859.43 Encumbered assets; payment of debt.
859.45 Tort claims.
859.47 Payment of unfiled claims.
859.49 Last illness and funeral expense of deceased wife.
859.51 No impediment to summary settlement.

SUMMARY OF CHAPTER: This chapter replaces chapter 313.

859.01 LIMITATION ON FILING CLAIMS AGAINST DECEDENT'S ESTATES. (1) Except as provided in sub. (2) and s. 859.03, all claims against a decedent's estate including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, shall be forever barred against the estate, the personal representative and the heirs and beneficiaries of the dece-

dent unless filed with the court within the time limited by the court for filing claims.

(2) This section does not apply to claims based on tort, claims based on Wisconsin income, sales, withholding, gift, inheritance or estate taxes, claims for funeral expenses, claims for administration expenses or claims of the United States.

CROSS REFERENCE: Section 893.19 (9) bars all claims against a decedent or his estate if administration not commenced within 6 years after his death. See s. 859.45 as to tort claims.

859.03 CONTINUANCE OF SEPARATE ACTION. If an action is pending against a decedent at the time of his death and the action survives, the plaintiff in that action may serve a notice of substitution of party defendant on the personal representative and file proof of service of notice in the probate court. Filing of proof of service within the time limited for filing claims in s. 859.05 gives the plaintiff the same rights against the estate as the filing of a claim. A judgment in any such action constitutes an adjudication for or against the estate.

859.05 TIME TO FILE. Upon the filing of an application for administration or at any time thereafter the court shall by order fix the time (not less than 3 months nor more than 6 months from the date of the order) within which claims against the decedent shall be presented or be forever barred.

COMMENT: This section reduces the maximum time which can presently be set for filing claims and eliminates the possibility of extending the time beyond the day set by the court as the last day for filing claims. It is consistent with the time usually set by the courts.

859.07 NOTICE; PUBLICATION. Notice of the time within which creditors may present their claims and of the time when the same will be examined and adjusted by the court shall be given by publication, as provided in s. 879.05 (4), and may be given with the notice for granting letters. The first insertion shall be made within 15 days of the date of

the order setting time.

859.09 TRANSFER OF CLAIMS WHEN ADMINISTRATION FAILS. Claims filed against the estate of a decedent following an order and notice to creditors shall, if such administration proceeding for any reason fails, be deemed filed upon notice to creditors in a subsequent administration proceeding. If the subsequent proceeding is in a different county, such claims shall be transmitted to and filed in the proper court.

859.13 FORM AND VERIFICATION OF CLAIMS. (1) General requirements. No claim shall be allowed unless it is in writing, describes the nature and amount thereof, if ascertainable, and is sworn to by the claimant or someone for him that the amount is justly due, or if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant, except as therein stated. The claim shall also show the post office address of the claimant.

(2) Requirements when claim founded on written instrument. If a claim is founded on a written instrument which is available, the original or a copy thereof with all indorsements must be attached to the claim.

CROSS REFERENCE: See s. 859.19 as to secured claims.

859.15 EFFECT OF STATUTE OF LIMITATIONS. No claim shall be allowed which was barred by any statute of limitations at the time of the decedent's death. No claim shall be barred by statutes of limitation which was not barred at the time of the decedent's death if the claim is filed against the decedent's estate in the probate court within 6 months from the date of the decedent's death or within the time fixed by the probate court for filing claims, whichever is earlier.

CROSS REFERENCES: Section 893.41 provides that the presentation of a claim in probate court is deemed the commencement of an action. Section 856.07 authorizes any creditor of a decedent to petition for the administration of the estate 30 days after the date of death.

859.17 CLAIMS NOT DUE. Upon proof of a claim which will become due at some future time, the court may allow it at the present value thereof, and payment may be made as in the case of an absolute claim which has been allowed; otherwise the court may order the personal representative to retain in his hands sufficient funds to satisfy the claim upon maturity; or if the distributees give a bond to be approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order such bond to be given in satisfaction of such claim and the estate may be closed.

859.19 SECURED CLAIMS. When a creditor holds any security for his claim the security shall be described in the claim, and the judgment allowing the claim shall also describe the security. The security is sufficiently described if the security document is described by date and by the recording or filing data. Payment of the claim shall be upon the basis of: (1) the full amount thereof if the creditor surrenders his security; or (2) if the creditor realizes on his security before receiving payment, then upon the full amount of the claim allowed less the fair value of the security.

CROSS REFERENCES: Section 859.13 deals with the form and verification of claims generally. Section 859.43 deals with the payment of secured claims. Section 863.13 deals with the exoneration of encumbered property.

COMMENT: This section is new. It adopts the procedure which has been generally used in the absence of a statute.

859.21 CONTINGENT CLAIMS. If the amount or validity of a claim cannot be determined until some time in the future, the claim is a contingent claim regardless of whether the claim is based on an event which occurred in the past or on an event which may occur in the future. Except for claims of the type not required to be filed by s. 859.01, contingent claims which cannot be allowed as absolute must, nevertheless,

859.17 CLAIMS NOT DUE. Upon proof of a claim which will become due at some future time, the court may allow it at the present value thereof, and payment may be made as in the case of an absolute claim which has been allowed; otherwise the court may order the personal representative to retain in his hands sufficient funds to satisfy the claim upon maturity; or if the distributees give a bond to be approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order such bond to be given in satisfaction of such claim and the estate may be closed.

859.19 SECURED CLAIMS. When a creditor holds any security for his claim the security shall be described in the claim, and the judgment allowing the claim shall also describe the security. The security is sufficiently described if the security document is described by date and by the recording or filing data. Payment of the claim shall be upon the basis of: (1) the full amount thereof if the creditor surrenders his security; or (2) if the creditor realizes on his security before receiving payment, then upon the full amount of the claim allowed less the fair value of the security.

CROSS REFERENCES: Section 859.13 deals with the form and verification of claims generally. Section 859.43 deals with the payment of secured claims. Section 863.13 deals with the exoneration of encumbered property.

COMMENT: This section is new. It adopts the procedure which has been generally used in the absence of a statute.

859.21 CONTINGENT CLAIMS. If the amount or validity of a claim cannot be determined until some time in the future, the claim is a contingent claim regardless of whether the claim is based on an event which occurred in the past or on an event which may occur in the future. Except for claims of the type not required to be filed by s. 859.01, contingent claims which cannot be allowed as absolute must, nevertheless,

be filed in the court and proved in the same manner as absolute claims. If allowed subject to the contingency, the order of allowance shall state the nature of the contingency. If such claim is allowed as absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of the following methods:

(1) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth, and upon approval thereof by the court, it may be allowed and paid in the same manner as an absolute claim.

(2) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but for this purpose the estate shall not be kept open longer than 2 years after distribution of the remainder of the estate has been made; and if such claim has not become absolute within that time, distribution shall be made to the distributees of the funds so retained, after paying any costs and expenses accruing during such period but such distributees shall be liable to the creditor to the extent provided in s. 859.23, if such contingent claim thereafter becomes absolute. When distribution is so made to distributees, the court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

(3) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent provided in s. 859.23, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

(4) Such other method as the court may order.

859.23 PAYMENT OF CONTINGENT CLAIMS BY DISTRIBUTEES. If a contingent claim is filed and allowed against an estate subject to

the contingency and all the assets of the estate including the fund, if any, set apart for the payment thereof, has been distributed, and the claim thereafter is allowed as absolute, the creditor may recover thereon against those distributees or their respective bondsmen whose distributive shares have been increased by reason of the fact that the amount of said claim as finally determined was not paid prior to final distribution, if a proceeding therefor is commenced in probate court within 6 months after the claim is allowed as absolute. No distributee or his bondsman shall be liable for an amount exceeding his proportionate share of the estate subject to the claim, nor for an amount greater than the value of the property which he received from the estate, the value to be determined as of the time of distribution to the distributee.

859.25 PRIORITY OF PAYMENT OF CLAIMS AND ALLOWANCES. (1) Classes and priority. At the time of their allowance, all claims and allowances shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

(a) Costs and expenses of administration.

(b) Reasonable funeral and burial expenses.

(c) Provisions for the family of the decedent under ss. 861.31, 861.33 and 861.35.

(d) Reasonable and necessary expenses of the last sickness of the decedent, including compensation of persons attending him.

(e) All debts and taxes having preference under the laws of the United States or the laws of this state.

(f) Wages due to employes which have been earned within 3 months before the date of the death of the decedent, not to exceed $300 in value to each employe.

(g) Property assigned to the surviving spouse under s. 861.41.

(h) All other claims allowed.

(2) No preference within classes. No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

859.27 EXECUTION AND LEVIES PROHIBITED. No garnishment, attachment or execution shall issue against nor shall any levy be made against any property of the estate under any judgment or cause of action against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, liens or other security agreements upon real or personal property in an appropriate proceeding.

859.29 INFORMATION TO PERSONS INTERESTED. Within 60 days after the last day for filing claims against the estate, the personal representative or special administrator shall mail or deliver to every person interested whose distribution from the estate will be affected by the allowance of claims against the estate, a statement listing all claims which have been filed against the estate, and showing as to each claim the name of the claimant, a brief description of the basis for the claim and the amount claimed. If any such person interested is represented by a guardian, guardian ad litem or attorney for persons in military service, a copy of the statement shall be mailed or delivered to the guardian, guardian ad litem or attorney for persons in military service as well as to the person interested. Failure of the personal representative or special administrator to comply with this section does not affect the jurisdiction of the court as to persons interested.

CROSS REFERENCE: Section 879.26 provides for waiver of this requirement.

COMMENT: This is one of the new requirements adopted for the purpose of keeping the persons interested in the estate informed of the progress of the administration and aware of the facts which affect the share of the estate which they will receive.

859.31 COMPROMISE OF CLAIMS. When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated; but if an objection to the claim has been filed by a person interested no compromise of the claim may be made without the consent of the objector.

859.33 CONTEST OF CLAIMS; PROCEDURE. (1) How contest initiated. The personal representative or any person interested may contest a claim or assert an offset or counterclaim in probate court only if he mails a copy of the objection, offset or counterclaim to the claimant and files the same with the court. Any offset or counterclaim so asserted will be deemed denied by the original claimant.

(2) Procedure. If any claim, offset or counterclaim is contested the court may require the issues to be made definite, may fix a date for pretrial conference and shall direct the manner in which pleadings, if any, shall be exchanged. The court shall set a time for trial upon its own motion or upon motion of any party.

859.35 PROMPT JUDGMENT; HEARING IF CLAIM FILED ONE YEAR. The hearing on any claim, offset or counterclaim may be adjourned, when necessary from time to time, but the hearing shall be concluded as soon as practicable. The court may on its own motion after such notice as the court may direct to the claimant, the objector and the personal representative, set for hearing any contested claim, offset or counter claim, filed over one year. The court may disallow all or any part of such claim, offset or counterclaim for nonprosecution.

859.37 JUDGMENT ON CLAIMS. Before setting a time for hearing on the final account the court shall enter a judgment on the claims presented against the decedent and the offsets and counterclaims asserted and stating how much was allowed for or against the estate in each case.

Such judgment shall set a date by which payment shall be made. If the balance as to any claimant is in favor of the estate, the payment thereof may be enforced as with any other judgment.

859.39 DELAY OF PAYMENT OF CLAIMS WHEN FUNDS ARE INSUFFICIENT. If it appears at any time that an estate is or may be insolvent, that there are insufficient funds on hand for payment of claims in full or that there is other good and sufficient cause for delaying payment, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith.

CROSS REFERENCE: Section 859.25 establishes priority of payment of claims and allowances.

859.40 CREDITOR'S ACTION FOR PROPERTY NOT INVENTORIED. Whenever there is reason to believe that the estate of a decedent as set forth in the inventory may be insufficient to pay his debts any creditor whose claim has been allowed may, on behalf of all, bring an action to reach and subject to sale any property or interest therein, not included in such inventory, which is liable for the payment of debts. Such creditor's action shall not be brought to trial until the insufficiency of the estate in the hands of the personal representative is ascertained; if found likely that the assets may be insufficient, the action shall be brought to trial; if such action is tried any property or interest therein which ought to be subjected to the payment of the debts of the decedent shall be sold in the action and the net proceeds used to pay such debts and to reimburse the creditor for the reasonable expenses and attorney's fees incurred by him in such action as approved by the court.

859.41 CREDITOR'S ACTION FOR PROPERTY FRAUDENTLY SOLD BY DECEDENT. Whenever there is reason to believe that the estate of a decedent as set forth in the inventory may be insufficient to pay his debts, and the decedent conveyed any property or any interest therein with intent to defraud his creditors or to avoid any duty, or executed

conveyances void as against creditors, any creditor whose claim has been allowed may, on behalf of all, bring an action to reach and subject to sale any property or interest therein. Such creditor's action shall not be brought to trial until the insufficiency of the estate in the hands of the personal representative is ascertained; if found likely that the assets may be insufficient, the action shall be brought to trial; if such action is tried any property or interest therein which ought to be subjected to the payment of the debts of the decedent shall be sold in the action and the net proceeds used to pay such debts and to reimburse the creditor for the reasonable expenses and attorney's fees incurred by him in such action as approved by the court.

859.43 ENCUMBERED ASSETS; PAYMENT OF DEBT. (1) Rights of secured creditors not affected. Nothing in this chapter shall affect or prevent any action or proceeding to enforce any mortgage, pledge, lien or other security agreement against property of the estate.

(2) Payment. When any property in the estate is encumbered by mortgage, pledge, lien or other security agreement, the personal representative may pay such encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer such assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim.

CROSS REFERENCES: Section 863.13 deals with exoneration of encumbered property. Section 859.19 deals with the payment of secured claims which have been filed.

COMMENT: Sub. (2) is new and is consistent with the new power to sell, lease and mortgage property which is given to the personal representative in ch. 860.

859.45 TORT CLAIMS. (1) Filed within time limited. If within the time limited for filing claims a claim based on a cause of action in

tort or for contribution resulting from a cause of action in tort is filed in accordance with s. 859.01 or 859.21 or a continuance is secured in accordance with s. 859.03 the claimant, will receive the same protection in regard to payment as a claimant who has filed a claim which was required to be filed.

(2) Not filed within time limited. A cause of action against a decedent in tort or for contribution resulting from a cause of action in tort is not defeated by failure to file the claim or commence or continue an action against the personal representative within the time limited for filing claims against an estate, but such failure relieves the probate court of all responsibility to protect the rights of the claimant and the claimant shall not be granted any of the protections set forth in s. 859.21. If the claim is made absolute through court approved settlement or adjudication and a certified copy of the settlement or judgment is filed in the court in which the estate is being administered prior to the approval of the final account, it shall be paid prior to the distribution of the estate, otherwise the estate may be distributed as though the claim did not exist. After the final account has been approved, a claimant whose claim has been made absolute through court approved settlement or through adjudication may proceed against the distributees, but no distributee shall be liable for an amount greater than that allowed in s. 859.23.

CROSS REFERENCE: Chapter 287 deals with actions against distributees.

COMMENT: This section is new. The Wisconsin Court has consistently held that tort claims against a decedent do not have to be filed in probate court. See Lounsbury v. Eberlein, 2 Wis.2d 112, 86 N.W.2d 12 (1957).

859.47 PAYMENT OF UNFILED CLAIMS. Where a personal representative has, in good faith, paid claims against the estate without the claims having been filed, such payments may be allowed upon proof that they were just demands against the estate and were paid within the time limited for the presentation of claims. Notice that application will be

made for such allowance shall be given as provided in s. 879.03. Payment shall be allowed on a pro rata basis with other claims of the same class if the estate is insolvent.

859.49 LAST ILLNESS AND FUNERAL EXPENSE OF DECEASED WIFE. The reasonable expense of her last illness and funeral may, if properly presented, be paid by the personal representative of the estate of a deceased wife and if so paid shall be allowed as a proper expenditure even though her surviving husband could have been held liable for the expense.

COMMENT: This section changes the common law rule which is to the effect that the estate of a deceased wife is not liable for the expense of her last illness when she is survived by a husband who is liable for all necessaries provided for her during her lifetime. See Grasser v. Anderson, 224 Wis. 654, 273 N.W. 63 (1937).

859.51 NO IMPEDIMENT TO SUMMARY SETTLEMENT. Nothing in this chapter shall impede the summary procedure provided by s. 867.01 for closing small estates.

CHAPTER 860.

SALE, MORTGAGE AND LEASE OF PROPERTY

860.01 Power of personal representative to sell mortgage and lease.
860.05 Free of creditor's claims.
860.07 No warranties.
860.09 Contract of decedent to sell or lease.
860.11 Special provisions in will; personal representative's duty to persons interested.
860.13 Who not to be purchaser, mortgagee or lessee without court approval.

SUMMARY OF CHAPTER: This chapter replaces chapter 316.

860.01 POWER OF PERSONAL REPRESENTATIVE TO SELL, MORTGAGE AND LEASE. A personal representative to whom letters have been issued by the probate court and whose letters have not been

revoked has complete power to sell, mortgage or lease any property in the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from such personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

COMMENT: This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He "must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Estate of Scheibe, 30 Wis.2d 116, 140 N.W. 2d 196 (1966).

860.05 FREE OF CREDITOR'S CLAIMS. If property in an estate is sold, mortgaged or leased by a personal representative, title passes subject to the rights of creditors having a secured interest in the property sold but free and clear of any right in creditors which is based on the filing and allowance of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

CROSS REFERENCE: Section 72.05 (4) provides that property sold from an estate by a personal representative passes free of any inheritance tax lien.

860.07 NO WARRANTIES. Except as provided in s. 860.09 (2),

a personal representative has no power to give warranties in any sale, mortgage or lease of property which are binding on himself personally or on the estate of the decedent.

860.09 CONTRACT OF DECEDENT TO SELL OR LEASE LAND. (1) Generally. When any person legally bound to make a conveyance or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to such conveyance or lease may petition the probate court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a conveyance or lease or may by its own order make a conveyance or lease to the person entitled thereto upon the performance of the contract.

(2) Warranties. If the contract for a conveyance required the decedent to give warranties, any instrument given by the personal representative or order by the court shall contain the warranties required. Such warranties are binding on the estate as though made by the decedent during his lifetime but do not bind the personal representative personally.

COMMENT: The purpose of this section is to provide a forum and procedure for the purchaser or lessee who seeks to specifically enforce a contract which he had with the decedent. If the decedent's contract required him to give a warranty deed, the purchaser's right to the warranties which the decedent agreed to give should not be cut off by the decedent's death.

860.11 SPECIAL PROVISIONS IN WILL; PERSONAL REPRESENTATIVE'S DUTY TO PERSONS INTERESTED. (1) Restriction. If the will of the decedent contains provisions which restrict the freedom of the personal representative to sell, mortgage or lease property, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property other than in accordance with such restrictions, except in the situation covered in sub. (4).

(2) Specific bequest. If the will of the decedent contains a specific bequest of property, the personal representative breaches his duty to the specific beneficiary if he makes a lease of such property for a period which exceeds one year or mortgages or sells such property unless the specific beneficiary joins in such lease, mortgage or sale, except in the situation covered in sub. (4).

(3) Prohibition. If the will of the decedent contains provisions which prohibit the sale, mortgage or lease of property by the personal representative, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property, except in the situation covered in sub. (4).

(4) Court may order sale, mortgage or lease. If the will of the decedent contains limitations described in sub. (1), (2) or (3) and the personal representative is unable to pay the allowances, expenses of administration and claims while complying with such limitations in the will, the court shall order the personal representative to sell, mortgage or lease such property in accordance with the appropriate terms and conditions of an order made after petition and hearing on notice given in accordance with s. 879.03 to all persons interested and all creditors of the estate.

COMMENT: Sub. (4) establishes a simple procedure for securing court authority to sell, mortgage or lease contrary to the provisions of the will when the proceeds are required to pay allowances, expenses of administration and claims. Compliance with this subsection protects the personal representative from liability to the persons interested. It is irrelevant to the rights and title of the purchaser, mortgagee or lessee.

860.13 WHO NOT TO BE PURCHASER, MORTGAGEE OR LESSEE WITHOUT COURT APPROVAL. The personal representative may not be interested as a purchaser, mortgagee or lessee of any property in the estate unless such purchase, mortgage or lease is made with the written consent of the persons interested and of the guardian ad litem for minors

and incompetents and with the approval of the court after petition and hearing on notice given in accordance with s. 879.03 to all persons interested, or unless the will of the decedent specifically authorizes the personal representative to be interested as a purchaser, mortgagee or lessee.

CHAPTER 861.

FAMILY RIGHTS.

SUBCHAPTER I. DOWER-ELECTIVE SHARE.

861.03 Dower.
861.05 Right to elective share; effect of election.
861.07 How elective share barred.
861.09 Denial of election or reduction of share when decedent and surviving spouse are living apart.
861.11 Procedure for electing.
861.13 Assignment of elective share.
861.15 Power of sale not affected by elective right.
861.17 Rights in non-probate property transferred in fraud of surviving spouse.

SUBCHAPTER II. ALLOWANCES AND EXEMPTION FROM CREDITORS.

861.31 Allowance to family during administration.
861.33 Selection of personalty by surviving spouse.
861.35 Special allowance for support and education of minor children.
861.41 Exemption of property to be assigned to surviving spouse.

SUMMARY OF CHAPTER: (1) This chapter combines the concepts of dower from chapter 233 and allowances from 313.15. The committee studied and rejected proposals along the lines of the English Family Allowances (giving the court complete discretion as to how much of the estate should go to the family contrary to decedent's wishes) and community property (assuring the spouse a fixed share of all wealth acquired during the marriage). Our existing system is essentially a compromise, with discretionary allowances to take care of need and the dower-elective share to give the surviving spouse a fractional share in the marital wealth.

(2) Dower is retained but modified. It is made an elective share (one-third) in the probate estate without regard to the type of property involved; inchoate dower is abolished in the interests of title simplification and to accord with the principle of treating real and personal property alike. Because of the increasing practice of placing marital wealth in the wife's name for tax reasons, the surviving husband is given the same rights in his wife's property as she would have as survivor in his.

(3) In the event of election, the testator's testamentary scheme is preserved as much as possible. The electing spouse does not necessarily get one-third outright, but the value of interests such as life estates under the will are deducted if capable of valuation; hence election to avoid a trust is no longer possible.

(4) Advance family planning is facilitated by allowing a simple contract to bar dower (as in the second marriage situation) and by barring dower if the decedent leaves half of his total estate, including nonprobate assets such as life insurance and joint tenancy property, outright or in trust for the surviving spouse.

(5) A new statutory provision builds on the judicial concept of setting aside transfers to defeat the spouse's rights if the transfers are in "fraud" of such rights. The problem is essentially left to the courts to apply a flexible concept to meet unusual cases where one spouse depletes the probate estate deliberately to avoid election. On the other hand, where there is reason to disinherit the surviving spouse, as where the couple have separated, the court has discretion to reduce or eliminate any share for the survivor.

(6) Again the homestead concept as such is abandoned, but the surviving spouse can ask for assignment of the home as part of the elective share; the court can make such an assignment outright or can refuse to assign the home in a proper case where it would unduly disrupt the estate plan.

(7) Changes in allowances are minor. The family allowance during administration of the estate can be charged against the recipient's share in the estate, either principal or income. The selection of personalty by the spouse is expanded to include an automobile, and the miscellaneous property increased from $400 to $1,000; the spouse also has what amounts to a right to "buy" personalty not specifically bequeathed by paying the appraised value to the personal representative. The allowance for support and education of a minor child can be placed in trust, to assure that it goes for the designated purpose and to return the property to the estate plan if the child dies before the age set.

(8) A change in the exemption from creditors is made. The existing law is based on the homestead concept, but operates inequitably (the exempt homestead goes to an adult child who has no need, for example; but a needy widow loses out to creditors if decedent has only nonhomestead assets). 861.41 allows the probate court to set aside up to $10,000 for the surviving spouse if needed for support. Here as in the case of

the allowances, the court is given standards and must consider assets outside the probate estate (life insurance, for example).

861.03 DOWER. The surviving spouse, whether widow or widower, of any decedent dying after June 30, 1968, has dower in any property which the decedent owned at his death. Dower consists of the right to elect a share as provided in this chapter. For dower purposes decedent is deemed to own property at his death if he has an interest which he can transmit by will and which would pass under the intestate succession laws if he leaves no will, whether such interest is legal or equitable. The inchoate dower right of the wife of any husband dying after June 30, 1968, is abolished, and the curtesy right of the husband of any wife dying after the same date is replaced by dower as herein provided.

COMMENT: Although this section retains the concept of dower, the concept has been broadened and changed in certain respects. Dower as defined by 233.01 is an expansion of the common law concept with all of its archaic limitations such as the requirement of seisin; dower is supplemented by the homestead concept and the elective right in 233.14. Moreover, it is limited to a right in the widow; the corresponding interest of a husband in his wife's real property as curtailed by 233.23 is in effect no more than a share in her intestate estate. Since 852.01 gives the surviving spouse an intestate share and makes the spouse an heir, there is no longer any need for defining dower to include a share in intestate property. This section gives the surviving husband the same dower right in the wife's estate as she has in his. This is not only justified on the basis of equality of treatment, but also required by the increasing number of instances in which a husband who has put his savings in his wife's name finds on her death that she has disinherited him by her will. With the growing practice of both husband and wife working, and investments being made in the wife's name for tax reasons, there is greater need for some protection for the husband than in a society in which most wealth was earned by the husband and invested in his name.

Distinctions between real and personal property, and between homestead and nonhomestead realty, or based on the feudal concept of seisin, have been eliminated. Classic concern as to whether there is dower in equitable interests in land, such as in the purchaser's interest under a land contract, is avoided by the proposed section.

Inchoate dower is abolished. This move has long been advocated by those interested in title simplification. It will not leave the wife unpro-

tected, as might be feared. Transfer of the home is still restricted by 235.01; and most homes are owned in joint tenancy anyway. Moreover, under existing law a husband can transfer unlimited amounts of personalty (such as stocks) without his wife's consent; it is anomalous to require her signature to a transfer of title to a vacant lot. Finally, the surviving spouse is protected by the provisions of 861.17 against a deliberate scheme by the decedent to deplete his probate estate.

861.05 RIGHT TO ELECTIVE SHARE; EFFECT OF ELECTION. (1) If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share consists of one-third of the value of the net probate estate, reduced by the value of the following property given to the spouse under the decedent's will: (a) property given outright; (b) the present value of any legal life estates if capable of valuation with reasonable certainty; (c) the present value of the spouse's right to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will which is capable of valuation with reasonable certainty without regard to powers which are forfeited under sub. (2). As used in this subsection, net probate estate means the net estate as defined in s. 851.17, including any property passing by intestate succession as well as under the will, but without deduction of the estate taxes.

(2) Except as to property applied under sub. (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, such spouse by electing to take under this section retains the power only if it is a special power as defined in s. 232.01 (5) and the testator has not provided otherwise, but forfeits any other power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under sub. (1) (c), or to apply additional principal or income in behalf of the electing spouse,

cannot be exercised in favor of the electing spouse.

(3) The right to elect may be barred under s. 861.07 or may be denied or the share reduced under s. 861.09.

COMMENT: This section replaces in large measure 233.13 — 233.14 on elective share. The term "net probate estate" is different from "net estate" as defined in 851.17; as used in this section federal and state estate taxes are not deducted in computing the net probate estate for purposes of election. In this respect, this definition changes the rule in Will of Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1952). This increases the amount of the elective share in the large probate estate, but is necessary because the increasing proportion of nonprobate assets may result in a tax burden capable of wiping out the probate estate.

An election against a will by a widow under existing law often results in distortion of the estate plan; dower gives her a one-third interest in each parcel of realty; the elective share in personalty passes to her outright free of any trust set up by the will. This section preserves the testamentary scheme to a large degree by reducing the elective share of one-third by interests passing to the spouse under the will if those interests are capable of valuation. Thus if she is given a life interest under a trust, and that interest can be valued on the basis of life expectancy tables, an election would not destroy the trust; but the wife could elect only the difference between the value of her interest under the trust and her one-third elective share.

An election to take against the will forfeits all rights in the estate (except those preserved in reducing the elective share); this includes a right to share in intestate property. In this respect the statute makes no change in existing law. See Chapman v. Chapman, 128 Wis. 413, 107 N.W. 668 (1906). It should, however, be noted that where the spouse takes under the will, 852.01 (1) of the Intestate Succession chapter will give the spouse a share in intestate property; this changes the rule in Will of Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1952). In the latter situation a testator would normally want the spouse to share in intestate property. Where the spouse elects against the will, however, the spouse is already taking a share of intestate property since that is included in the net probate estate on which the share is computed; moreover, under 861.13 the intestate property is used to satisfy the elective share.

The impact of election on powers of appointment and on powers of a trustee deserves special treatment. Sub. (2) sets forth the rules. The existing law is that an electing spouse retains powers of appointment created by the will, on the basis of the concept of a power as not an interest in property. See the Uihlein case cited above. This subsection provides for forfeiture of general and unclassified powers of appointment created in the spouse by the will. If the will creates a special power as

defined in 232.01 (5), such as a "power to appoint among our issue," the spouse may retain such a power unless the will itself provides for forfeiture by an election; the reason is that such a power is primarily intended to benefit the class among whom appointment may be made, to allow for flexibility, rather than to benefit the donee. Powers in a trustee which may confer direct benefits on the spouse, such as a power to invade principal to meet the needs of the spouse, will likewise normally be nullified by an election against the will. The theory underlying this section is that the spouse may not elect against the will and still derive benefits under it, except as those benefits are used to reduce the elective share.

Sub. (3) ties this section with the ensuing sections, which may in appropriate cases operate to restrict or nullify the right to elect.

861.07 HOW ELECTIVE SHARE BARRED. (1) By written agreement. The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage. If the agreement provides that the surviving spouse gives up rights in specified property but does not bar rights in other property, the spouse is barred only as to the specified property; and such property is excluded from the net probate estate for purposes of computing the share of the spouse under s. 861.05 and is not subject to the provisions of s. 861.17.

(2) By gift of half of decedent's probate and nonprobate assets. The surviving spouse is barred if he or she receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property: the net estate, joint annuities furnished by the decedent, proceeds of life insurance as to which decedent had any of the incidents of ownership at his death, transfers within 2 years of death to the extent to which decedent did not receive consideration in money or money's worth, transfers by decedent during lifetime as to which he has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary, payments from decedent's employer or from a plan created by the employer or under a contract between

the decedent and his employer (but excluding workmen's compensation and social security payments), property appointed by the decedent by will or by deed executed within 2 years of his death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse, and property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent. For this purpose the surviving spouse is deemed to receive any property as to which he or she is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse. As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including conventional joint tenancy, cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of 2 or more persons payable to the survivor, U.S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

COMMENT: This section replaces obsolete concepts of jointure which appear in 233.09 — 233.12 and is generally new. It is designed to facilitate advance family planning. Sub. (1) provides for barring the surviving spouse by simple written agreement. In order to prevent overreaching by a dominant spouse, consideration would still be necessary; this accords with the decision of the Wisconsin Supreme Court in Estate of Beat, 25 Wis.2d 315, 130 N.W.2d 739 (1964). It applies to both antenuptial and postnuptial agreements. Such an agreement could, of course, be set aside by the court if the surviving spouse lacked capacity or was subject to undue influence or if the agreement was the product of overreaching or misrepresentation. No attempt has been made to embody such tests in the statute, but they are left to court determination as is

true of a challenge on such grounds to any voluntary transfer or agreement. The statute reflects the present judicial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.

Sub. (2) is a completely new approach. The existing law allows a surviving widow to elect against a will and receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through nonprobate arrangements, such as life insurance payable to her or joint ownership passing to her by survivorship. This is obviously unfair, and this statutory provision bars the surviving spouse where he or she has received a majority of both probate and nonprobate assets considered together. In addition, the statute recognizes that such property may be tied up in an arrangement which would qualify for the marital deduction, rather than passing outright, and still constitute a bar.

861.09 DENIAL OF ELECTION OR REDUCTION OF SHARE WHEN DECEDENT AND SURVIVING SPOUSE ARE LIVING APART. In any case where the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there has been a judgment for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court deems reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: length of the marriage, whether the marriage was a first or subsequent marriage for either or both of the parties, the contribution of the surviving spouse to the decedent's property either in the form of services or transfers of property, length and cause of the separation, and any other relevant circumstances.

COMMENT: This section is new and changes existing law. The inequity of allowing election where the surviving spouse has deserted the decedent during lifetime should be obvious. The existing law allows even an adulterous widow to claim dower. Estate of Davis, 167 Wis. 328, 167 N.W. 819 (1918). The difficulty, however, of providing a fixed rule for separated couples has led to the proposed section which would vest discretion in the court to deal with individual cases on the basis of all available

facts. In some cases of separation no right to elect should be given; in others a full elective share is proper; in still others a reduced share would be consistent with the facts. The judicial burden should not be great since the number of cases will be few, and the issues are no more troublesome than a property division in a contested divorce. The presence of this section should operate to deter election in many instances where the surviving spouse might otherwise elect.

The phrase "living apart" is designed to mean more than physical separation. Thus the section would not apply merely because an elderly husband or wife was in a nursing home while the other spouse resided elsewhere.

861.11 PROCEDURE FOR ELECTING. (1) Filing written election. If the surviving spouse wishes to elect to take the share provided by s. 861.05, such spouse must file with the court in which the decedent's estate is being administered an election in writing signed by the spouse to take such share. The spouse may bar any right to elect under this chapter by filing with the court a writing, signed by the spouse in open court, electing to take under the will.

(2) Election by a guardian or guardian ad litem. An election may be filed on behalf of the spouse by a guardian of an incompetent spouse or a guardian ad litem. Either a guardian or guardian ad litem may elect against the will only if additional assets are needed for the reasonable support of the spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse, and any other assets (whether or not owned by the spouse) available for such support. Such election shall be subject to the approval of the court, with or without notice to other interested parties.

(3) Time for filing. The election must be filed within 6 months of the filing of the petition for probate of the will, except that the period may be extended by the court, during or after such 6 months, for such additional time as the court deems just, in event of the filing of a petition for appointment of a guardian for an incompetent spouse within such 6

months period, a contest of the will, a proceeding to obtain a judicial construction of the will, failure of the personal representative to file an inventory and comply with s. 858.03 within 5 months of the filing of the petition for probate, or other special circumstances justifying the delay in filing an election.

(4) Death of surviving spouse. If the surviving spouse dies prior to filing an election, or approval by the court of an election filed by a guardian or guardian ad litem, the right to the elective share ceases with death.

COMMENT: This section on procedure is based on the existing law embodied in 233.14 and 233.15 with some changes. The burden is still on the surviving spouse to file an election; otherwise the spouse is deemed to take under the will. The time for filing is shortened from one year to six months, in hopes that this will speed up settlement of estates, but the court has ample power to extend the time in proper cases. In a complex estate it will often be much longer before the nature of all assets and their value can be determined, so that an intelligent choice can be made.

Although 233.14 allows election by a guardian, no criterion for such election is stated; whereas this section allows election in such a case only if additional assets are needed for the reasonable support of the spouse; election merely to swell the estate subject to guardianship is undesirable for the entire family.

Sub. (4) makes the right to elect personal. Under existing law if a widow dies within the statutory period and leaves issue by the deceased husband, election may be made by her personal representative. The right to elect is intended for the protection of the surviving spouse, not for the spouse's estate. If there are minor issue by the deceased testator, who have been disinherited, the court can protect them under 861.35.

861.13 ASSIGNMENT OF ELECTIVE SHARE. (1) Except as provided in sub. (2), property shall be applied in satisfaction of the elective share in the following order unless the will directs otherwise:

(a) Any intestate property;

(b) The residue under the will;

(c) After the residue is exhausted, each person receiving a nonresiduary gift under the will must contribute, in proportion to the value of his gift, to the remaining balance of the elective share, except that

persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

(2) Upon request of the surviving spouse, the court shall assign to the spouse the home if its value does not exceed the elective share, or if the spouse pays to the personal representative the excess of the value over the elective share, unless the court finds that such an assignment would unduly disrupt the testator's plan for disposition of his estate. If a specifically devised home is assigned to the spouse, the devisee is entitled to reimbursement from property which would otherwise be applied in satisfaction of the elective share under sub. (1); but if contribution is required under sub. (1)(c), the devisee is entitled to reimbursement reduced by the amount which he would have been required to contribute had he received the home. Home has the same meaning as provided by s. 852.09 (2) and is valued as provided in s. 852.09 (1).

COMMENT: This section is new. The impact of election on distribution of the estate to other beneficiaries under the will is presently left to judicial determination. The court has used various concepts to ameliorate the distortion caused by election, including acceleration of future interests, sequestration, and construction; but in general the burden as to personal property falls on the residue while dower and homestead come out of specific parcels of realty regardless of their disposition under the will.

This section must be read in light of 861.05 which preserves as far as possible the testamentary plan by reducing the elective share by gifts to the surviving spouse to the extent they are capable of valuation. Moreover, dower is no longer a fractional share in each parcel of real estate, so that the problem of impact is different. This section basically places the burden on the residue, as does existing law as to the elective share.

Although the surviving spouse no longer has an absolute right to the home (by virtue of "homestead rights" under existing law), sub. (2) empowers the court to assign the home as part of the elective share if this will not unduly disrupt the testamentary plan. If the home is devised to a beneficiary other than the spouse, and there is sound reason to give the surviving spouse preference over the named beneficiary, the beneficiary will be compensated for loss of the home which the court would

assign to the spouse. The court may, however, refuse to assign the home to the surviving spouse, and satisfy the elective share out of other property.

861.15 POWER OF SALE NOT AFFECTED BY ELECTIVE RIGHT. Nothing in this chapter limits the power of the personal representative to sell any property in the course of administration.

COMMENT: This section corresponds to 233.16. Because the Code empowers the personal representative to sell both real and personal property, the section is no longer limited to a power of sale conferred expressly by will but applies to all estates. Hence the possibility of an election would in no way inhibit any transfer by the personal representative. This also follows from the basic concept of the new elective right, which does not confer rights in any particular piece of property in the estate.

861.17 RIGHTS IN NONPROBATE PROPERTY TRANSFERRED IN FRAUD OF SURVIVING SPOUSE. (1) Nothing in this chapter precludes a court in an equitable proceeding from subjecting to the rights of the surviving spouse under this chapter any property arrangement made by the decedent in fraud of such rights. A property arrangement in fraud of the rights of the surviving spouse means any transfer or acquisition of property regardless of the form or type of property rights involved, made by the decedent during marriage or in anticipation of marriage for the primary purpose of removing the property from the probate estate in order to defeat the rights of the surviving spouse under this chapter.

(2) An arrangement made before marriage, or within one year after marriage, or prior to July 1, 1969, to provide for issue by a prior marriage is not a fraudulent property arrangement within the meaning of this section.

(3) If the spouse is successful in an action or actions to reach such fraudulent property arrangements, recovery is limited to one-third of the total of the net probate estate as defined in s. 861.05 (1) and the fraudulently arranged property, reduced by any property received out

of the probate estate (whether by intestate succession, election, or the terms of the will) and any property passing to the spouse under the fraudulent arrangement to the extent that such property would have reduced an elective share under s. 861.05 (1) if the property had passed by will. Failure of the spouse to elect against a will, if any, within the time allowed for election by this chapter does not bar the spouse from maintaining an action. Other rules of this chapter shall apply so far as possible. Recovery may be denied or reduced in accordance with s. 861.09; and the suit may be barred if election is barred under s. 861.07. Recovery will forfeit any power of appointment over the remaining portion of the fraudulently arranged property, except a special power; and a power to pay over or apply principal or income may be exercised as to such property only as a similar power under a will could be exercised under s. 861.05 (2).

(4) The surviving spouse has no rights against any person dealing with the property without actual knowledge, or receipt of written notice, of the claim of the spouse; a person who has knowledge of facts and circumstances sufficient to put him on inquiry as to a claim by the spouse does not have actual knowledge and is not required to make further inquiry; but this subsection does not protect a gratuitous donee from the original beneficiary of the fraudulent arrangement.

(5) Every such suit must be brought within 3 years of decedent's death, but may be barred by laches at an earlier date.

COMMENT: This section is new. It is based on the judicial concept of allowing the surviving spouse to reach lifetime transfers made in "fraud" of the elective right. See Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); Mann v. Grinwald, 203 Wis. 27, 233 N.W. 582 (1930); Estate of Steck, 275 Wis. 290, 81 N.W.2d 729 (1957); Estate of Mayer, 26 Wis.2d 671, 133 N.W.2d 322 (1965). Although in none of those cases was the widow successful in setting aside or reaching the personal property transferred during lifetime, the Wisconsin Supreme Court affirmed in each opinion that it would allow such action in a proper case. It is the intent to fortify this judicial doctrine and give it procedural shape. It

should be noted that this section becomes more important in light of abolition of inchoate dower by 861.03; inchoate dower at present restricts inter vivos transfer of realty to defeat the widow. This section is therefore necessary to prevent depletion of the probate estate at the expense of the surviving spouse.

The most difficult issue in modernizing family protection is that of proper treatment of the myriad forms of ownership which result in passage of wealth at death outside of the regular probate court processes. These nonprobate assets more often than not are greater than the probate assets. They include joint tenancy assets, in both real and personal property, variations of joint ownership such as joint bank accounts, life insurance, death benefits under pension and retirement plans, gifts in comtemplation of death, bonds and share accounts payable on death to a named beneficiary, and revocable living trusts. The tax laws treat all or most of these as essentially testamentary in nature and hence taxable. Some states, notably Pennsylvania and recently New York, have adopted statutes including at least part of such nonprobate assets as subject to the elective share. Although the Committee considered such an approach, it was decided to retain the basic approach of the present Wisconsin law for the time being. It is intended that this section should be applied to reach deliberate plans to deplete the probate estate in order to defeat election by the surviving spouse. It is hoped that the very existence of the section will deter such plans. Although the test of "primary purpose" embodied in sub. (1) has been criticized as difficult of proof, it has the advantage of being familiar.

Sub. (2) permits transfer of assets, creation of joint tenancies or revocable trusts, and similar arrangements to be made for the benefit of children by a prior marriage if the arrangement is made before marriage to the surviving spouse or within a year after the marriage is entered into. Because persons now married may have intended to provide for issue by a prior marriage, they are able to do so within a year after the effective date of this Code without danger of having such arrangements challenged as a fraud on the rights of the spouse.

It is not necessary that the surviving spouse has elected to take against a will in order to bring an action to set aside fraudulent property arrangements. In this respect, the rule laid down in Estate of Mayer, supra, is changed by the statute. Thus if testator depleted his estate down to $5,000 by inter vivos transfers designed to defeat his widow (as by placing $1,000,000 in a revocable living trust), and then left the entire estate of $5,000 to the widow, she can take under the will and still proceed against the trust. Otherwise, the decedent could simply let his depleted estate go under the law of intestate succession so that there would be no will to elect against, and thereby avoid the law.

It is the intent of sub. (4) to protect transfer agents, banks, insurance companies and the like as well as innocent purchasers for value. The interest of the surviving spouse is primarily to be asserted against the

person receiving the property from the decedent by reason of the fraudulent transfer.

Sub. (5) sets a time limit on an action based on the theory of this section, but recognizes that it may be unfair to permit suit even within the time set (a proper case for laches).

SUBCHAPTER II.

ALLOWANCES AND EXEMPTION FROM CREDITORS.

861.31 ALLOWANCE TO FAMILY DURING ADMINISTRATION. (1) The court may, without notice or on such notice as the court directs, order payment by the personal representative or special administrator of such allowance as it determines necessary or appropriate for the support of the surviving spouse and any minor children during the administration of the estate. In making or denying such order the court shall consider the size of the probate estate, other resources available for support, existing standard of living, and such other factors as it considers relevant.

(2) The allowance may be made to the spouse for support of the spouse and any minor children, or separate allowances may be made to the spouse and to the minor children or their guardian if the minor children do not reside with the surviving spouse or if for any other reason the court finds separate allowances advisable; if there is no surviving spouse the allowance may be made to the minor children or to their guardian.

(3) The initial order may not exceed support for one year but may be extended for additional periods of not to exceed one year at a time, and is subject to revision or termination at any time by further order of the court.

(4) The court may direct that the allowance be charged against income or principal, either as an advance or otherwise, but in no event may an allowance for support of minor children be charged against the income or principal interest of the surviving spouse.

COMMENT: This section provides for an allowance to the family to enable the surviving spouse and minor children to live during the period of administration. It is substantially the same as 313.15 (2) with minor exceptions noted. It extends to the widower as well as the widow, in line with the policy of equal treatment and recognition that in some cases the family wealth will be in the wife's name. There are minor changes in the procedure, the section expressly recognizing that separate allowances for the spouse and for the minor children may be appropriate in some cases. Sub. (3) limits the initial order for the allowance to one year but permits extensions; the court also retains power to modify the allowance at any time.

Sub. (4) empowers the court to charge the allowance as an advance. This is new. While it is essential to provide an immediate source of funds for the family to live on, in substantial estates the allowance may result in unfair distribution; the court therefore is given power to charge the allowance as an advance. However, to assure that the marital deduction will not be jeopardized in any case, the court may not charge an allowance for support of minor children against the interest of the surviving spouse, whether income or principal.

In sub. (1) the court is directed to consider other resources available for support of the family as well as the size of the probate estate, in determining whether to make an allowance as well as how much of an allowance to set.

861.33 SELECTION OF PERSONALTY BY SURVIVING SPOUSE. (1) Subject to this section, the surviving spouse may file with the court a written selection of the following personal property, which shall thereupon be transferred to such spouse by the personal representative: (a) decedent's wearing apparel and jewelry held for personal use, (b) one automobile, (c) household furniture, furnishings and appliances, and (d) other tangible personalty not used in trade, agriculture or other business, not to exceed $1,000 in inventory value. The above selection may not include items specifically bequeathed except that the surviving spouse may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home; for this purpose any antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

(2) If it appears that claims may not be paid in full, the court may upon petition of any creditor limit the transfer of personalty to the spouse

under this section to items not exceeding $3,000 in aggregate inventory value until such time as claims are paid in full or the court otherwise orders; or the court may require the spouse to retransfer property in excess of $3,000 or, at the option of the spouse, pay the excess in value over this amount.

(3) The surviving spouse may select items not specifically bequeathed of the type specified under sub. (1) (d) exceeding in value the $1,000 limit or obtain the transfer of items exceeding the limit set by the court under sub. (2), by paying to the personal representative the excess of inventory value over the respective limit.

(4) The personal representative has power, without court order, to execute such documents as may be appropriate to effect transfer of title to any personal property selected by such spouse pursuant to this section. No person shall question the validity of any such document of transfer or refuse to accomplish any such transfer on the grounds that the personal representative is also the surviving spouse.

COMMENT: This section providing for selection of personalty by the surviving spouse is more liberal than 313.15 (1) and contains some innovations. The spouse is allowed one automobile (almost a necessity in modern times) and the amount of miscellaneous personalty is increased from $400 to $1,000 and is limited to tangible personalty (the widow cannot "select" cash).

The relation of this selection to specifically bequeathed personalty is defined in sub. (1).

This section like the existing statute on allowances involves a built-in exemption from creditors. In rare instances the value of household furnishings and wearing apparel may be a very substantial amount; hence there is provision for limiting the total value of the selected personalty if creditors petition the court.

There is a new feature in sub. (3) allowing the spouse to select other personalty or personalty of greater value (such as a $5,000 boat) by paying to the personal representative the appraised value; this does not apply to items specifically bequeathed.

Once the selection has been filed (unless limited on petition of creditors) the selected items are no longer subject to administration and the personal representative has power to effect a transfer of title by whatever means are necessary.

861.35 SPECIAL ALLOWANCE FOR SUPPORT AND EDUCATION OF MINOR CHILDREN. (1) If decedent is survived by a minor child or children, the court may order an allowance for the support and education of each such minor child until he reaches a specified age, not to exceed 21. This allowance may be made whether the estate is testate or intestate; but no allowance may be made if the decedent has amply provided for such child by the terms of his will and if the estate is sufficient to carry out such terms after payment of all debts and expenses, or if such support and education have been provided for by any other means, or if the surviving spouse is legally responsible for such support and education and has ample means to provide such support and education in addition to his or her own support. In any case where the decedent is not survived by a spouse, the court may also allot directly to the minor child or children household furniture, furnishings and appliances.

(2) The court may set aside property to provide such allowance and may appoint a trustee to administer the property, subject to the continuing jurisdiction of the court. If at any time the property held by such trustee is no longer required for the support and education of the minor child, or when the child dies or reaches 21, any remaining property is to be distributed by the trustee as directed by the court in accordance with the terms of the decedent's will or to the heirs of the decedent in intestacy or to satisfy unpaid claims of decedent's estate, as the case may be.

(3) In making allowances under this section, the court must take into account the effect of such allowances on claims under s. 859.25 and balance the needs of the minor child against the nature of the creditors' claims in setting the amount allowed hereunder.

COMMENT: This section is substantially the same as 313.15 (3) under which the court can make an allowance for support and education of minor children. The only important change is procedural, enabling the court to set aside the amount in a trust so that rights of other persons are protected in the event the amount proves greater than needed for the intended purposes. It is not necessary, however, to create a trust if the amount is not substantial, or if it is inappropriate for other reasons.

This section like the preceding ones necessarily may reduce the estate available for payment of claims. Sub. (3) is a recognition of this problem and allows the court to balance the needs of the minor children against the interests of the creditors in an insolvent estate.

The Committee considered a dollar limitation on allowances under this section, but decided that flexibility was more important. Extension of the section to adult incompetent children was also considered, but is not recommended at this time.

861.41 EXEMPTION OF PROPERTY TO BE ASSIGNED TO SURVIVING SPOUSE. (1) After the amount of claims against the estate has been ascertained, the surviving spouse may petition the court to set aside as exempt from the claims of creditors under s. 859.25 (1) (h) an amount of property reasonably necessary for the support of such spouse, not to exceed $10,000 in value, if it appears that the assets are insufficient to pay all claims and allowances and still leave the surviving spouse such an amount of property in addition to selection and allowances.

(2) The court shall grant such petition if it determines that such an assignment ahead of creditors is reasonably necessary for the support of such spouse. In determining the necessity and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and all other assets and resources available for support of such spouse.

(3) An assignment of property hereunder shall be applied against any right of the surviving spouse to take under the will, under the intestate succession law, or under the elective share provided by s. 861.05, as the case may be.

(4) If the decedent's estate includes an interest in a home, the court may upon request of the spouse include as part or all of the property assigned to the spouse hereunder either a fee or a life interest in the home, to the extent of the decedent's interest therein. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign

such an interest to the spouse upon payment to the personal representative of the excess of the value of such interest over the amount set by the court hereunder; for this purpose the court may require a new appraisal or use the original inventory value. Home has the same meaning as provided in s. 852.09 (2).

COMMENT: This section replaces the well-known "exempt homestead" provisions in our existing statutes.

Our existing law deals with the problem of protection of the family against claims of creditors in an ineffective and clumsy manner. Inchoate dower gives the widow a third of all non-homestead realty ahead of creditors, regardless of need and regardless of value involved. Melms v. Pabst Brewing Company, 93 Wis. 140, 66 N.W. 244 (1896). The exempt homestead (the home up to $10,000 in value) passes to the widow or a child free of judgments and claims against the deceased owner, under 237.025 (or may be willed to them under 238.04); in either case the widow or the child may have no need for protection and may in fact be independently wealthy. Life insurance and joint tenancy property pass to the beneficiaries or survivor free of unsecured claims, regardless of amount. A terminal allowance of up to $2,000 under 313.15 (4) (a) may further increase the amount of property passing to the family ahead of creditors. Thus the total escaping from legitimate creditor claims may be a staggering amount or a very small amount depending upon the composition of the estate, and may also have no relation to the need of the recipient.

This section makes a fresh approach. It bases the exemption directly on the need of the surviving spouse for support ahead of payment of creditors. It is limited to the surviving spouse, since the court can protect minor children under 861.35 ahead of creditors. There is no reason to protect adult children; they should have no right prior to creditors. Furthermore, the exemption does not depend on the presence or absence of a home in the estate, although under sub. (4) the court may assign the home (or a life estate) against the exemption. But if there is no home, the surviving spouse can be allocated other property.

The amount is limited to $10,000. However, the court is not required to allot this amount but may give a lesser amount or no exemption at all. In making this determination the court is directed to consider other assets available to the surviving spouse. This would include assets already owned by the survivor as well as assets acquired as surviving joint tenant or proceeds of life insurance or any other assets passing at death.

CHAPTER 862.

ACCOUNTS.

862.01 When personal representative shall account.

862.03 Account of incompetent, deceased or removed personal representative.
862.05 What charged to personal representative.
862.07 Value at which to account: what accounts to contain.
862.09 Hearing on settlement of account; notice.
862.11 Copy of account to be given to persons interested.
862.13 Objections to account.
862.15 Settlement of account.
862.17 Accounts: failure of personal representative to file.

SUMMARY OF CHAPTER: This chapter replaces chapter 317.

862.01 WHEN PERSONAL REPRESENTATIVE SHALL ACCOUNT. Every personal representative shall file in the court a verified account of his administration

(1) When he files a petition for final settlement;

(2) Upon the revocation of his letters;

(3) When he submits his application to resign;

(4) At any other time when directed by the court either on its own motion or on the application of any person interested.

CROSS REFERENCE: See Section 863.33 as to time within which Final Account must be filed.

862.03 ACCOUNT OF INCOMPETENT, DECEASED OR REMOVED PERSONAL REPRESENTATIVE. (1) Incompetent personal representative. If a personal representative is adjudged incompetent, his account shall be filed by his guardian, or if his guardian fails to file then by his bondsman, if any. If neither the guardian nor the bondsman files an account, the court shall direct the public administrator to file the account of the incompetent personal representative.

(2) Deceased personal representative. If a personal representative dies, his account shall be filed by the personal representative of his estate, or if his personal representative fails to file then by a special administrator of his estate or by his bondsman, if any. If neither his

personal representative, special administrator nor his bondsman files an account, the court shall direct the public administrator to file the account of the deceased personal representative.

(3) Removed personal representative. If a personal representative is removed and fails to file his account, his account shall be filed by his bondsman, if any. If the bondsman fails to file, the court shall direct the public administrator to file the account of the personal representative who has been removed.

(4) Payment for preparation. The person who prepares and files an account in accordance with this section shall be allowed the reasonable value of his services to be paid out of the estate, and the fees of the incompetent, deceased or removed personal representative shall be reduced accordingly.

862.05 WHAT CHARGED TO PERSONAL REPRESENTATIVE. Every personal representative shall be charged in his accounts with all the property of the decedent which comes to his possession; with all profit and income which comes to his possession from the estate and with the proceeds of all property of the estate sold by him.

862.07 VALUE AT WHICH TO ACCOUNT: WHAT ACCOUNTS TO CONTAIN. The personal representative shall account for the property of the decedent at the value at which it is shown in the inventory. Accounts rendered to the court by a personal representative shall be for a period distinctly stated and shall show by debit and credit each item with which he is chargeable. The account shall first show the total value of the property with which he is chargeable according to the inventory or, if there has been a prior accounting, the amount of the balance of the prior account; it shall show all income or other property received and gains or losses from the sale of any property; and it shall show all payments, charges and losses. The final account shall also itemize all property available for distribution and all property previously distributed and

show its inventory value or if acquired by the personal representative during administration, its acquisition value; it shall contain a proposed distribution schedule showing as to each distributee the property being distributed to him or previously distributed to him and showing its inventory value, or if acquired by the personal representative during administration, its acquisition value, and in addition showing its estimated value as of the last day covered by the final account or if previously distributed, its value at the time it was distributed. The final account shall also show as to each distributee the estimated inheritance tax payable out of his distribution.

CROSS REFERENCE: Section 71.08 (6) requires the personal representative to file with the assessor of incomes such withholding tax returns (reports) for wages paid, sales tax returns and income tax returns as are due from the decedent and his estate.

COMMENT: This section contains new requirements as to information to be included in the final account in order to make persons interested in the estate aware of what they may expect to receive when the property is distributed.

862.09 HEARING ON SETTLEMENT OF ACCOUNT; NOTICE. Upon the filing of any account, the court shall set a date for hearing and notice thereof shall be given in accordance with s. 879.03. Unless notice is waived the account must be filed not less than 3 weeks before the date set for hearing. An account so filed may be brought up to date on the day of the hearing. If any account shows that the assets in the estate are insufficient to pay the creditors in full, notice of that fact and of the filing of the account shall be given to all creditors who have filed claims against the estate and whose claims have not been disallowed.

862.11 COPY OF ACCOUNT TO BE GIVEN TO PERSONS INTERESTED. At the time he gives notice of hearing of allowance of any account or secures waivers of notice of hearing the personal representative shall mail or deliver a copy of the account to every person interested whose distribution from the estate is affected by the information, other than

inheritance tax information, contained in the account. If any such person interested is represented by a guardian, guardian ad litem, or attorney for persons in military service a copy of the account shall be mailed or delivered to the guardian, guardian ad litem or attorney for persons in military service as well as to the person interested. Failure of the personal representative to comply with this section does not affect the jurisdiction of the court as to persons interested.

CROSS REFERENCE: Section 879.26 provides for waiver of this requirement.

COMMENT: This is one of the new requirements adopted for the purpose of keeping the persons interested in the estate periodically informed of the progress of the administration and aware of the facts which affect the share of the estate which they will receive. Persons interested "whose distribution is affected by the information, other than inheritance tax information, contained in the account" includes all those who receive a residual or fractional share of the estate, but does not include those who receive only specific or monetary bequests unless their bequest is subject to abatement.

862.13 OBJECTIONS TO ACCOUNT. At the hearing on an account of a personal representative or at any time prior thereto, any person interested may file objections to any item or omission in the account. All such objections shall be specific.

862.15 SETTLEMENT OF ACCOUNT. The court must be satisfied of the correctness and legality of the account before allowing it. If the personal representative is present at the hearing, he may be examined on oath upon any matter relating to his account and the settlement of the estate. The court may refuse to approve the account unless the personal representative is present at the hearing.

862.17 ACCOUNTS: FAILURE OF PERSONAL REPRESENTATIVE TO FILE. If any personal representative fails to file his account as required by law or ordered by the court, the court may, upon its own motion or upon the petition of any person interested either order the personal representative to file such account by a day certain or the court

may proceed in accordance with s. 857.09. If after having been ordered to file such account by a day certain, the personal representative fails to comply with the order, the court shall proceed in accordance with s. 857.09.

CHAPTER 863.

CLOSING ESTATES.

863.01 Distribution of specific property to distributee and partial distribution before final judgment.
863.05 Execution and levies by creditors of distributees prohibited.
863.07 Assignment by distributee.
863.09 Allowance for tombstone and care of grave.
863.11 Order in which assets appropriated; abatement.
863.13 No exoneration of encumbered property.
863.15 Right of retention.
863.16 Value used in distribution of factional shares.
863.17 Partition by agreement.
863.19 Valuation used in distribution of estate assets.
863.21 Construction of will, notice.
863.23 Determination of heirship and proof of heirship.
863.25 Petition for final judgment.
863.27 Contents of final judgment.
863.29 Recording final judgment.
863.31 Conclusiveness of final judgment.
863.33 Estates to be completed promptly: time limits.
863.35 Dormant estates.
863.37 Distribution of money or other property where payment or transfer is prohibited.
863.39 Escheats.
863.41 Receipts to be filed.
863.43 Distribution to ward: notice.

863.45 Receipts from guardians.

863.47 Order of discharge of personal representative.

863.49 Inactive estates: summary discontinuance.

SUMMARY OF CHAPTER: This chapter replaces chapter 318.

863.01 DISTRIBUTION OF SPECIFIC PROPERTY TO DISTRIBUTEE AND PARTIAL DISTRIBUTION BEFORE FINAL JUDGMENT. Before final judgment has been rendered the personal representative may deliver to any distributee possession of any specific property to which he is entitled under the terms of the will or any statute. The personal representative may make one or more partial distributions of the estate, provided that other distributees and claimants are not prejudiced thereby. The personal representative may require the distributees to give security for the return of such property.

863.05 EXECUTION AND LEVIES BY CREDITORS OF DISTRIBUTEES PROHIBITED. No garnishment, attachment or execution shall issue against nor shall any levy be made against any property of the estate under any judgment or cause of action against any distributee of the estate.

CROSS REFERENCE: Chapter 273 and s. 268.026 provide remedies for creditors through the appointment of a receiver.

863.07 ASSIGNMENT BY DISTRIBUTEE. If any person interested in an estate assigns all or part of his interest therein (other than an interest not assignable by the specific language of the will) as collateral or otherwise and the assignee serves a copy thereof on the personal representative of the estate and files a copy with the probate court in which the estate is being administered before the entry of the final judgment and before the property or interest covered by the assignment has been distributed in accordance with s. 863.01, the probate court shall assign to such assignee in the final judgment such interest or part of the interest of the assignor included within such assignment to the extent

that the assignment is valid as determined by said court, after giving effect to any credits to which the assignor may prove himself entitled. A personal representative incurs no liability to an assignee of a person interested for any acts performed or distribution made by the personal representative prior to the time a copy of the assignment is received by the personal representative or he has actual knowledge of the assignment.

COMMENT: This section permits a person interested to assign his interest in the estate, but protects any personal representative who distributes property before he has knowledge of the assignment.

863.09 ALLOWANCE FOR TOMBSTONE AND CARE OF GRAVE. (1) Tombstone. In case no provision is made in the will for a tombstone or monument or marker at the grave of the decedent, and none has been erected, the personal representative may expend a reasonable sum for a tombstone or monument or marker at the grave of the decedent. The expenditure shall be subject to the approval of the court and is classed as funeral expense.

(2) Care of grave. The court may order the personal representative to pay a suitable amount for perpetual care of the grave of the decedent. The expenditure is classed as funeral expense.

CROSS REFERENCE: For county court orders concerning perpetual care of graves, see 157.11 and 157.125.

863.11 ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT. (1) General rules. Except as provided in sub. (2), and except as provided in s. 853.25 dealing with the shares of pretermitted heirs and in s. 861.13 dealing with the share of the surviving spouse who elects to take against the will, shares of the distributees abate, without any preference or priority as between real and personal property, in the following order: (a) property not disposed of by the will; (b) residuary bequests; (c) general bequests; (d) specific bequests. A general bequest charged on any specific property or fund is, for purposes of abatement, deemed

property specifically bequeathed to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is deemed a general bequest to the extent of such failure or insufficiency. Abatement within each classification is in proportion to the amounts of such property each of the beneficiaries would have received had full distribution of such property been made in accordance with the terms of the will.

(2) Contrary provisions, plan or purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the bequest would be defeated by the order of abatement stated in sub. (1), the shares of the distributees abate in such other manner as may be found necessary to give effect to the intention of the testator.

863.13 NO EXONERATION OF ENCUMBERED PROPERTY. (1) Generally. All specifically devised property shall be assigned to the beneficiary without exoneration unless the will of the decedent provides that a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes an encumbrance on property which is specifically devised should be paid out of other assets in the estate and the property assigned to the beneficiary free of the encumbrance. Unless the will provides to the contrary, if the debt or interest on the debt which is secured by the encumbrance on the specifically devised property is paid in whole or in part out of other assets in the estate, such specifically devised property shall be assigned to the beneficiary only if: (a) the beneficiary contributes to the estate an amount equal to the amount which the estate has paid, or (b) the personal representative secures such amount for the estate through a new encumbrance on such specifically devised property. If the estate is not reimbursed under (a) or (b), the personal representative shall sell such specifically devised property, reimburse the estate from the proceeds of such sale and assign the balance of the proceeds, if any, to the specific beneficiary.

(2) Joint tenancy. If all or any part of a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes

an encumbrance on property in which the decedent at the time of his death had an interest as a joint tenant is paid out of assets in the estate as the result of a claim being allowed against the estate, the estate is subrogated to all rights which the claimant had against such property, unless the will of the decedent provides to the contrary.

(3) Insurance. If all or any part of a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named insured is paid out of assets in the estate as the result of a claim being allowed against the estate, the estate is subrogated to all rights which the claimant had against such proceeds, unless the will of the decedent provides to the contrary.

CROSS REFERENCE: Section 859.43 deals with payment of debts which are secured by an encumbrance on property in the estate.

COMMENT: Under this provision survivors receive property subject to whatever liens were against it at the time of the decedent's death. This changes the common law rule as expressed in Estate of Budd, 11 Wis.2d 248, 105 N.W.2d 358 (1960).

863.15 RIGHT OF RETENTION. When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, shall be treated as an offset by the personal representative against property of the estate to which such distributee is entitled. In contesting such offset such distributee shall have the benefit of any defense which would be available to him in a direct proceeding by the personal representative for the recovery of such debt.

863.16 VALUE USED IN DISTRIBUTION OF FRACTIONAL SHARES. In distributing property to distributees who receive fractional shares of the estate under the statutes of descent and distribution or under provisions in a will, the personal representative shall divide the property among the distributees on the basis of the value of the property at the time of distribution unless the will, if any, provides otherwise.

863.17 PARTITION BY AGREEMENT. Property passing by statute or by will to persons as joint tenants or tenants in common may be partitioned among such persons by the judgment of the probate court assigning such property, provided a petition therefor is filed with the court prior to such judgment signed by all persons interested in the property involved. The petition must set out the manner in which the property is to be divided and the agreement of all persons interested in the property involved.

863.19 VALUATION USED IN DISTRIBUTION OF ESTATE ASSETS. If a general bequest of estate assets, including a pecuniary bequest, in a dollar amount fixed by formula or otherwise is satisfied by a distribution in kind, the distribution shall be made at current fair market values unless the will expressly provides that another value may be used. If the will requires or permits a different value to be used all assets available for distribution, including cash, shall unless otherwise expressly provided be so distributed that the assets, including cash, distributed in satisfaction of the bequest will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in a will that the personal representative may fix values for the purpose of distribution does not of itself constitute authorization to fix a value other than current fair market value.

COMMENT: This section was adopted by the 1965 Legislature to meet problems involved in securing the marital deduction under federal estate tax rules.

863.21 CONSTRUCTION OF WILL, NOTICE. Notice of hearing upon a petition for the construction of a will shall be given as provided in s. 879.05

863.23 DETERMINATION OF HEIRSHIP AND PROOF OF HEIRSHIP. In every administration of an estate in which notice to creditors is required

the persons who are the heirs of the decedent shall be determined by the court after hearing. Notice of the hearing shall be given in accordance with s. 879.03 but shall include notice by publication in accordance with s. 879.05 (4). No determination of heirship shall be made until after the testimony or deposition of one or more witnesses is reduced to writing and filed. A petition for determination of heirship may be included in the petition for administration, petition for approval of final account and final judgment or in a separate petition; and the notice may be included in the notice of hearing on any of said petitions, or in the notice to creditors.

CROSS REFERENCE: Section 856.15 provides for proof of heirship outside the county.

863.25 PETITION FOR FINAL JUDGMENT. After the payment of the allowances, debts, taxes, funeral expenses and expenses of administration and when, if necessary, a fund has been withheld from distribution for the payment of contingent claims, for meeting possible tax liability or for any other reasonable purpose, the personal representative shall, if the estate is in a condition to be closed, file his final account and at the same time petition the court for hearing on the final account and for final judgment assigning the estate to such persons as are entitled to the same. Notice of hearing shall be given in accordance with s. 879.03.

863.27 CONTENTS OF FINAL JUDGMENT. In the final judgment the probate court shall approve the final account, designate the persons to whom assignment and distribution is being made and assign to each of them the property or proportions or parts of the estate or the amounts to which each is entitled in accordance with the terms of the will or the statutes of descent and distribution. The findings of fact which support the judgment shall include a determination of the heirs of the decedent; facts showing that all jurisdictional requirements have been met; the date of death of the decedent and his testacy or intestacy; facts relating to the payment of state inheritance and estate tax, state income tax and

claims and charges against the estate; and if the decedent immediately prior to his death had an estate for life or an interest as a joint tenant in any property in regard to which a certificate of termination in accordance with s. 867.03 has not been issued, shall set forth the termination of such life estate or the right of survivorship of any joint tenant. Every tract of real property in which an interest is assigned or terminated shall be specifically described. If a fund is withheld from distribution for the payment of contingent claims, for meeting possible tax liability or for any other reasonable purpose, the judgment shall provide for the distribution of such fund in the event that all or a part of it is not needed.

CROSS REFERENCE: The 6-month limitation on rehearing inheritance tax determination provided in s. 72.15 (11) will run even though the final judgment indicates that property is being withheld from distribution until possible liability for claims etc. is determined in the future, unless in the order determining inheritance tax, the probate court reserves jurisdiction to redetermine inheritance tax. Section 231.40 (3a) provides the method for allocating estate income among distributees and requires that the amount of any net probate income distributed by the personal representative to any trustee or other distributee shall be stated in the final judgment.

863.29 RECORDING FINAL JUDGMENT. (1) Recording required. Whenever the final judgment assigns an interest in real property, assigns a debt which is secured by an interest in real property or shows the termination of a life estate or an interest as a joint tenant in real property or in a debt which is secured by an interest in real property, such final judgment, a certified copy of such final judgment or a certified abridgment thereof as described in sub. (2) shall be recorded by the personal representative in the office of the register of deeds in each county in this state in which such real property is located.

(2) Abridged final judgment. In lieu of a certified copy of the final judgment assigning the estate the personal representative may record an abridgment of such final judgment including such portions as relate to and affect title to real property in the county in which the abridgment is recorded. The accuracy of the abridgment shall be certified by the judge or the register in probate of the court which assigned the estate.

863.31 CONCLUSIVENESS OF FINAL JUDGMENT. (1) Generally. The final judgment is a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the judgment. It operates as an assignment or final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated.

(2) As to purchasers for value from distributees. After the final judgment has been recorded in the office of the register of deeds in the county in which the real estate is located, purchasers for value of real estate which is described in the final judgment from distributees or their successors in title may rely on the final judgment as conclusive in so far as it purports to transfer to the distributees any title which the decedent held in such real estate at the time of his death, except to the extent that there has been a transfer of an interest in such real estate by the personal representative in accordance with ch. 860 or s. 863.01 of which the purchaser has actual notice or of which he has constructive notice because of recording in the office of the register of deeds in the county in which the real estate is located.

863.33 ESTATES TO BE COMPLETED PROMPTLY: TIME LIMITS. (1) Generally. All estates are to be completed as soon as reasonably possible and without unnecessary delay.

(2) Personal representative to petition within 18 months. The personal representative shall within 18 months after the issuance of letters

either: (a) file with the court the final account of his administration and notice of determination of inheritance tax with proof of service on or waiver by the department of taxation, or (b) secure from the court, upon its finding that a good and sufficient cause for delay exists, an order extending the time within which such documents shall be filed. In the discretion of the court the order extending time may be entered ex parte or after hearing on notice to all persons interested. The order may extend the time for up to one year. Succeeding orders may be entered only after hearing on notice to all persons interested.

(3) Court may require sworn statement and hearing. Whenever a personal representative petitions for an extension of time, the court may by order require the personal representative, within such time as the court fixes, to file an accounting together with an affidavit stating the reasons for the delay in settlement of the estate and the additional time necessary for the settlement of the estate. The court may by order fix a time and place for hearing on such petition and require notice of the hearing together with a copy of the accounting and statement of the personal representative to be served upon all persons interested in accordance with s. 879.05.

(4) Removal of personal representative for non-compliance. If a personal representative fails to comply with this section the court may remove him and appoint his successor and may reduce the compensation to which he would have been otherwise entitled, or may proceed in accordance with s. 857.09.

863.35 DORMANT ESTATES. If final judgment is not entered in an estate within 3 years after filing of the petition for administration and the estate is not open pursuant to an order extending time in accordance with s. 863.33, the judge shall order the attorney and the personal representative for such estate to show cause why final judgment has not been entered and shall follow the procedure set forth in s. 857.09.

863.37 DISTRIBUTION OF MONEY OR OTHER PROPERTY WHERE PAYMENT OR TRANSFER IS PROHIBITED. Where the laws of the United States, or executive orders, or regulations pursuant thereto prohibit payment, conveyance, transfer, assignment or delivery of property or interest therein to a legatee, devisee, ward or beneficiary of an estate or trust or to any person on his behalf, the probate court, after due notice to such person as prescribed by s. 879.03, may, by judgment or decree, authorize such disposition of such property or interest therein, as is or may be permissible under or in conformity with the laws, executive orders or regulations of the United States.

863.39 ESCHEATS. (1) Generally. If any legacy or intestate property is not claimed by the distributee within 120 days after entry of final judgment (or within the time designated in such judgment) it shall be converted into money and paid to the state school fund.

(2) Foreign distributee. If notice is given to a distributee domiciled in a foreign country as provided in s. 879.03 and such person is not heard from within 120 days after entry of final judgment of distribution (or within a longer time designated in such judgment) the property which such foreign distributee would take shall not escheat, but shall descend as intestate property.

(3) Recovery of money from state treasurer. The money received by the state treasurer pursuant to sub. (1) and s. 852.01 (3) shall be paid to the owner on proof of his right thereto. The claimant may, within 7 years after the date of publication by the treasurer of notice of receipt thereof as provided by s. 14.42 (15), file in the probate court in which the estate was settled, a petition alleging the basis of his claim. The court shall order a hearing upon the petition; and 20 days notice thereof shall be given by the claimant to the attorney general, who shall appear for the state at the hearing. If the claim is established it shall be allowed without interest; and the court shall so certify to the department of admin-

istration, who shall audit and the state treasurer shall pay the same. If real property has been adjudged to escheat to the state pursuant to s. 852.01 (3) the probate court which made the adjudication may adjudge at any time before title has been transferred from the state that the title shall be transferred to the proper owners pursuant to proceedings brought as provided in this subsection.

CROSS REFERENCES: See Chapter 24 for procedure for handling escheated lands. See s. 895.42 as to deposit of undistributed money and property with public administrator or bank with trust powers.

863.41 RECEIPTS TO BE FILED. Within 120 days after the final judgment is signed the personal representative shall file with the court receipts from distributees for all personal property assigned in the final judgment, unless the court extends the time.

863.43 DISTRIBUTION TO WARD: NOTICE. At least 10 days prior to distribution of a share or legacy for the benefit of a minor or incompetent for whom a guardian of his estate has been appointed, the personal representative shall notify the court appointing such guardian of the estate, in writing, the total property to be distributed to the guardian of the estate for the benefit of his ward. An affidavit of mailing said notice shall be filed before making such distribution.

CROSS REFERENCE: Section 319.125 requires probate court, before approving disbursement of funds to a guardian, to be satisfied as to the sufficiency of the guardian's bond.

863.45 RECEIPTS FROM GUARDIANS. If a distributee of an estate is a minor or an incompetent and has within this state a guardian of his estate, the personal representative shall deliver the money or other property to the guardian, take a receipt from the guardian and file the receipt with the court of probate. The court of probate shall transmit a certified copy of the receipt to the court which appointed the guardian.

CROSS REFERENCES: Section 319.04 describes the situations in which a guardian is not required for a minor or incompetent. Section 319.29 provides procedure for payment to and receipt by a foreign guardian.

863.47 ORDER OF DISCHARGE OF PERSONAL REPRESENTATIVE. Upon proof of the recording of certified copies of the final judgment or abridgements thereof, if required by s. 863.29, and upon the filing of receipts from the distributees for all other property assigned in the final judgment, or other evidence of transfer satisfactory to the court, the court shall enter an order finding such facts, discharging the personal representative and canceling his bond. The order of discharge operates as a release of the personal representative from his duties and constitutes a bar to any suit against the personal representative and his sureties unless such suit is commenced within 6 years from the date of the order of discharge.

863.49 INACTIVE ESTATES: SUMMARY DISCONTINUANCE. The probate judge may by order upon his own motion and without notice summarily discontinue any administration in which no paper has been filed for more than 5 years and may cancel the bond, if any.

CHAPTER 867.

SUMMARY PROCEDURES.

867.01 Summary settlement of small estates.
867.03 Termination of joint tenancy and life estate.
867.05 Determination of descent of property.
867.07 Grounds for appointment of special administrator.
867.09 Who may petition for appointment of special administrator.
867.11 Notice of hearing on petition for appointment of special administrator.
867.13 Bond of special administrator.
867.15 Letters of special administration; no appeal.
867.17 Powers, duties and liabilities of special administrator.

867.19 Compensation of special administrator.

867.21 Termination of authority and discharge of special administrator.

SUMMARY OF CHAPTER: This chapter contains the provisions for summary settlement and determination of the rights of survivors which are scattered throughout the probate chapters.

867.01 SUMMARY SETTLEMENT OF SMALL ESTATES. (1) When available. The probate court shall summarily settle the estate of a deceased person without the appointment of a personal representative: (a) whenever the estate, less the amount of the debts for which any property in the estate is security, does not exceed in value the costs, expenses, allowances and claims set forth in s. 859.25 (1) (a) to (g); or (b) whenever the estate less the amount of the debts for which any property in the estate is security, does not exceed $5,000 in value and the decedent is survived by a spouse from whom he is not living apart or one or more minor children or both. An estate, administration of which has been commenced under ch. 856, may be terminated under this section at any time that it is found to meet the requirements of this section.

(2) Procedure. Any person who has standing to petition for administration of the estate under s. 856.07 has standing to petition for summary settlement.

(a) Petition. The petition shall set forth the facts required by sub. (1) and a detailed statement of property in which the decedent had an interest, property over which the decedent had a power of appointment, life insurance, benefits payable on decedent's death under annuities or under a retirement plan, joint and life tenancies, gifts made in contemplation of death or taking effect upon death or made within 2 years prior to death and any other property which may be subject to inheritance tax as a result of the decedent's death. It shall set forth the names and post-office addresses of all persons interested, so far as known to the petitioner or ascertainable by him with reasonable diligence, and shall indicate such of those who are minors or otherwise under disability and

the names and post-office addresses of their guardians.

(b) Special administrator may be appointed. If the court deems it necessary, it may at any time during the proceeding appoint a special administrator to aid in the settlement.

(c) Bond. Before making any order the court may require a bond of the petitioner in such amount as the court deems sufficient, conditioned to indemnify any person who may be aggrieved thereby.

(d) Notice. The court may hear the matter without notice or order notice to be given pursuant to s. 879.03.

(e) Determination of tax. The department of taxation or public administrator may examine the property referred to in any petition under this section. Before making an order which distributes the estate, the court shall make an order determining inheritance tax or an order finding no inheritance tax due. No notice need be given to the department of taxation unless the court so orders.

(f) Order. If the court is satisfied that the estate is one proper to be settled by this section, it shall assign the property to the persons entitled to the same. If the estate is eligible to be settled under sub. (1) (b), any property not otherwise assigned shall be assigned to the surviving spouse or minor children or both as an allowance as provided in s. 861.31. The court shall order any person indebted to or holding money or other property of the decedent to pay the indebtedness or deliver the property to the persons found to be entitled to receive the same. It shall order the transfer of interests in real estate, stocks or bonds registered in the name of the decedent, the title of a licensed motor vehicle, or any other form of property whatsoever. If the decedent immediately prior to his death had an estate for life or an interest as a joint tenant in any property in regard to which a certificate of termination in accordance with s. 867.03 has not been issued, the order shall set forth the termination of such life estate or the right of survivorship of any joint tenant. Every tract

of real property in which an interest is assigned or terminated or which is security for a debt in which an interest is assigned or terminated shall be specifically described.

(g) Information to unsatisfied creditors. The court may order the petitioner to inform known unsatisfied creditors as to the final disposition of the estate.

(h) Recording required. Whenever the order relates to an interest in real property or to a debt which is secured by an interest in real property, a certified copy or duplicate original of such order shall be recorded by the petitioner in the office of the register of deeds in each county in this state in which such real property is located.

(3) Release of liability of transferor. Upon the payment, delivery, transfer or issuance in accordance with the order of the court, the persons making such delivery, transfer or issuance are released to the same extent as if the same had been made to a personal representative of the estate of the decedent.

CROSS REFERENCES: See ss. 253.10 and 856.01 for jurisdiction for administration of estates. Section 319.28 provides for summary closing by guardian of small estate of ward. See s. 851.61 for transfer of United States obligations in beneficiary form. See s. 103.39 for payment of decedent's wages by employer directly to decedent's dependents. See s. 895.41 (3) for payment of decedent's employee's cash bond by employer directly to decedent's dependents. See s. 215.14 (13) for savings account in savings and loan association issued to a member payable on death to another person. See s. 186.34 for share in credit union issued to a member payable on death to another person.

COMMENT: Sub. (1) (b) broadens the existing statute to include all estates of $5,000 or less when the decedent is survived by a spouse from whom he is not living apart or by minor children.

867.03 TERMINATION OF JOINT TENANCY AND LIFE ESTATE. When a domiciliary of this state dies who immediately prior to his death had an estate for life or an interest as a joint tenant in any property, or

when a person not domiciled in this state dies having such an interest in property in this state, upon petition of any person interested in such property to the probate court of the county of domicile of the decedent (or if the decedent was not domiciled in this state, of any county where such property is situated) the court shall issue a certificate, under the seal of the court. Such certificate shall set forth the fact of the death of such life tenant or of such joint tenant, the termination of such life estate or joint tenancy interest, the right of survivorship of any joint tenant and any other facts essential to a determination of the rights of persons interested. Such certificate is prima facie evidence of the facts therein recited, and if such certificate relates to an interest in real property or to a debt which is secured by an interest in real property, a certified copy or duplicate original of such certificate shall be recorded by the petitioner in the office of the register of deeds in each county in this state in which such real property is located.

CROSS REFERENCES: Section 863.27 deals with the termination of life estate and joint tenancy in the final judgment of an estate. Section 72.176 requires that inheritance tax be determined in every proceeding for termination of joint tenancy or life estate.

867.05 DETERMINATION OF DESCENT OF PROPERTY. (1) Petition. Six years or more after any person dies intestate, leaving an estate which a probate court in this state has jurisdiction to administer, any person interested in such estate or in any property in such estate may petition the probate court which has jurisdiction to administer such estate, to determine the descent of the property in such estate. Such petition shall be verified and shall show, as particularly as known or can with due diligence be ascertained, the time and place of death and domicile of such decedent, that the estate has not been administered and the other facts which authorize the proceeding, the names, post-office addresses and relationship to the decedent of all heirs and their grantees entitled to any interest in said property, stating who, if any, are minors or under legal disability, and the names and residences

of their guardians, if any, and a description of all property for which a determination of descent is sought.

(2) Certificate after hearing without notice. The court may hear the petition without notice, and after hearing the evidence, if the court is satisfied who the heirs of the decedent are and what their respective rights and interests in the property are, the court shall certify the same and in its certificate shall name the persons entitled to interests therein and the property to which each is entitled. The certificate is prima facie evidence of the facts recited therein.

(3) Judgment after hearing on notice. The court may hear the petition after notice of hearing given in accordance with s. 879.03, and after hearing the evidence, if the court is satisfied who the heirs of the decedent are and what their respective rights and interests in the property are, the court shall determine the same and in its judgment shall name the persons entitled to interests therein and the property to which each is entitled.

(4) Recording required. Whenever the certificate or judgment relates to an interest in real property or to a debt which is secured by an interest in real property, a certified copy or duplicate original of such certificate or judgment shall be recorded by the petitioner in the office of the register of deeds in each county in this state in which such real property is located.

CROSS REFERENCE: Section 72.176 requires that inheritance tax be determined in every proceeding for the determination of descent of property.

COMMENT: This section broadens the existing statute to cover personal as well as real property, but makes it available only after the statute of limitations on claims has run. (893.19 (9)).

867.07 GROUNDS FOR APPOINTMENT OF SPECIAL ADMINISTRATOR. Whenever it appears by petition to probate court that a person has died and the court would have jurisdiction for the administration of his

estate, the court may appoint a special administrator under any of the following circumstances:

(1) It appears that there is no estate to be administered and an act should be performed on the part of the decedent, the performance of which affects or is of importance to the petitioner or any other person.

(2) That the final judgment of distribution in the estate has been entered and an act remains unperformed in said estate, or that unadministered assets have been found or may be found belonging to said estate.

(3) That it appears that the estate can be settled in accordance with s. 867.01.

(4) That it appears to be necessary to conserve or administer the estate of a decedent before letters can be issued to a personal representative.

(5) That circumstances provided for in s. 72.17 exist.

(6) That there is reason to believe that a cause of action exists for or against the decedent or his estate and that it is necessary that some act be performed before letters can be issued to a personal representative.

(7) That other circumstances exist which in the discretion of the court require the appointment of a special administrator.

CROSS REFERENCE: See ss. 253.10 and 856.01 for jurisdiction for administration of estates.

867.09 WHO MAY PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR. Petition for the appointment of a special administrator may be made by any person who has standing to petition for administration of the estate under s. 856.07, and waiting periods stated in that section do not apply.

867.11 NOTICE OF HEARING ON PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR. The court shall determine whether notice of the hearing for the appointment of a special administrator need be given. If the court deems notice of such hearing unnecessary or inex-

pedient or if the appointment should be made without delay, the court shall proceed to hear the matter without notice. If notice of hearing is required, it shall be given pursuant to s. 879.03.

867.13 BOND OF SPECIAL ADMINISTRATOR. If it appears that anything of value will come into the hands of the special administrator, the court may require him to give bond in such amount as the court deems reasonable, except that no bond shall be required of any trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02. If the person appointed special administrator is subsequently appointed personal representative, his bond given as special administrator continues in effect as his bond as personal representative unless otherwise ordered by the court. Section 895.345 does not apply to bonds of special administrators.

867.15 LETTERS OF SPECIAL ADMINISTRATION; NO APPEAL. Upon the appointment of a special administrator, letters of special administration shall be issued to the special administrator by the court. An order appointing a special administrator is a nonappealable order.

867.17 POWERS, DUTIES AND LIABILITIES OF SPECIAL ADMINISTRATOR. A special administrator has the same powers, duties and liabilities as a personal representative except as expressly limited by order of the court. By order the court may expressly grant him powers and impose duties in addition to those granted by statute to personal representatives as may be necessary to accomplish the purpose for which he is appointed.

CROSS REFERENCE: As defined in s. 851.23 "personal representative" as used in title XLII does not include "special administrator".

867.19 COMPENSATION OF SPECIAL ADMINISTRATOR. The special administrator shall be allowed all necessary expenses incurred in the care and management of the estate and the performance of his duties; for his services he shall be allowed such compensation as the

court finds to be reasonable. If a special administrator is subsequently appointed personal representative, his compensation as special administrator may be considered and fixed at the time his compensation as personal representative is determined.

867.21 TERMINATION OF AUTHORITY AND DISCHARGE OF SPECIAL ADMINISTRATOR. (1) When no personal representative is to be appointed. The special administrator shall be discharged whenever the court is satisfied that he has properly performed his duties. Before discharging the special administrator the court may require him to file any accounts or reports which the court deems necessary. Such discharge may be granted with or without notice as the court determines. If notice of hearing upon the application for discharge is required, such notice shall be given pursuant to s. 879.03.

(2) Upon granting letters to a personal representative. Upon the granting of letters to a personal representative of the estate of the decedent the power of the special administrator ceases, and the special administrator shall forthwith file his account and deliver to the personal representative all property of the estate which the special administrator has in his possession. The court may accept the written receipt of the personal representative as evidence of such delivery and upon approving his account shall discharge the special administrator. If the special administrator is appointed personal representative, he need not file an account as special administrator unless his bond is not continued as his bond as personal representative. If no accounting as special administrator is made he shall account for the special administration in his account as personal representative.

CHAPTER 868.

ANCILLARY PROCEDURES.

868.01 Uniform probate of foreign wills act.

868.03 Uniform ancillary administration of estates act.

868.05 Foreign wills; certificate of assignment.

SUMMARY OF CHAPTER: This chapter contains all the sections relating to ancillary probate procedure.

868.01 UNIFORM PROBATE OF FOREIGN WILLS ACT. (1) Probate on proof of domiciliary probate; effect. The written will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, shall be admitted to probate upon proof that it stands probated or established in the jurisdiction where the testator died domiciled and is not being contested there. A will probated under this subsection is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the jurisdiction where the testator died domiciled. Rights to take against the will are not affected by this subsection.

(2) Local contest limited; setting aside local probate. A will offered for probate under sub. (1) may be contested only upon the ground that the conditions of that subsection are not met or that it has been finally rejected from probate in this state; but probate under sub. (1) shall be set aside upon proof that probate or establishment of the will has been set aside in the jurisdiction where the testator died domiciled, if, within one year after such probate in this state under sub. (1), application is made in this state to set aside such probate upon such ground, or verified notice that proceedings have been taken to contest the will in the jurisdiction where the testator died domiciled, is filed, and in the case of real property, also recorded as provided in sub. (3).

(3) Protection of probate under sub. (1). If within one year after probate under sub. (1), verified notice that proceedings have been taken to contest the will in the jurisdiction where the testator died domiciled is filed in the court of this state where probate was granted, and, in the case of real property, also recorded in the office of the register of deeds in the county where the real property is located, the protection of probate ceases until proof that the domiciliary proceedings have been terminated in favor of the will or were never actually taken is filed and, in the case

of real property, also recorded as provided herein.

(4) Effect of rejection of will at domicile. Final rejection of the will from probate or establishment in the jurisdiction where the testator died domiciled is conclusive in this state except where the will has been rejected solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this state, in which case the will nevertheless may be admitted to probate under sub. (5).

(5) Original probate; when allowed. Original probate of the will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state and is valid under the laws of this state, may be granted if the will does not stand rejected from probate or establishment in the jurisdiction where the testator died domiciled, or stands rejected from probate or establishment in the jurisdiction where the testator died domiciled solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this state. The court may delay passing on the application for probate under this subsection pending the result of probate or establishment or contest at the domicile or on the application for probate under sub. (1).

(6) Proof of will by probate in nondomiciliary jurisdiction. If a testator dies domiciled outside this state, an authenticated copy of his will and of the probate or establishment thereof in a jurisdiction other than the one in which he died domiciled shall be sufficient proof of the contents and legal sufficiency of the will to authorize the admission of the will to probate under sub. (5) if no objection is made thereto. This subsection does not authorize the probate of any will which would not be admissible to probate under sub. (5), nor, in case objection is made to the will, to relieve proponent from offering proof of the contents and legal sufficiency of the will except that the original will need not be produced unless the court so orders.

(7) Authentication and translation. Proof contemplated by this section

may be made by authenticated copies of the will and the records of judicial proceedings with reference thereto. If the will has not been probated but is otherwise established under the laws of the jurisdiction where the testator died domiciled, its contents and establishment may be proved by the authenticated certificate of the notary or other official having custody of the will or having authority in connection with its establishment. If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this section he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

(8) General law to apply. Except where otherwise provided, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in case of a testator who died domiciled outside this state.

(9) Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

CROSS REFERENCES: See s. 223.12 as to capacity of foreign trust company. Section 72.12 requires notice to public administrator when petitioning for ancillary letters.

868.03 UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT. (1) Definitions. As used in this section:

(a) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This section does not change the powers or duties of a testamentary trustee under the nonstatutory law or under the terms

of a trust.

(b) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.

(c) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(d) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

(2) Application for ancillary letters and notice thereof. (a) Qualifications of and preference for foreign representative. Any foreign representative upon the filing of an authenticated copy of the domiciliary letters with the probate court may be granted ancillary letters in this state notwithstanding that the representative is a nonresident of this state or is a foreign corporation. If the foreign representative is a foreign corporation it need not qualify under any other law of this state to authorize it to act as local and foreign representative in the particular estate if it complies with subs. (4) and (5). If application is made for the issuance of ancillary letters to the foreign representative, the court shall give preference in appointment to the foreign representative unless the court finds that it will not be for the best interests of the estate or the decedent has otherwise directed.

(b) Intervention upon application. When application is made for issuance of ancillary letters any interested person may intervene and pray for the appointment of any person who is eligible under this section or the law of this state.

(c) Notice to foreign representative. When application is made for issuance of ancillary letters to any person other than the foreign representative, the applicant shall send notice of the application by registered mail to the foreign representative if the latter's name and address are

known and to the court which appointed him if the court is known. These notices shall be mailed upon filing the application if the necessary facts are then known, or as soon thereafter as the facts are known. If notices are not given prior to the appointment of the local representative, he shall give similar notices of his appointment as soon as the necessary facts are known to him. Notice by ordinary mail is sufficient if it is impossible to send the notice by registered mail. Notice under this paragraph is not jurisdictional.

(3) Denial of ancillary letters. The court may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. Such denial is without prejudice to any subsequent application if it later appears that ancillary administration should be had.

(4) Bond. No nonresident shall be granted ancillary letters unless he gives an administration bond.

(5) Agent to accept service of process. No nonresident shall be granted ancillary letters and no person shall be granted leave to remove assets under sub. (7), until he files in the court an irrevocable power of attorney constituting the clerk of the court his agent to accept and be subject to service of process or of notice in any action or proceeding relating to the administration of the estate. The clerk shall forthwith forward to the representative at his last known address any process or notice so received, by registered mail requesting a return receipt signed by addressee only. Forwarding by ordinary mail is sufficient if when tendered at a U.S. post office an envelope containing such notice addressed to such representative is refused registration.

(6) Substitution of foreign for local representative. (a) Application and procedure. If any other person has been appointed local representative, the foreign representative, not later than 14 days after the mailing of notice to him under sub. (2), unless this period is extended by the court because the foreign representative resides outside continental United States or in

Alaska, or for other cause which the court deems adequate, may apply for revocation of the appointment and for grant of ancillary letters to himself. Ten days' written notice of hearing shall be given to the local representative. If the court finds that it is for the best interests of the estate, it may grant the application and direct the local representative to deliver all the assets, documents, books and papers pertaining to the estate in his possession and make a full report of his administration to the local and foreign representative as soon as the letters are issued and he is qualified. The local representative shall also account to the court. The hearing on the account may be forthwith or upon such notice as the court directs. Upon compliance with the court's directions, the local representative shall be discharged.

(b) Effect of substitution. Upon qualification, the local and foreign representative shall be substituted in all actions and proceedings brought by or against the local representative in his representative capacity, and shall be entitled to all the rights and be subject to all the burdens arising out of the uncompleted administration in all respects as if it had been continued by the local representative. If the latter has served or been served with any process or notice, no further service shall be necessary nor shall the time within which any steps may or must be taken be changed unless the court in which the action or proceedings are pending so orders.

(7) Removal of assets to domiciliary jurisdiction. (a) Application. Prior to the final disposition of the ancillary estate under sub. (12) and upon giving the notice provided in s. 879.03, the foreign representative or the local and foreign representative may apply for leave to remove all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(b) Prerequisites to granting application. Before granting such application, the court shall require compliance with sub. (5) and the filing

of a bond by the foreign representative or of an additional bond for the protection of the estate and all interested persons unless the court finds that the bond given under sub. (4) by the local and foreign representative is sufficient.

(c) Granting application; terms and consequences. Upon compliance with this subsection, the court shall grant the application upon such conditions as it sees fit unless it finds cause for the denial thereof or for postponement until further facts appear. The granting of the application shall not terminate any proceedings for the administration of property in this state unless the court finds that such proceedings are unnecessary. If the court so finds, it may order the administration in this state closed, subject to reopening within one year for cause.

(8) Effect of adjudications for or against representatives. A prior adjudication rendered in any jurisdiction for or against any representative of the estate shall be as conclusive as to the local or the local and foreign representative as if he were a party to the adjudication unless it resulted from fraud or collusion of the party representative to the prejudice of the estate. This subsection shall not apply to adjudications in another jurisdiction admitting or refusing to admit a will to probate.

(9) Payment of claims. No claim against the estate shall be paid in the ancillary administration in this state unless it has been proceeded upon in the manner and within the time required for claims in domiciliary administrations in this state.

(10) Liability of local assets. All local assets are subject to the payment of all claims, allowances and charges, whether they are established or incurred in this state or elsewhere. For this purpose local assets may be sold in this state and the proceeds forwarded to the representative in the jurisdiction where the claim was established or the charge incurred.

(11) Payment of claims in case of insolvency. (a) Equality subject to preferences and security. If the estate either in this state or as a

whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference, priority or security is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. Creditors who have security claims upon property not exempt from the claims of general creditors, and who have not released or surrendered them, shall have the value of the security determined by converting it to money according to the terms of the security agreement, or by such creditor and the personal representative by agreement, arbitration, compromise or litigation, as the court directs, and the value so determined shall be credited upon the claim, and dividends shall be computed and paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

(b) Procedure. In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with sub. (12). If local assets are not sufficient to pay all claims allowed in this state the full amount to which they are entitled under this subsection, local assets shall be marshaled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

(12) Transfer of residue to domiciliary representative. Unless the court otherwise orders, any movable assets remaining on hand after payment of all claims allowed in this state and of all taxes and charges levied or incurred in this state shall be ordered transferred to the representative in the domiciliary jurisdiction. The court may decline to make the order until such representative furnishes security or additional security in the

domiciliary jurisdiction, for the proper administration and distribution of the assets to be transferred.

(13) General law to apply. Except where special provision is made otherwise, the law and procedure in this state relating generally to administration and representatives apply to ancillary administration and representatives.

(14) Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

CROSS REFERENCES: See s. 287.16 as to power of foreign representative to act in this state when no personal representative has been appointed in this state. Section 72.12 requires notice to public administrator when petitioning for ancillary letters.

868.05 FOREIGN WILLS; CERTIFICATE OF ASSIGNMENT. (1) Petition. If a will devising or bequeathing property in this state or any interest therein has been admitted to probate in any state, and 6 years has passed since the death of the decedent, the probate court of any county in which any of such property is situated may, upon petition accompanied by an authenticated copy of such will and its probate, issue a certificate of assignment as provided herein.

(2) Certificate. If it appears that the foreign will has been so admitted to probate and that no Wisconsin inheritance tax is owing or that the tax has been paid, the court may issue a certificate so showing; the certificate shall give the names of the beneficiaries, a description of the property and interest of each in said property. The certificate or a duplicate or a certified copy thereof when recorded in the office of the register of deeds of the county in which the property is situated shall be prima facie evidence of the facts therein recited.

CROSS REFERENCES: See s. 235.56 as to power of a foreign personal representative and s. 235.57 as to power of heir or legatee of non-resident decedent to satisfy mortgage on real estate in this state. Section 72.12 deals with jurisdiction to determine inheritance tax on

property of non-resident decedents.

COMMENT: This broadens the existing statute to cover personal as well as real property, but makes it available only after the statute of limitations on claims has run. (893.19 (9)).

CHAPTER 878.

PROBATE COURT BONDS.

878.01 Probate court bonds.
878.03 Corporate fiduciaries.
878.05 Additional bond; reducing bond; sureties discharged.
878.07 Actions on bonds.
878.09 Actions on bonds in name of judge.
878.11 Money, to whom paid.
878.13 Action not barred; partial defense; stay of execution.

SUMMARY OF CHAPTER: This chapter replaces chapter 321.

878.01 PROBATE COURT BONDS. (1) Generally. All bonds required by law to be taken in or by order of the probate court shall be for such sum and with such sureties as the court directs, except when otherwise provided by law. Such bonds shall be for the security and benefit of all persons interested and shall be taken to the judge of the probate court, and in any probate court having more than one judge, shall run to all of the judges of said court, except where they are required by law to be taken to the adverse party. No such bond shall be deemed sufficient unless it has been examined and approved by the judge or the register in probate and his approval indorsed thereon in writing and signed by him; but his failure so to do shall not render the bond void.

(2) Sureties. When individuals act as sureties, each must be a resident of this state, and shall give satisfactory evidence as to his financial responsibility, and, when required, shall do so before the judge, or some other officer designated by him.

CROSS REFERENCE: Section 204.07 authorizes bonds by licensed surety corporations.

878.03 CORPORATE FIDUCIARIES. The probate court shall not require bond from any corporate fiduciary which has complied with the requirements of s. 220.09 or 223.02.

878.05 ADDITIONAL BOND; REDUCING BOND; SURETIES DISCHARGED. The probate judge may, at any time, require additional bond from any personal representative, special administrator, guardian or trustee and may, upon application, enter an order, with or without notice, reducing the amount of any bond, when he is satisfied that no injury can result therefrom to those interested in the estate.

CROSS REFERENCE: Section 895.38 provides a procedure for the discharge of a surety from future liability.

878.07 ACTIONS ON BONDS. (1) Who may bring. Actions may be brought on the bonds of personal representatives, special administrators, guardians and trustees in the probate court;

(a) By any creditor when the amount due him has been ascertained and ordered paid by such court, if the personal representative, special administrator, guardian or trustee neglects to pay the same when demanded;

(b) By any distributee to recover his share of the estate, after the court has declared the amount due to him, and ordered it paid or delivered if the personal representative, special administrator or trustee fails to pay or deliver the same when demanded; and

(c) By any creditor, distributee, or other person aggrieved by any maladministration, when it appears that the personal representative, special administrator, guardian or trustee has failed to perform his duty in any other particular.

(2) When ordered. Whenever a personal representative, special administrator, guardian or trustee refuses or neglects to perform any order or judgment for rendering an account, or upon a final settlement, or for the payment of debts or distributive shares, the judge of such court shall cause the bond of such personal representative, special ad-

ministrator, guardian or trustee to be prosecuted for the benefit of all concerned, and the money collected thereon shall be applied in satisfaction of such order or judgment in the same manner as such property ought to have been applied by such personal representative, guardian or trustee.

(3) Limitation as to liability of surety on fiduciary's bond. No action shall be maintained against the sureties on any bond given by a personal representative, special administrator, guardian or trustee unless it is commenced within 6 years from the time when he was discharged.

(4) Separate and joint actions; action by ward; accounting, when unnecessary. Any action upon such bond by or in behalf of one person interested does not bar or in any way affect the right of any other person interested to maintain an action thereon, but separate actions or a joint action may be maintained thereon by or in behalf of any or all persons interested. Nor does any such action impair any other remedy of the ward. No accounting is necessary before bringing an action against sureties when the personal representative, special administrator, guardian or trustee dies or moves out of the state or becomes incompetent.

878.09 ACTIONS ON BONDS IN NAME OF JUDGE. All actions upon bonds issued to a probate judge or judges shall be brought in the name of the probate judge or judges in office at the time the action is commenced. If judgment is rendered for the plaintiff, it shall be for the amount found due and costs of suit, and shall specify the amount found due to each particular person for whose benefit it is brought; but no judgment or execution against the sureties on any bond shall exceed the amount of the penalty thereof, exclusive of costs.

878.11 MONEY, TO WHOM PAID. All moneys recovered on any judgment in favor of the judge of the probate court, shall be paid over to such person, other than the defendant therein, who is then the rightful personal representative, special administrator, guardian or trustee, and such

moneys shall be assets in his hands to be administered according to law; but if there is no personal representative, special administrator, guardian or trustee, other than the defendant, such moneys shall be paid to the persons entitled thereto upon their giving receipts therefor, which receipts shall be filed with the probate court.

878.13 ACTION NOT BARRED; PARTIAL DEFENSE; STAY OF EXECUTION. No action brought upon the bond of any personal representative, special administrator, guardian or trustee shall be barred or dismissed by reason merely that any former action was prosecuted on such bond, but any payment of damages made or collected from the sureties or any of them on any judgment in an action previously begun by any party on such bond shall be applied as a total or partial discharge of the liability thereon; and such partial defense may be pleaded by answer or supplemental answer as may be proper. The court may, when it is necessary, stay execution on any judgment rendered in such action until the final determination of any other action commenced upon the bond.

CHAPTER 879.

NOTICE, APPEARANCE, APPEAL AND MISCELLANEOUS PROCEDURE.

879.01 Petitions to probate court.
879.03 Notice: court order.
879.05 Notice: manner of giving.
879.07 Proof of service of notice.
879.09 Notice requirement satisfied by waiver of notice.
879.11 Notice requirement satisfied by appearance.
879.13 Delayed service of notice.
879.15 Appearances, how made.
879.17 Attorney, appearance by.
879.19 Attorney, notice to.
879.21 Appearance by public administrator for person domiciled in foreign country.

879.23 Guardian ad litem.
879.25 Attorney for person in military service.
879.26 Waiver of right to certain documents.
879.27 Appeals from probate court.
879.31 Extension of time for appeal; retrial.
879.33 Costs, when allowed: judgment for.
879.35 Costs in will contests.
879.37 Attorney fees in contests.
879.39 Security and judgment for costs.
879.41 Fees in probate court.
879.43 Money judgment in favor of estate.
879.45 Jury trials, practice.
879.47 Papers, preparation and filing.
879.49 Papers, withdrawal.
879.51 Court not to delay in setting matter for hearing.
879.53 Hearing set for a day certain.
879.55 Correction of clerical errors in court records.
879.57 Public administrator; personal representative, guardian.
879.59 Compromises.
879.61 Discovery proceedings.
879.63 Action by person interested to secure property for estate.
879.65 Annuity table.
879.67 Out of state service on personal representative.
879.69 Court must rule on petition.

SUMMARY OF CHAPTER: This chapter replaces chapter 324 and also contains many related provisions that are scattered throughout the probate chapters.

879.01 PETITIONS TO PROBATE COURT. All applications to probate courts, except motions in matters at issue, shall be made by verified petition. All petitions must show the jurisdiction of the court and the

interest of the petitioner. All petitions, except those for statutory certificates or for ex parte orders in proceedings already pending, shall also show the names and post-office addresses of all persons interested, so far as known to the petitioner or ascertainable by him with reasonable diligence; and shall indicate who are minors or otherwise under disability, and the names and post-office addresses of their guardians. No defect of form or substance in any petition shall invalidate any proceedings.

879.03 NOTICE: COURT ORDER. (1) How given. If notice of any proceeding in probate court is required by law or deemed necessary by the court and the manner of giving notice is not directed by law, the court shall order notice to be given as prescribed in s. 879.05. The court may order both service by publication and personal service on designated persons.

(2) Who entitled to notice. The following persons are entitled to notice:

(a) Any person interested unless he is represented by a guardian ad litem or guardian of the estate or unless he is represented by another person under the doctrine of virtual representation.

(b) Any guardian ad litem, guardian of the estate and attorney for person in the military service for any person interested.

(c) The attorney general where a public charitable trust is involved, and in all cases mentioned in s. 852.01 (3).

(3) Domiciliary of a foreign country. If the petition for administration shows, or if it appears, that any person interested is a domiciliary of a foreign country, the court may cause the notice of hearing of such petition or of any subsequent proceeding that may then be pending to be given the consul, vice consul or consular agent of such foreign country by mailing a copy of the notice in a sealed envelope. the postage prepaid, addressed to such consul, vice consul or consular agent at his post-office address, at least 20 days before the hearing. If it is shown to the court that there is no such consul, vice consul or consular agent of such foreign

country, the court may direct that such notice be so mailed to the public administrator.

(4) When order does not specifically designate persons interested. If the order does not specifically designate the persons to whom notice is to be given, the order shall be deemed to refer to the persons set forth in the petition for such hearing or otherwise shown by the record as being persons interested and to the post-office addresses set forth or otherwise shown therein. Such order and record shall be conclusive in all collateral actions and proceedings as to the names being the names of all persons interested and as to the reasonable diligence of the personal representative in determining the post-office addresses.

CROSS REFERENCE: Section 856.11 requires notice to both an interested person and his guardian ad litem or guardian of the estate when giving notice of hearing on petition for administration. Section 851.21 defines "persons interested".

879.05 NOTICE: MANNER OF GIVING. (1) Generally. Unless the statute requiring notice in a particular proceeding provides otherwise, notice required in the administration of an estate or other proceeding shall be given either by mail as set forth in sub. (2) or by personal service as set forth in sub. (3). The first notice given by mail in any administration or other proceeding must be accompanied by notice by publication given as set forth in sub. (4). Notice by publication in addition to mailed notice is required for subsequent hearings if the name or the post-office address of one or more persons entitled to notice has not been ascertained.

(2) Service by mail. Service shall be made by first class mail either within or without the state at least 20 days before the hearing or proceeding upon any person whose post-office address is known or can with reasonable diligence be ascertained.

(3) Personal service. Personal service shall be made at least 10 days before the hearing as provided by s. 262.06, except as that section provides for service by publication and except that substituted service

under s. 262.06 (1) (b) may not be made outside this state.

(4) Service by publication. Unless a statute provides otherwise every probate court notice required to be given by publication shall be published as a class 3 notice in a newspaper published in the county eligible under ch. 985, as the court by order directs.

COMMENT: The only change from existing procedure is to require publication as a class 3 notice only once in most estates.

879.07 PROOF OF SERVICE OF NOTICE. (1) Mail. Proof of service by mail shall be by the affidavit of the person who mailed the notice showing when and to whom he mailed it and how it was addressed.

(2) Personal service. Proof of personal service shall be made as provided in s. 262.17 (1) or by the written admission of service by the person served if he is competent and an adult, and the subscription of his name to such admission is presumptive evidence of its genuineness.

(3) Publication. Proof of service by publication shall be by affidavit as provided in s. 985.12.

879.09 NOTICE REQUIREMENT SATISFIED BY WAIVER OF NOTICE. Persons who are not minors or incompetent, on behalf of themselves, and duly appointed guardians ad litem and guardians of the estate on behalf of themselves and those whom they represent, may in writing waive the service of notice upon them and consent to the hearing of any matter without notice except that guardians ad litem cannot waive the notice of a hearing to prove a will or for administration on behalf of those whom they represent. An attorney for a person in the military service may waive notice on behalf of himself but cannot waive notice on behalf of anyone whom he represents. Waiver of notice by any person is equivalent to timely service of notice.

879.11 NOTICE REQUIREMENT SATISFIED BY APPEARANCE. An appearance by a person who is not a minor or incompetent is equivalent to timely service of notice upon him. An appearance by a guardian of the estate is equivalent to timely service of notice upon him and upon his ward. An appearance by a guardian ad litem is equivalent to timely service of notice

upon him and except at a hearing to prove a will or for administration is equivalent to timely service of notice upon those whom he represents. An appearance by an attorney for a person in the military service is equivalent to timely service of notice upon him but does not satisfy a requirement for notice to anyone whom he represents.

879.13 DELAYED SERVICE OF NOTICE. If for any reason notice to any person is insufficient, the court may at any time order service of notice together with such documents as are required by law as set forth in s. 879.26 and require the person to show cause why he should not be bound by the action already taken in the proceedings as though he had been seasonably served with notice. Such person may consent in writing to be bound.

879.15 APPEARANCES, HOW MADE. In any proceeding in probate court or before any probate judge appearances shall be made as follows:

(a) A minor or incompetent person shall appear by his guardian ad litem, who shall be an attorney, or by the guardian of his estate, who may appear by attorney;

(b) A personal representative shall appear by attorney; and

(c) Every other person shall appear either in person or by attorney.

879.17 ATTORNEY, APPEARANCE BY. The attorney who first appears for any party or person interested shall be recognized as his attorney throughout the matter or proceeding unless another attorney is substituted in accordance with s. 256.27 (3).

879.19 ATTORNEY, NOTICE TO. When a person interested who is not a minor or incompetent has retained an attorney to represent him and the attorney has mailed a notice of retainer and request for service to the attorney for the personal representative and filed a copy with the court, any notice which would be given to the person interested shall instead be given to the attorney; such attorney may waive notice for the person interested as provided in s. 879.09.

879.21 APPEARANCE BY PUBLIC ADMINISTRATOR FOR PERSON DOMICILED IN FOREIGN COUNTRY. When notice has been given to the public administrator as specified by s. 879.03 (3) that a person domiciled in a foreign country, not represented by a consul, vice consul or consular agent, is interested in an estate, the public administrator shall appear for such person and be allowed his compensation and necessary expenditures in the same manner as a guardian ad litem.

879.23 GUARDIAN AD LITEM. A guardian ad litem shall be appointed for any person interested who is a minor or incompetent and has no guardian of his estate, or where such guardian of his estate fails to appear on his behalf or where the interest of the person who is a minor or incompetent is adverse to that of the guardian of his estate. A guardian ad litem may be appointed for persons not in being or presently unascertainable and for persons having successor or contingent interests. The court may appoint the guardian ad litem at the time of making the order for hearing the matter, and require notice thereof and of such hearing to be served upon such guardian ad litem; or such guardian ad litem may be appointed on the day of the hearing and before any proceedings are had. The guardian ad litem shall continue to act throughout the proceeding in relation to the same estate or matter until proper distribution to or for the benefit of the minor or incompetent has been completed, unless earlier discharged by the court, but if a will creates a testamentary trust, a guardian ad litem appointed in the administration of the estate has no responsibility in regard to the administration of the trust unless reappointed for that purpose. The guardian ad litem shall be an attorney admitted to practice in this state and shall be allowed compensation and his necessary expenditures to be fixed by the court and paid out of the estate, but no attorney shall appear or be appointed as guardian ad litem for different persons in the same matter or proceeding, whose interests and rights in relation to such matter or proceeding are conflicting. A guardian ad litem shall be discharged by the court at any time that it

appears that his ward no longer has an interest in the estate. The court may dispense with or terminate the appointment of a guardian ad litem for a person having a successor or contingent interest who is legally incompetent, unborn or presently unascertainable, if there is a living person, sui juris, having in the judge's opinion a substantially identical interest, who is a party to the proceeding and whose interest is not adverse.

879.25 ATTORNEY FOR PERSON IN MILITARY SERVICE. At the time of filing a petition for administration of an estate an affidavit setting forth facts showing whether or not any of the persons interested in such matter are actively engaged in the military service of the United States shall be filed. Whenever it appears by such affidavit or otherwise that any person in the active military service of the United States is interested in any administration and is not represented by an attorney, the judge shall appoint an attorney to represent such person and protect his interest and no further proceedings shall be had until such appointment has been made. The attorney for a person in the military service shall be an attorney admitted to practice in this state and shall be allowed compensation and his necessary expenditures to be fixed by the court and paid out of the estate, but no attorney shall appear or be appointed for different persons in the same matter or proceeding, whose interests and rights in relation to such matter or proceeding are conflicting.

879.26 WAIVER OF RIGHT TO CERTAIN DOCUMENTS. Any person who is not a minor or incompetent may in writing waive his right to be given (1) a statement that the inventory has been filed and a copy of the inventory or a statement of the inventory value of each item of property in which he has an interest as provided in s. 858.03, (2) information as to claims filed as provided in s. 859.29 and (3) a copy of accounts as provided in s. 862.09.

879.27 APPEALS FROM PROBATE COURT. (1) Appeal is to supreme court. Any person aggrieved by any appealable order or judgment of the probate court may appeal or take a writ or error therefrom to the supreme

court.

(2) Effect of title XXV. In all matters not otherwise provided for in this chapter relating to appeals from probate courts to the supreme court, the law and rules of practice set forth in title XXV govern.

(3) Time limit. The time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any appealable order or judgment of the probate court is limited to 60 days from the date of entry thereof, except as provided in s. 879.31.

(4) Who may appeal on behalf of minor or incompetent. In all cases the appeal on behalf of any minor or incompetent person may be taken and prosecuted by the guradian of his estate or by a guardian ad litem.

(5) Limitation on bond and costs. On appeals from probate courts to the supreme court no bond shall be required of, or costs awarded against any alleged incompetent or person acting in behalf of an alleged incompetent on an appeal from an adjudication of incompetency, and no bond shall be required of any personal representative, guardian or trustee of a testamentary trust.

CROSS REFERENCE: Where bond not required, see s. 274.16.

879.31 EXTENSION OF TIME FOR APPEAL; RETRIAL. If any person aggrieved by any act of the probate court shall, from any cause without fault on his part, omit to take his appeal within the time allowed, the court may, upon his petition, notice to the adverse party, and hearing, and upon such terms and within such time as it deems reasonable, but not later than 6 months after the act complained of, by order allow an appeal, if justice appears to require it, with the same effect as though done seasonably; or the court may reopen the case and grant a retrial.

COMMENT: This provision reduces to 6 months the time during which it is possible to bring an appeal. This is consistent with the procedure in civil actions.

879.33 COSTS, WHEN ALLOWED; JUDGMENT FOR. Costs may be allowed in all appealable contested matters in probate court to the prevailing party, to be paid by the losing party or out of the estate as justice may require; and when costs are allowed they shall be taxed by the register in probate after the notice required in ch. 271. When costs are allowed, the court shall render judgment therefor, stating in whose favor and against whom the same is rendered and the amount thereof; and a list of the items making such amount shall be filed with the papers in the case.

879.35 COSTS IN WILL CONTESTS. Costs may be awarded out of the estate to an unsuccessful proponent of a will if he is named as an executor therein and propounded the document in good faith, and to the unsuccessful contestant of a will if he is named as an executor in another document propounded by him in good faith as the last will of the decedent.

879.37 ATTORNEY FEES IN CONTESTS. Reasonable attorney fees may be awarded out of the estate to the prevailing party in all appealable contested matters, to an unsuccessful proponent of a will if he is named as an executor therein and propounded the document in good faith, and to the unsuccessful contestant of a will if he is named as an executor in another document propounded by him in good faith as the last will of the decedent.

879.39 SECURITY AND JUDGMENT FOR COSTS. In all cases mentioned in s. 879.33 the probate court may require the claimant or contestant to give a bond in such sum and with such surety as is approved by the court, to the effect that he will pay all costs that may be awarded by such court in such proceeding against him. A judgment for costs shall be against the claimant or contestant and the surety.

879.41 FEES IN PROBATE COURT. Fees in probate court shall be allowed:

(1) To appraisers, an amount to be fixed by the court,

(2) To jurors, the same fees as provided in s. 255.25,

(3) To witnesses and interpreters, the same fees as provided in s. 885.05, and to expert witnesses, the same fees as provided in s. 271.04 (2).

(4) Travel as fixed by the court;

(5) In cases not provided for, a fair compensation shall be allowed by the court.

879.43 MONEY JUDGMENT IN FAVOR OF ESTATE. (1) Enforcement. All money judgments in probate court in favor of an estate may be enforced through the probate court, after costs have been taxed as provided in s. 270.66. The pertinent provisions of ch. 272, relating to executions apply.

(2) Stay of execution. Execution of such judgments may be stayed as provided in title XXV.

(3) Docket. Such judgments may be docketed in the office of the clerk of circuit court, upon the filing therein of a certified transcript of such judgment.

(4) Lien. Such judgment when docketed as aforesaid is a lien upon the real estate of the debtor as provided in s. 270.79.

879.45 JURY TRIALS, PRACTICE. (1) Generally. Jury trials may be had in probate court in all cases in which a jury trial may be had of similar issues under s. 270.07.

(2) Demand. In all cases provided in sub. (1), any person having the right of appeal from the determination of the court, may file with the court, within 10 days after notice that the matter is to be contested, a written demand for a jury trial, and deposit $10 with the county treasurer, take his receipt therefor and file it with the court. If such issue is trans-

ferred for trial to the circuit court, as provided in this section, the judge of the probate court may order said deposit refunded to the depositor, and the county treasurer upon presentation of such order shall refund said amount.

(3) Framing issues; transfer. Upon filing such demand and receipt, the court may order an issue to be framed by the parties within a fixed time, and the matter shall be placed upon the calendar for the next jury term of the court. The probate court may transfer the matter or cause, and the record thereof, to the circuit court of such county for trial.

(4) Jury terms. Three jury terms of the probate court shall be held each year (if there are jury cases ready for trial at such times), commencing respectively on the 2nd Tuesday in January, April and October.

(5) Selection of jurors. Jurors and trial juries shall be drawn as provided by ss. 255.04 to 255.09, except as otherwise provided herein, and trials by jury shall be as provided by ss. 270.15 to 270.31; but in county courts exercising civil jurisdiction jurors and juries may be drawn in probate matters and jury terms had in the manner required in civil cases in such courts.

(6) Calendar. Not more than 10 days prior to each jury term the clerk shall prepare, in the order of their date of issue, a list of cases in which a trial by jury has been demanded, and such list shall constitute the jury calendar for such term of the probate court. Unless the court otherwise orders, every case on such calendar which shall not be disposed of at said term shall stand continued to the next jury term, and be placed on the jury calendar for such term. If the party who demanded the jury trial shall ask to have such action continued for the term, after the commencement of the term at which such action is for trial, such continuance shall be granted only upon payment of $10 motion fees unless such party waives a jury trial in such proceeding. In case a continuance in any action upon the jury calendar is asked by any other party, the court may

grant such continuance and require payment of $10 motion fees.

(7) Pretrial conference. The court may hold a pretrial conference in accordance with s. 269.65.

(8) Costs. In all jury cases costs shall be allowed as a matter of course to the prevailing party, the items and taxation of which shall be as in circuit court.

(9) Transfer to circuit court. Any party to the controversy may within 10 days after notice that a jury trial has been demanded, have the matter transferred to the circuit court of the county for trial. Upon the filing of such demand for transfer, the judge of the probate court shall immediately cause the record and proceedings in the matter to be certified to the circuit court, and the same shall then be tried and determined as a circuit court action. In case the matter is one where the probate court has the right to fix the fees or compensation of the attorneys, personal representatives or guardians, the circuit court may determine such fees or compensation. The circuit court may render such judgment as is proper, or make such order therein as the probate court ought to have made and may remit the case to the probate court for further proceedings, or make any order or take any action therein to enforce its own judgment as the circuit court deems best. The probate court, after such cause is remitted, shall proceed therein in accordance with the determination of the circuit court.

COMMENT: This section retains the existing statute on jury trials in probate court.

879.47 PAPERS, PREPARATION AND FILING. The attorney for any person desiring to file any paper in probate court is responsible for the preparation of such paper. All papers shall be legibly written on substantial paper and shall state the title of the proceeding in which they are filed and the character of the paper. Uniform forms shall be used when suitable and available. If papers are not so written or if uniform forms are not used when suitable and available, the court may refuse to receive

and file them. The court shall show on all papers the date of their filing.

CROSS REFERENCE: Section 253.21 provides for adoption of uniform forms.

879.49 PAPERS, WITHDRAWAL. No paper filed in any matter may be withdrawn without leave of the court or the judge, and when a paper is withdrawn a copy thereof, attested by the judge or register in probate, shall, if required, be left in its place.

879.51 COURT NOT TO DELAY IN SETTING MATTER FOR HEARING. When a petition and proposed order for hearing are filed, the court within 10 days thereafter shall set a time for hearing.

879.53 HEARINGS SET FOR A DAY CERTAIN. All matters in probate court requiring notice of hearing shall be set for hearing on a day certain. Such matters shall be heard on the day set or as soon thereafter as counsel may be heard.

879.55 CORRECTION OF CLERICAL ERRORS IN COURT RECORDS. Upon verified petition to a probate court by any person interested or his successor in title praying that clerical errors in its records be corrected as specified in the petition, the court shall order a hearing thereon. The hearing shall be held without notice or upon such notice as the court requires. If the court requires notice, it shall be given to those persons interested who will be affected by such change in the records. If on such hearing the court finds its record incorrect as a result of clerical error, it shall make its record conform to the truth. Such corrected record shall be as valid and binding as though correctly made and entered at the proper time.

COMMENT: This provision follows existing statutes as interpreted and limited in Estate of Cudahy, 196 Wis. 260, 210 N.W. 203 (1928).

879.57 PUBLIC ADMINISTRATOR; PERSONAL REPRESENTATIVE, GUARDIAN. Whenever it is found by the court to be necessary to appoint a personal representative or guardian and there appears to be no person

in the state to petition for such appointment or there appears to be no suitable person to be so appointed, the court shall, upon its own motion or upon the petition of the public administrator, grant administration of an estate of a decedent or guardianship of the estate of minor or incompetent person to the public administrator, and he shall thereupon take possession of the estate and protect and preserve the same, and proceed with the administration and with the care and management of the estate. Such authority to the public administrator in the administration or guardianship may be revoked at any time upon the appointment and qualification of a personal representative or guardian, or when for any other cause the court deems it just or expedient; but such revocation does not invalidate his acts performed prior to revocation of his authority and does not impair the public administrator's rights to receive from the estate his legal charges and disbursements, to be determined by the probate court.

CROSS REFERENCE: For duty of public administrator as to inheritance taxes, see s. 72.17.

879.59 COMPROMISES. (1) Between claimants; parties. The court may authorize personal representatives and trustees to adjust by compromise any controversy that may arise between different claimants to the estate or property in their hands to which agreement such personal representatives or trustees and all other parties in being who claim an interest in such estate and whose interests are affected by the proposed compromise shall be parties in person or by guardian as hereinafter provided.

(2) Between testate and intestate distributees; parties. The court may likewise authorize the person or persons named as executor 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 the persons claiming as devisees or legatees under such will or wills and the persons entitled to or claiming the estate of the deceased

under the statutes regulating the descent and distribution of intestate estates, to which agreement or compromise the persons named as executors or the petitioners for administration with will annexed, as the case may be, those claiming as devisees or legatees and those claiming the estate as intestate shall be parties, provided that persons named as executors in any instrument who have renounced or shall renounce such executorship and any person whose interest in the estate is unaffected by the proposed compromise shall not be required to be parties to such compromise.

(3) Parties subject to guardianship. Where a person subject to guardianship is a necessary party to a compromise under this section he shall be represented in the proceedings by his guardian or by a special guardian appointed by the court, who shall in the name and on behalf of the party he represents make all proper instruments necessary to carry into effect any compromise that is sanctioned by the court.

(4) Persons unknown or not in being. If it appears to the satisfaction of the court that the interests of persons unknown or the future contingent interests of persons not in being are or may be affected by the compromise, the court shall appoint some suitable person to represent such interests in the compromise and to make all proper instruments necessary to carry into effect any compromise that is sanctioned by the court. If by the terms of any compromise made pursuant to this section money or property is directed to be set apart or held for the benefit of or to represent the interest of persons subject to guardianship or persons unknown or unborn, the same may in a proper case be deposited in any trust company, or any state or national bank within this state, authorized to exercise trust powers, or with the public administrator, and shall remain subject to the order of the court.

(5) Court approval required. An agreement of compromise made in writing pursuant to this section, if found by the court to be just and reasonable in its effects upon the interests in said estate or property of

persons subject to guardianship, unknown persons, or the future contingent interests of persons not in being, shall be valid and binding upon such interests as well as upon the interests of adult persons of sound mind.

(6) Procedure. An application for the approval of a compromise pursuant to this section shall be made by petition duly verified, which shall set forth the provisions of any instrument or documents by virtue of which any claim is made to the property or estate in controversy and any and all facts relating to the claims of the various parties to the controversy and the possible contingent interests of persons not in being and all facts which make it proper or necessary that the proposed compromise be approved by the court. The court may entertain such application prior to the execution of the proposed compromise by all the parties required to execute it and may permit the execution by the necessary parties to be completed after the inception of the proceedings for approval thereof if the proposed compromise has been approved by the estate representatives described in sub. (1) and (2). The court shall inquire into the circumstances and make such order or decree as justice requires.

CROSS REFERENCE: Section 859.31 provides for compromise of creditor's claims against the estate.

COMMENT: This section retains the existing statute on compromises which was held constitutional in Estate of Jorgenson, 267 Wis. 1, 64 N.W.2d 430 (1954).

879.61 DISCOVERY PROCEEDINGS. Any personal representative or any person interested who suspects that any other person has concealed, stolen, conveyed or disposed of property of the estate, or is indebted to the decedent, or has in his possession or under his control or has knowledge of concealed property of the decedent, or has in his possession or under his control or has knowledge of writings which contain evidence of or tend to disclose the right, title, interest or claim of the decedent to

any property, or has in his possession or under his control or has knowledge of any will of the decedent, may file a petition in the probate court so stating, and the court upon such notice as it may direct, may order such other person to appear before the said court or court commissioner for disclosure, may subpoena witnesses and compel the production of evidence and may make such order in relation to such matter as may be just and proper.

879.63 ACTION BY PERSON INTERESTED TO SECURE PROPERTY FOR ESTATE. Whenever there is reason to believe that the estate of a decedent as set forth in the inventory does not include property which should be included in the estate, and the personal representative has failed to secure such property or to bring an action to secure such property, any person interested may, on behalf of the estate, bring an action in the court in which the estate is being administered to reach such property and make it a part of the estate. If such action is successful, such person interested shall be reimbursed from the estate for the reasonable expenses and attorney's fee incurred by him in such action as approved by the court but not in the excess of the value of the property secured for the estate.

879.65 ANNUITY TABLE. The present value of any estate, annuity or interest of beneficiary may be computed on the basis of the American Experience Table of Mortality with Craig's Extension below age 10, and interest at 5% per annum. The Northampton Table of Mortality and interest at the aforesaid rate may be used where it is impracticable to use the aforesaid basis. Any court or judge by whom any such present value is to be determined may transmit to the commissioner of insurance such statement of the facts as he may require, and said commissioner shall thereupon make the necessary computation and certify same without charge. The present value of an immediate annuity of $1, on the above basis for a single life is as follows:

AMERICAN EXPERIENCE FIVE PER CENT SINGLE LIFE.

Age	Present Value	Age	Present Value	Age	Present Value
10	16.505	39	13.881	67	6.8607
11	16.461	40	13.716	68	6.5642
12	16.415	41	13.544	69	6.2705
13	16.366	42	13.365	70	5.9802
14	16.316	43	13.179	71	5.6942
15	16.263	44	12.985	72	5.4129
16	16.207	45	12.783	73	5.1359
17	16.149	46	12.574	74	4.8628
18	16.088	47	12.357	75	4.5926
19	16.024	48	12.133	76	4.3248
20	15.957	49	11.901	77	4.0586
21	15.886	50	11.662	78	3.7939
22	15.813	51	11.416	79	3.5311
23	15.736	52	11.164	80	3.2702
24	15.655	53	10.905	81	3.0135
25	15.570	54	10.640	82	2.7606
26	15.482	55	10.370	83	2.5105
27	15.389	56	10.095	84	2.2607
28	15.292	57	9.8145	85	2.0098
29	15.191	58	9.5299	86	1.7606
30	15.084	59	9.2413	87	1.5175
31	14.973	60	8.9493	88	1.2861
32	14.857	61	8.6545	89	1.0670
33	14.735	62	8.3574	90	0.85453
34	14.608	63	8.0588	91	0.64497
35	14.475	64	7.7590	92	0.44851
36	14.336	65	7.4588	93	0.28761
37	14.191	66	7.1592	94	0.13605
38	14.039				

NOTE: Rule for calculating the present value of a life estate: "Present value" at the head of the above table means that the numbers below that head give the present value of a life annuity of one dollar. Calculate the interest at five per cent for one year upon the sum to the income of which the person is entitled. Multiply this interest by the present value set opposite the person's age in the above table, and the product will be the present value of the life estate of such person in said sum.

879.67 OUT OF STATE SERVICE ON PERSONAL REPRESENTATIVE. When it is necessary to serve upon a personal representative any order,

notice or process of the probate court, and service cannot be made in this state, such service may be made as provided in s. 262.06 (1) for the service of summons.

879.69 COURT MUST RULE ON PETITION. When the personal representative petitions for a ruling or order in regard to any matter connected with the administration of the estate, the court, after hearing on notice as provided in s. 879.03 shall make a ruling or grant or deny the petition by order.

SECTION 26. In the sections listed in column "A" below, the cross references to the sections in "B" are changed as shown in column "C".

A	B	C
Statute sections	Old cross references	New cross references
14.42 (15)	238.136	852.01 (3)
14.42 (15)	318.03	863.39
45.37 (12) (i)	311.05	867.01
45.37 (12) (i)	313.03	859.07
48.911	Ch. 324	Ch. 879
49.08 (1)	313.08	859.01
49.25	313.15	861.31, 861.33 and 861.35
49.26 (3) (c)	311.05	867.05
49.26 (3) (c)	313.03	859.07
72.15 (2) (a)	317.11	862.09
72.17 (1)	237.09	867.05
72.17 (1)	310.075	868.05
72.17 (1)	230.47	867.03
103.39 (2)	313.16	859.25
157.06 (2)	324.20	879.05 (4)
182.24	230.48	867.03
231.36 (4)	324.18 to 324.20	879.03
231.49 (1)	312.01	858.07
231.50 (1) (a)	324.29	879.23
245.25	237.06	1965 Stats.
253.10 (3)	Ch. 313	Ch. 859
253.10 (5)	318.03 (4)	863.39 (3)
253.21 (1) (a)	Title XXIX	Titles XXIX and XLII
253.26	Title XXIX	Titles XXIX and XLII
253.30 (1)	Title XXIX	Titles XXIX and XLII

A	B	C
Statute sections	Old cross references	New cross references
253.32 (2)	Title XXIX	Titles XXIX and XLII
253.32 (3)	Title XXIX	Titles XXIX and XLII
253.33 (1) (a)	Title XXIX	Titles XXIX and XLII
253.34 (1) (e)	310.02	856.05 (1)
262.02 (3)	Title XXIX	Titles XXIX and XLII
274.01 (2)	311.02	856.07 (2)
276.14 (1)	237.02 (2)	1965 Stats.
276.14 (1)	314.06	879.65
296.36	296.42	296.37
319.06 (2)	324.18	879.05
319.08 (3) (intro.)	324.18	879.05
319.13 (1)	Ch. 321	Ch. 878
319.16 (4)	312.06	879.61
319.16 (4)	312.07	879.61
319.28	311.05	867.01
323.05	324.18	879.03
323.06 (1)	324.18	879.03
323.06 (2)	312.11	323.25
893.16 (2)	321.02	878.07
895.04 (2)	237.01	852.01
895.38 (5)	Ch. 317	Ch. 862
895.41 (3)	313.16	859.25
895.42 (3)	324.18	879.03
957.263	313.08	859.01
957.263	313.15	861.31, 861.33 & 861.35

SECTION 27. SECTIONS 1 to 13, 16 to 24 and 26 become effective as of July 1, 1968. SECTIONS 14 and 15 become effective upon passage and publication of this act. SECTION 25 becomes effective according to section 851.001.

(End)

CROSS REFERENCE TABLE

This table is designed to assist in tracing the former provisions of the statutes relating to probate into the sections of the new probate code.

Old Sections	New Prob.Code
233.01	861.03
	852.01 (1)
233.02	861.03
	852.01 (1)
233.03 to 233.08	None
233.09 to 233.12	861.07 (1)
233.13	861.05 (2)
233.14	861.05
	861.11 (1), (3)
233.15 (1)	861.11 (2), (4)
(2)	861.11 (3)
233.16	861.15
233.17 to 233.22	None
233.23	861.03
	852.01 (1)
237.01	852.01
237.02	852.01
	852.09
237.025	861.41
237.03	852.03 (2), (3)
237.04	851.51
237.05	852.05 (1)
237.06	852.05 (2)
237.07	852.03 (1), (4)
237.08	None
237.09	867.05
237.10	851.55
237.11	851.61
238.01	853.01
238.02 (1)	853.31
238.02 (2)	853.15
238.03	853.29
238.04	861.41
238.05	853.01
238.06	853.03
	853.07
238.07	853.05
238.08	853.07
238.09	853.07
238.10	853.25 (1)
238.11	853.25 (2)
238.12	853.25 (4)
238.13	853.27
238.135	853.21
238.136	852.01 (3)
238.14	853.11
238.15	853.09
238.16	None
238.17	None
238.18	856.13
238.19	853.13
238.20	856.19
310.01	856.03
310.02	856.05 (1)
310.03	856.05 (4)
310.031	856.05 (3)
310.04	856.11 (1)
310.045 (1)	879.01
310.05 (1)	879.09
310.05 (2)	879.03 (3)
310.06 (1)	856.15 (1)
310.06 (2)	856.15 (2), (3)
310.06 (3)	856.15 (4)
310.06 (4)	856.15 (3)
310.06 (5)	856.15 (5)
310.07	868.01
310.075	868.05
310.09	None
310.10	856.17
310.11	863.21
310.12	856.21
310.14	857.03
310.15	856.25
310.16	856.23
	857.13
310.17	856.23
310.18	856.25
	857.23
310.19	857.13
	857.23

Old Sections	New Prob.Code
310.20 (1)	856.25
	857.13
	857.15
	857.21
310.20 (2)	862.01
	862.03
310.21	879.67
310.25	856.31
310.27	857.27
311.01	856.01
	856.07
311.02	856.07
	856.21
	856.23
311.03	856.11 (1)
311.04	856.25
311.05	867.01
311.06	867.07
311.07	867.11
311.075	867.15
311.08	867.13
311.09 (1) to (6)	867.17
311.09 (7)	867.19
311.10	867.21
311.11	857.23
311.12	857.19
311.13	857.23
311.14	857.19
311.16 (1)	879.57
311.16 (2)	879.57
311.16 (3)	879.21
312.01 (1)	858.01
	858.07
312.01 (2)	858.13
312.01 (3)	858.15
312.01 (4)	None
312.02	858.11
312.03 (1)	858.09
312.03 (2)	858.05
312.04	857.03
312.05	None
312.06	879.61
312.07	879.61
312.08	879.61

Old Sections	New Prob.Code
312.09	None
312.10	None
312.11	857.09
	857.15
	862.01
312.13	860.01
312.15	None
312.16	859.40
312.17	859.40
313.01	859.01
313.03 (1)	859.05
313.03 (2)	None
313.03 (3)	859.07
313.03 (5)	859.29
	859.35
313.03 (6)	859.09
313.03 (7)	859.51
313.04	859.07
313.05 (1)	859.13
	859.29
313.05 (2)	859.15
	859.33
313.05 (3)	859.33
313.05 (4)	859.29
	859.35
313.06	859.37
	879.43
313.07	859.17
313.08	859.01
313.09	860.01
313.093	860.13
313.095	860.01
313.10	859.01
	859.03
313.12	None
313.13	863.33
313.14	859.39
	863.33
	863.35
313.15 (1)	861.33
313.15 (2)	861.31
313.15 (3)	861.35
313.15 (4)	None
313.16	859.25

Old Sections	New Prob.Code
313.17	859.37
	859.39
313.18	859.39
313.19	859.39
313.20	859.39
313.21	859.39
313.22	859.21
313.23	859.21
313.25	859.23
313.26	863.11
313.27	863.11
313.28	863.11
313.29	None
313.30	None
313.31	None
313.32	None
314.05	None
314.06	879.65
314.07	None
315.02	867.05
315.03	867.05
315.04	867.05
315.05	867.05
315.06	867.05
316.01	None
316.02	None
316.03	None
316.07	None
316.09	None
316.10	857.29
316.105	None
316.11	None
316.12	None
316.13	None
316.14	None
316.15	None
316.16	None
316.17	None
316.18	None
316.19	None
316.20	None
316.21	None
316.22	None
316.23	None
316.235	860.05
316.24	860.05
316.25	None
316.26	None
316.27	None
316.28	None
316.29	None
316.30	None
316.31	None
316.32	None
316.33	None
316.39	None
316.40	None
316.41	860.13
316.43	None
316.45	None
316.46	None
316.47	859.43
316.48	None
316.49	None
316.50	None
316.51	None
316.52	860.09
316.53	860.09
316.54	860.09
316.55	860.09
317.01 (1)	862.05
317.01 (2)	862.07
	862.09
317.02	862.07
317.03	None
317.04	857.03
	857.25
317.05	862.01
	862.15
317.06	Renumber
317.07	None
317.08	857.05
317.09	857.07
317.10	859.47
317.105	857.03
317.11	862.09
317.13	862.03

Old Sections	New Prob.Code
317.14	862.03
317.15	862.13
318.01 (1)	852.01 (1)
318.01 (3)	863.09 (2)
318.01 (4)	863.09 (1)
318.02	879.03 (2) (c)
318.03	863.39
318.04	None
318.06 (1)	863.25
318.06 (2)	863.25
	863.27
318.06 (3)	863.31
318.06 (4)	863.27
	863.29
318.06 (5)	863.47
318.06 (7)	863.23
318.06 (8)	863.37
318.06 (9)	863.17
318.06 (10)	863.07
318.065	863.29 (2)
318.07	863.43
318.075	863.45
318.08	None
318.10	None
318.12	None
318.15	863.19
318.24	852.11
318.25	852.11
318.26	852.11
318.27	852.11
318.28	852.11
318.29	852.11
318.30	None
318.31	879.59
321.01	878.01
321.015	878.05
321.02	878.07
321.03	878.09
321.04	None
321.05	None
321.06	878.11
321.07	None
321.08	878.13
324.001	851.23

Old Sections	New Prob.Code
324.01	879.27
324.04	879.27
324.05	879.31
324.11	879.33
324.12	879.35
324.13 (1)	879.37
324.13 (2)	879.23
324.14	879.39
324.15	879.43
324.16	879.27
324.17	879.45
324.18 (1) (a)	879.03
	879.05
324.18 (1) (b)	879.03 (2) (c)
324.18 (2)	879.09
324.18 (3)	879.11
324.18 (4)	879.05 (3)
324.18 (5) (a)	879.07 (2)
324.18 (5) (b)	879.07 (2)
324.18 (5) (c)	879.07 (3)
324.18 (5) (d)	879.07 (1)
324.19	879.03 (1)
324.20 (1)	879.05 (4)
324.20 (2)	None
324.21	879.55
324.22	879.55
324.23	879.55
324.24	879.53
324.25	None
324.26	None
324.27	879.41
324.29 (1)	879.15
324.29 (2)	879.23
324.29 (3)	879.17
	879.23
324.29 (4)	879.25
324.30	879.47
	879.49
324.31	868.03
324.35	857.15
324.351	862.17
324.355	857.09
	863.35
324.356	None
324.36	879.13

CROSS REFERENCE TABLE

This table is designed to assist in tracing the provisions of the new probate code to the provisions that existed prior to the passage and publication of the code.

New Prob.Code	Old Sections
851.01 to 851.29	New
851.51	237.04
851.55	237.10
851.61	237.11
852.01 (1)	237.01 (1) to 237.02
	233.01
	233.02
	233.23
	318.01 (1)
852.01 (2)	New
852.01 (3)	237.01 (7)
	238.136
852.01 (4)	New
852.03 (1)	237.07
(2)	237.03
(3)	237.03
(4)	237.07
852.05	237.05
	237.06
852.09	237.02
852.11	318.24 to 318.29
852.13	237.01 (8)
853.01	238.01
	238.05
853.03	238.06
853.05	238.07
853.07	238.06
	238.08
	238.09
853.09	238.15
853.11	238.14
853.13	238.19
853.15	238.02 (2)
853.17	New
853.19	New
853.21	238.135
853.23	New

New Prob.Code	Old Sections
853.25	238.10 to 238.12
853.27	238.13
853.29	238.03
853.31	238.02 (1)
853.33	New
853.35	New
856.01	311.01
856.03	310.01
856.05 (1)	310.02 (1), (2)
856.05 (2)	New
856.05 (3)	310.031
856.05 (4)	310.03
856.07	311.01
	311.02
856.09	New
856.11	310.04
	311.03
856.13	238.18
856.15 (1)	310.06 (1)
856.15 (2)	310.06 (2)
856.15 (3)	310.06 (2), (4)
856.15 (4)	310.06 (3)
856.15 (5)	310.06 (5)
856.17	310.10
856.19	238.20
856.21	310.12
	311.02
856.23	310.16
	310.17
	311.02
	324.35
856.25	310.15
	310.18
	310.20 (1)
	311.04
856.27	New
856.29	New
856.31	310.25

New Prob.Code	Old Sections
857.01	New
857.03	310.14
	312.04
	317.04
	317.105
857.05	317.08
857.07	317.09
857.09	312.11
	324.355
857.10	New
857.11	New
857.13	310.16
	310.19
	310.20 (1)
857.15	310.20 (1)
	312.11
	324.35
857.17	New
857.19	311.12 to
	311.14
857.21	310.20 (1)
857.23	310.18
	310.19
	311.11
	311.13
857.25	317.04
857.27	310.27
857.29	316.10
858.01	312.01 (1)
858.03	New
858.05	312.03 (2)
858.07	312.01 (1)
858.09	312.03 (1)
858.11	312.02
858.13	312.01 (2)
858.15	312.01 (3)
858.17	New
859.01	313.08
	313.10
859.03	313.10
859.05	313.03 (1)
859.07	313.03 (3)
	313.04
859.09	313.03 (6)

New Prob.Code	Old Sections
859.13	313.05 (1)
859.15	313.05 (2)
859.17	313.07
859.19	New
859.21	313.22
	313.23
859.23	313.25
859.25	313.16
859.27	New
859.29	313.03 (5)
	313.05 (1), (4)
859.31	New
859.33	313.05 (2), (3)
859.35	313.03 (5)
	313.05 (4)
859.37	313.06
	313.17
859.39	313.14
	313.17 to
	313.21
859.40	312.16
	312.17
859.41	287.43
	287.44
859.43	New
859.45	New
859.47	317.10
859.49	New
859.51	313.03 (7)
860.01	312.13
	313.09
	313.095
860.05	316.235
	316.24
860.07	New
860.09	316.52 to
	316.55
860.11	New
860.13	313.093
	316.41
861.03	233.01
	233.02
	233.23
861.05	233.13
	233.14

New Prob.Code	Old Sections
861.07 (1)	233.09 to 233.12
(2)	New
861.09	New
861.11 (1)	233.14
(2)	233.15 (1)
(3)	233.14
	233.15 (2)
(4)	233.151 (1)
861.13	New
861.15	233.16
861.17	New
861.31	313.15 (2)
861.33	313.15 (1)
861.35	313.15 (3)
861.41	237.025
	238.04
862.01	310.20 (2)
	312.11
	317.05
862.03	310.20 (2)
	317.13
	317.14
862.05	317.01 (1)
862.07	317.01 (2)
	317.02
862.09	317.01 (2)
	317.11
862.11	New
862.13	317.15
862.15	317.05
862.17	324.351
	324.35
863.01	New
863.05	New
863.07	318.06 (10)
863.09 (1)	318.01 (4)
863.09 (2)	318.01 (3)
863.11	313.26
	313.27
	313.28
863.13	New
863.15	New
863.16	New

New Prob.Code	Old Sections
863.17	318.06 (9)
863.19	318.15
863.21	310.11
863.23	318.06 (7)
863.25	318.06 (1), (2)
863.27	230.47 (3)
	318.06
863.29 (1)	318.06 (4)
863.29 (2)	318.06 (4)
	318.065
863.31 (1)	318.06 (3)
863.31 (2)	New
863.33	313.13
	313.14
863.35	313.14
	324.355
863.37	318.06 (8)
863.39	318.03
863.41	New
863.43	318.07 (25 Wis.3d 1x)
863.45	318.075 (25 Wis.2d 1x)
863.47	318.06 (5)
863.49	New
867.01	311.05
867.03	230.47
	230.48
867.05	237.09, ch. 315
867.07	311.06
867.09	New
867.11	311.07
867.13	311.08
867.15	311.075
867.17	311.09 (1) to (6)
867.19	311.09 (7)
867.21	311.10
868.01	310.07
868.03	324.31
868.05	310.075
878.01	321.01
878.03	New
878.05	321.015
878.07	321.02

New Prob.Code	Old Sections
878.09	321.03
878.11	321.06
878.13	321.08
879.01	310.045 (1)
879.03 (1)	324.18 (1) (a)
	324.19
879.03 (2) (a)	324.18 (1) (a)
879.03 (2) (b)	New
879.03 (2) (c)	318.02
	324.18 (1) (b)
879.03 (3)	310.05 (2)
879.03 (4)	324.18 (1) (a)
879.05 (1)	324.18 (1) (a)
879.05 (2)	324.18 (1) (a)
879.05 (3)	324.18 (1) (a), (4)
879.05 (4)	324.18 (1) (a)
	324.20
879.07 (1)	324.18 (5) (d)
879.07 (2)	324.18 (5) (a), (b)
879.07 (3)	324.18 (5) (c)
879.09	310.05 (1)
	324.18 (2)
879.11	324.18 (3)
879.13	324.36
879.15	324.29 (1)
879.17	324.29 (3)
879.19	New
879.21	311.16 (3)
879.23	324.13 (2)
	324.29 (2), (3)

New Prob.Code	Old Sections
879.25	324.29 (4)
879.26	New
879.27	324.01
	324.16
	324.04
879.31	324.05
879.33	324.11
879.35	324.12
879.37	324.13 (1)
879.39	324.14
879.41	324.27
879.43	313.06
	324.15
879.45	324.17
879.47	324.30
879.49	324.30
879.51	New
879.53	324.24
879.55	324.21 to
	324.23
879.57	311.16 (1), (2)
879.59	318.31
879.61	312.06
	312.07
	312.08
879.63	New
879.65	314.06
879.67	310.21
879.69	New